No. _____

In The
Supreme Court of the United States

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Petitioners,

v.

JOAN M. GLASS,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Michigan Supreme Court effect an unconstitutional taking in violation of the Fifth and Fourteenth Amendments and violate Due Process when it ignored and misconstrued clearly established Michigan common law and ruled that under the so-called "public trust doctrine," the public has a right to walk on private beaches of riparian owners?

PARTIES TO THE PROCEEDING

The only parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. Amicus briefs were submitted or endorsed by fifteen state and national private and public entities and groups.

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OPINIONS BELOW

The Opinion of the Michigan Supreme Court (App. A) is reported at 473 Mich 667, 703 NW2d 58 (2005). That Court's Order Denying Motion for Rehearing (App. G) is reported at 474 Mich 1201, 703 NW2d 188 (2005). The Opinion of the Michigan Court of Appeals (App. D) is reported at 262 Mich App 29, 63 NW2d 719 (2004). The Opinion of the Alcona County Circuit Court (App. E) is unreported.

JURISDICTION

The Michigan Supreme Court entered its Opinion, constituting its Judgment, on July 29, 2005. App. A. The Court entered its Order Denying Motion for Rehearing on September 14, 2005. App. G. The jurisdiction of this Court is invoked under 28 USC §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves two provisions of the Constitution of the United States. The Fifth Amendment provides as follows:

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be*

> *deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation* (emphasis added).

The Fourteenth Amendment, §1, to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws (emphasis added).

STATEMENT OF THE CASE

Joan Glass owns property behind and across the road from the lakefront cottage of Richard and Kathleen Goeckel. That cottage overlooks, and is adjacent to, Lake Huron, one of the five Great Lakes. The 1967 deed to Glass conveys an express "easement for ingress and egress to Lake Huron" over the north fifteen feet of the Goeckels' property.

A dispute arose regarding the use of that easement, and Glass filed suit on the issue. As part of an amended complaint, Glass additionally asserted that the Goeckels were interfering with her claimed right to walk along the shore of Lake Huron lying below and lakeward of a so-called "ordinary high water mark." The trial court awarded summary disposition in favor of Joan Glass,

finding that she had a right to use the Goeckels' property below the "natural ordinary high water mark" for "pedestrian travel, without interference from the Defendants." App. E. The trial court based its ruling on a statute commonly known as the Great Lakes Submerged Lands Act, MCL 324.32501 *et seq*.

The Goeckels appealed. They argued that the Great Lakes Submerged Lands Act did not apply to their dry beach, and that under Michigan common law, they had fee simple title, which included the right of exclusive use to the water's edge. The Michigan Court of Appeals agreed that the Great Lakes Submerged Lands Act did not apply, and that the Goeckels had the right of exclusive use to the water's edge. It found, however, that the State held title in public trust to the so-called "ordinary high water mark." App. D.

Appealing to the Michigan Supreme Court, Mrs. Glass again argued that the Great Lakes Submerged Lands Act granted the State title in public trust to the statutorily defined ordinary high water mark, and that by virtue of both the statute and common law, she had the right to walk the Goeckels' beach up to that mark. Among other things, Defendants argued that by granting title to the State, the Court of Appeals effected an unconstitutional taking. Brief on Appeal – Appellees', pp 21-25. In a highly publicized 5-2 decision that gained national attention, the Michigan Supreme Court ruled that by virtue of the public trust doctrine, Glass had a right to walk the beach along Lake Huron, including the Goeckels' beach, up to a point it referred to as the "ordinary high water mark." App. A. The ruling assumed that the beach was that of the Goeckels, but nevertheless found their rights subject to the public trust doctrine. It found that the doctrine includes the right

of the public to walk the dry shore, among other things. The opinion concluded that "[t]he state cannot take what it already owns." *Id*. at 43 (App. 35). The court's opinion was countered by two lengthy dissents authored by Justices Robert Young and Steven Markman.

In their Motion for Rehearing, the Goeckels argued that the court's opinion had both ignored and misconstrued Michigan common law and the decisions of this Court; that it effected a taking in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution; and that it violated due process. The Michigan Supreme Court denied the Goeckels' Motion for Rehearing by order dated September 14, 2005. App. G.

Petitioners now seek review by this Court.

REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court's decision represents a sudden and unexpected change in property law that is directly contrary to longstanding and firmly established precedent which culminated seventy-five years ago in *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930), whose holding has been consistently followed thereafter without deviation.

The Court's decision also ignores and is contrary to this Court's holdings in *Massachusetts v New York*, 271 US 65, 92-93, 46 S Ct 357, 70 L Ed 838 (1926) and *Vermont v New Hampshire*, 289 US 593, 53 S Ct 708, 77 L Ed 1392 (1933), the former case involving the Great Lakes, in which this Court found that "there are no public rights in the shores of non-tidal waters."

As such, the Michigan Supreme Court's decision effects an unconstitutional taking of the private rights to the world's longest freshwater shoreline, contrary to the Fifth and Fourteenth Amendments to the U.S. Constitution. *See Nollan v California Coastal Commission,* 483 US 825, 842, 107 S Ct 3141, 97 L Ed2d 677 (1987) ("If [the State of California] wants an easement across the Nollan's property, it must pay for it.").

The court below grants public rights sought by the State – but consistently denied by its courts – for eight decades. The decision therefore improperly takes from private owners the exclusive use of the privately held portion (approximately seventy percent) of Michigan's 3,288 miles of Great Lakes shoreline, including its dry beaches, and turns over the use of that shoreline to the public for walking, hunting, fishing, and recreation, and such acts which a future court finds "inherent in the exercise of those rights."

I. THE MICHIGAN SUPREME COURT DECISION REPRESENTS A SUDDEN AND UNEXPECTED CHANGE IN MICHIGAN REAL PROPERTY LAW.

In the landmark case of *Hilt v Weber*, *supra*, the Michigan Supreme Court clearly and unequivocally determined that title to Great Lakes riparian lands extended to the water's edge, at whatever stage. The court also unequivocally found exclusive use to the water's edge in the adjacent riparian free of public rights, excluding only rights of navigation. Numerous Michigan cases have since uniformly quoted and followed the decision without criticism, and no case since decided has denied the riparian's title or rights of exclusive use above the water's edge.

To the contrary, the riparian's rights were enforced and protected in several subsequent cases against both private individuals and the State.

At issue in *Hilt* was title to a strip of land from the meander line[1] to a stake located approximately 100 feet from the water's edge. A land contract purchaser no longer wished to perform his purchase of the real estate, and stopped making payments. When the seller sued to foreclose, the buyer defended claiming that the seller was unable to convey marketable title to the disputed parcel. That claim was based on the then recent cases of *Kavanaugh v Rabior*, 222 Mich 68, 192 NW 623 (1923), and *Kavanaugh v Baird*, 241 Mich 240, 217 NW 2 (1928), in which the Michigan Supreme Court held that the State owned in public trust the beds of the Great Lakes up to the meander line. Among other things, a squatter had erected a small building on the disputed parcel which, under the *Kavanaugh* decisions, the buyer had no power to remove. Steinberg, "*God's Terminus: Boundaries, Nature, and Property on the Michigan Shore*," The American Journal of Legal History, Vol XXXVII (1993), pp 78, 84, reprinted in Amicus Brief of Save Our Shoreline, Appendix 3; *Kavanaugh v Rabior*, *supra*. The Michigan Supreme Court accepted the case to reexamine the *Kavanaugh* cases. Those cases had caused such a stir that the State legislature had unanimously passed – but the Governor did not sign – a bill defining the boundary between the state and the riparian as the water's edge. Steinberg at 82.

[1] A meander line, according to *Hilt*, is simply an approximation of a shoreline boundary for the purpose of computing the amount of acreage sold by the government, and was never intended to be a boundary in fact. *Hilt* at 204-206.

The *Hilt* court acknowledged the need to clarify Michigan law as a result. *Hilt* at 202.

The *Hilt* court first embarked on an analysis of previous Michigan decisions, as well as the decisions of other state and federal courts. It carefully considered the *Kavanaugh* cases, finding that they were at odds with precedent and, if left to stand, would effect an unconstitutional taking. The court then made its conclusions of law, further supported by policy considerations. As to title, the court found that prior to the *Kavanaugh* cases, the court "in common with public opinion and in harmony with the weight of authority, assumed, without question, that the upland proprietor owns to the water's edge." *Hilt* at 212. Finding that the *Kavanaugh* cases "abrogated a rule of property in force" in Michigan, the *Hilt* court found those cases "should be overruled," and did so, restoring riparian title to the water's edge. *Hilt* at 222, 227.

The *Hilt* court did not rest simply with a decision identifying the holder of title to the shore. It held that "[t]he riparian owner has the *exclusive use* of the bank and shore, and may erect bathing houses and structures thereon for his business and pleasure (emphasis added)." *Id.* at 226. Even under the *Kavanaugh* cases, where State title to the meander line was limited to "title only for the preservation of public rights of navigation, fishing and hunting," the riparian had exclusive use above the water's edge. *Id*. at 224. The *Hilt* court reasoned that because of the riparian's rights of exclusive use above the water's edge, the *Kavanaugh* cases left the State with an "empty title." *Id.* at 227. In other words, because of the riparian's rights of "full and exclusive use" on the dry shore, the public's rights of navigation, fishing, and hunting could not be exercised above the water's edge. *Id*. at 227.

Despite the *Hilt* court's clear and unequivocal statements regarding both the riparian's exclusive use and finding title in the riparian to the water's edge, the Michigan Supreme Court in the case at bar asserts the issue in *Hilt* "was the boundary of a littoral landowner's private title, rather than the public trust." Opinion, p 25 (App. 21). It is this statement, more than any other, that forms the test of the accuracy of the court's decision. If the statement is accurate, the court's decision is arguably unbounded by *Hilt*. But if untrue, then the court below has improperly disregarded seventy-five years of consistently followed precedent and violated Petitioners' constitutionally protected property rights.

The Michigan Supreme Court's contention that the boundary of the public trust was not at issue in *Hilt* cannot be sustained. The issue in *Hilt* was an alleged misrepresentation of title to the shore. The Michigan Supreme Court found that the outcome of the case would "depend upon the respective *rights of the state* and the riparian owner in the strip of relicted land (emphasis added)." *Id*. at 201. The court had investigated the law "for the purpose of an enumeration of the respective rights" of the State and the riparian owner. *Id*. at 201. The seller in *Hilt* had represented the title to the shore as being "fee simple absolute." *Hilt* record, pp 1-2, 12, 14, reproduced in Brief in Support of Defendants'/Appellees' Motion for Rehearing, Exhibit 2. Fee simple title carries with it the right to exclude others. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 602 NW2d 215 (1999). "[T]he right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Nollan v California Coastal Commission*, 483 US at 831. When the defendant complained that Hilt had

misrepresented his title, that necessarily included a misrepresentation as to the "most essential" stick: the right to exclude others. Moreover, the defendant presented as evidence of failure of title the existence of an unidentified squatter on the land who had erected a small structure. Thus the right of use of any third party – be it the public under the public trust doctrine or otherwise – was squarely at issue under the facts presented in *Hilt*.

In its discussion of the law, the public's right of use under the public trust doctrine was central to the *Hilt* decision. The title at issue was public trust title, "i.e., that the State had title in its sovereign capacity and only for the preservation of the public rights of navigation, fishing, and hunting." *Id*. at 224. According to *Hilt*, under state law prior to the *Kavanaugh* cases, "it was a settled rule of property that the purchaser of meandered public land on the Great Lakes took to the water's edge." *Id*. at 213. But even under the *Kavanaugh* cases, which extended public trust title to the meander line, the riparian had rights of exclusive use above the water's edge. *Id*. at 225-226. Where riparian rights and public rights conflict, "the only substantial paramount [public] right is the right to the free and unobstructed use of navigable waters for navigation."[2] *Id*., citing *Town of Orange v Resnick*, 94 Conn 573, 109 A 864, 866 (1920). Since there were no rights of hunting and fishing above the water's edge, and since it was impossible to navigate on dry land, the *Kavanaugh* cases gave the State an "empty title" above the shoreline. *Hilt* at 227.

[2] In its opinion, the Michigan Supreme Court ignores this sentence and *Hilt*'s distinction between those public trust rights that are "paramount" to the riparian and those that are not. *See* Opinion, pp 35-36 (App. 29-30).

The *Hilt* court found such a state of affairs unacceptable. The *Kavanaugh* cases left intact "the overhanging threat of the State's claim of right to *occupy* [the shore] for state purposes (emphasis added)."[3] *Id*. at 227. The *Kavanaugh* cases compromised the riparian's ability to "expel a squatter." *Id*. Finally, the cases impaired the riparian's ability to "develop" the land, and their result was "destructive of the development of the lakeshores." *Id*.

Quite contrary to the assertion of the court below, the scope of the public trust was therefore central to *Hilt*'s holding. Had the court found that the public rights of hunting and fishing were paramount to a riparian's exclusive use rights, the State's title under the *Kavanaugh* cases would not have been "empty," and the possibility of public use would not be "so remote as to be practically negligible." *Id*. at 227. The *Hilt* court acknowledged arguments for "public control of the lakeshores," including "financial and recreational benefit" to the State. It also acknowledged the benefits state title would have for tourism and conservation. Yet, as this Court observed in *Nollan*, *supra*, if it wished to accomplish these objectives with the shore, "the state has authority to acquire land by paying for it." *Hilt* at 224. Surely, if the *Hilt* court contemplated that after its decision, the public would have the right to fish, hunt, and walk the shores, among other things, it would not have reminded us of the State's ability to accomplish its objectives by paying for the land.

[3] This Court has acknowledged that "where individuals are given a permanent and continuous right to pass to and fro," a "permanent physical *occupation* has occurred (emphasis added)." *Nollan*, 483 US at 832.

A final indicator that *Hilt* was addressing the application of the public trust doctrine to the defendant's shore is found in the dissent of Justice Wiest:

> My brother's opinion is far-reaching, for it constitutes the Michigan shoreline of 1,624[4] miles private property, *and thus destroys for all time the trust vested in the state for the use and benefit of its citizens* (emphasis added).

Id. at 231. Had the *Hilt* court intended to restore the water's edge as a boundary, but found the shore burdened with all of the public trust rights (as the court below suggested), Justice Wiest would have had no reason for concluding that the public trust on the shoreline was "destroy[ed] for all time."

With a squatter on his land and the *Kavanaugh* cases granting public trust title – with its concomitant public trust uses – to the meander line, the defendant in *Hilt* claimed the plaintiff could not deliver fee simple absolute title, a title which includes rights of exclusive use. The *Hilt* court found that defendant had both title and exclusive use. The court below erred in failing to follow this precedent, and by instead imposing a public occupation on Petitioners' private land.

Numerous Michigan cases since *Hilt* have uniformly quoted and followed the decision without criticism, and their holdings do not allow the new exercise of public trust rights on Petitioners' shore granted by the court below. The first of those cases was *Kavanaugh v Baird* (*On Rehearing*), 253 Mich 631, 235 NW 871 (1931). After *Hilt*

[4] Perhaps Justice Wiest had neglected to consider Michigan's Upper Peninsula in his total.

overruled the *Kavanaugh* cases, the Michigan Supreme Court *sua sponte* ordered a rehearing in *Kavanaugh v Baird* to reconsider its 1928 decision. The contest in that suit to quiet title was between the State, which asserted title under the "Trust Doctrine" to the meander line, and Kavanaugh, a riparian owner who asserted absolute title to "the low water mark or the water's edge." Steinberg, *supra,* at 80. The court affirmed a decision in favor of the State, which "fixed the title to the land in question in the state in trust for its people." *Kavanaugh v Baird*, 241 Mich at 253. But on rehearing after *Hilt*, the court found the riparian "entitled to a decree quieting the title in him to the relicted land involved as prayed for in his bill of complaint." *Kavanaugh v Baird* (*On Rehearing*), 253 Mich at 631. As noted above, exclusive use – "the most treasured strands in an owner's bundle of property rights" – is included in "fee simple" title. *Adams v Cleveland-Cliffs Iron Co*, *supra*. By quieting title in Kavanaugh as against the State's claims that it held his land in public trust, Kavanaugh retained the right to exclude the public. It would indeed be a strange state of affairs if Kavanaugh had prevailed in his quiet title case against the State, but his property nevertheless remained burdened by the same public trust rights he sought to eliminate.

At the same time as the rehearing in *Kavanaugh v Baird*, the Michigan Supreme Court reconsidered *Staub v Tripp*, 248 Mich 45, 226 NW 667 (1929). *See Staub v Tripp (On Rehearing)*, 253 Mich 633, 235 NW 844 (1931). In that case, a riparian owner sought to plat land "between the meander line and the water of [Lake Michigan]." *Id*. at 46. The State rejected the plat on the grounds that, under the *Kavanaugh* cases, the State owned the land. The riparian sued his grantor, who had conveyed by warranty deed,

alleging "breach of covenant of title."[5] The court affirmed a judgment of damages in favor of the riparian against his grantor on the basis of breach of title. But after *Hilt*, the Michigan Supreme Court reversed its decision, holding that because the riparian's "title extended beyond the meander line to the water's edge, there was in fact no failure of title." *Id*. at 634. Surely, the court would not have so held if it thought the property remained burdened by the public trust rights or the right of passage on dry land now imposed by the court below.

More recently, the Michigan Supreme Court followed *Hilt* with its decision in *Peterman v DNR*, 446 Mich 177, 521 NW2d 449 (1994). In *Peterman*, the State had constructed a boat launch on property adjacent to that of the plaintiff. The boat launch caused erosion of plaintiff's beach. The court found the plaintiff entitled to damages for loss of his beach, both above and below what the court characterized as the "ordinary high water mark." In its discussion of the riparian's rights, the *Peterman* court cited with approval from *Hilt* that "[t]he riparian owner has exclusive use of the bank and shore." *Id*. at 192. Moreover, it noted that "[t]he right of exclusion or the right of complete possession and enjoyment is one of the essential elements of property in land." *Id*. at 189, citing *Vanderlip v Grand Rapids*, 73 Mich 522, 535, 41 NW 677 (1889).

[5] Although not described by the *Staub* court, a warranty deed carries with it several implied covenants of title, including a warranty that the title is "free from all encumbrances." MCL 565.151. "Anything that constitutes a burden on title is an encumbrance, including a right of way . . . " Cameron, *Michigan Real Property Law*, §10.22 (1985).

The court below makes no effort to address its rulings on rehearing in *Kavanaugh, supra*, or *Staub, supra*. But it does attempt to convince us that *Peterman* extends the public trust, inclusive of all its rights, to a so-called "ordinary high water mark." To do so, the court conveniently ignores *Peterman*'s recognition of the "exclusive use" rule from *Hilt*. It also flagrantly ignores the court's award of damages to the riparian *below* the so-called "ordinary high water mark." Opinion, p 21 (App. 18).

Instead, it seizes upon *Peterman*'s discussion of the public's paramount rights of navigation. In harmony with *Hilt*, the *Peterman* court recognized that riparians exercise their exclusive rights "subject to the public right of navigation." *Id*. at 194-195, citing *Hall v Alford*, 114 Mich 165, 167, 72 NW 137 (1897); *Hilt* at 225. The court indicated that "riparian owners hold a limited title to their property that is subject to the power of the state to improve navigation." *Peterman* at 195. In a discussion that ultimately had no bearing on the case, the court for the first time suggested that the navigational servitude on the Great Lakes was limited to a so-called "ordinary high water mark."[6]

While *Peterman* limited its dictum to rights of navigation, the court below concluded that because *Peterman* "held that public rights end at the ordinary high water mark," it "adopted the ordinary high water mark as the landward boundary of the public trust." Opinion, p 21 (App. 18). The court reasoned that *Peterman* relied "not simply on 'a navigational servitude' unique to that case,

[6] This dictum was based on law regarding rivers and streams and not any case involving the Great Lakes. Moreover, the issue was not briefed by the parties in *Peterman*.

but rooted that 'navigational servitude' in the public trust doctrine." *Id*., n 15. On this basis, the court proceeded to define beachwalking as a public trust right to be conducted anywhere below the so-called ordinary high water mark.

The leaps of logic of the court below cannot be sustained. In its dictum regarding an ordinary high water mark, the *Peterman* court did not *hold* that "public rights end at the ordinary high water mark on the Great Lakes." Instead, it intimated in dictum that one public right – the public's right of navigation – did. *Peterman* at 198-200. Hence, *Peterman* did not adopt the so-called "ordinary high water mark as the landward boundary of the public trust." Instead, it suggested in dictum that the so-called ordinary high water mark was the landward boundary of the right of navigation. That the court's discussion may have rooted the "navigational servitude" in the public trust doctrine does not mean the *Peterman* court intended to extend all rights under that doctrine to the same mark. Quite the contrary, *Peterman* acknowledged *Hilt*'s exclusive use rule. Moreover, the *Peterman* court expressed no disagreement with *Hilt*'s distinction between the "paramount public right of navigation" and other public rights. *Hilt* at 225-226. Simply put, *Peterman* does not stand for either the confirmation or the extension of the public trust rights of fishing and hunting beyond the water's edge, where the *Hilt* decision firmly placed them. To the extent it found rights of navigation beyond the shore, it did so in dictum and without the benefit of briefing on the issue.

In addition to the authorities discussed above, *Hilt v Weber*, *supra*, was followed in *Donohue v Russell,* 264 Mich 217, 249 NW 830 (1933); *Klais v Danowski*, 373 Mich 262, 129 NW2d 414 (1964); *Turner Subdivision Property Owners Association v Schneider*, 4 Mich App 388, 144 NW2d

848 (1966) (defining *Hilt* as a "landmark case"); and *Boekeloo v Kuschinski*, 117 Mich App 619, 324 NW2d 104 (1982).

So firmly settled is Michigan law on the topic that the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan has adopted a standard providing that "[t]he waterfront boundary line of property abutting the Great Lakes is . . . the naturally occurring water's edge." Michigan Land Title Standards 5th Edition (State Bar of Michigan 1988, supplemented through 2001), Standard 24.6. According to its preface, the committee includes "only those principles of land title law which are clearly supported by the law of the state . . . as to which there are relevant statutes or cases which are reasonably definitive in their effect or holding. Points of law that are subject to some dispute, or as to which there are conflicting opinions, are not included." *Id*.

In addition to addressing the question of title, the Land Title Standards clearly distinguish between the navigational servitude and other rights of the public. "The rights of the public in the Great Lakes include, but are much broader than, its rights under the navigational servitude. These rights include, among others, rights under the public trust doctrine . . . " *Id*., Standard 24.3, comment B. The interpretation of *Peterman* by the court below is inconsistent with this Land Title Standard. While the Standard differentiates between navigational servitude and public trust, the court below, in interpreting the *Peterman* holding, impermissibly conflates the two concepts.

The court below found that beach walking is a "public trust right" because it is an activity "inherent in the exercise" of traditional public trust rights such as "fishing,

hunting, and navigation for commerce or pleasure." Opinion, p 33 (App. 28). Moreover, the court looks outside of Michigan law to suggest other public rights, such as "bathing, taking shellfish, gathering seaweed, cutting sedge, . . . fowling, [and] sustenance." *Id*. Certainly, the court's opinion opens the door to a whole host of beach uses "inherent in the exercise" of the new list of rights. Under its reasoning, the court could hardly deny use of formerly private beaches for fishing shanties, snowmobiles, four-wheelers, horses, and myriad other uses "inherent in the exercise" of public trust rights.

Imposition of a public "right" of walking the dry shore, let alone these other possible uses, is not only without precedent in Michigan; it is directly contrary to existing Michigan common law. In *Lorman v Benson*, 8 Mich 18, 30 (1860), the Michigan Supreme Court specifically observed the state of the common law as it pertained to public rights on the shore:

> And, while it was said that it was quite common to use the shore for various purposes of passage, that was regarded not as rightful, but merely by sufferance, and analogous to the frequent passage over uninclosed lands, which was not lawful, but was seldom complained of.

No Michigan decision – including that of the court below – has distinguished this observation of the common law by the *Lorman* court, nor has it been overruled. Like the exclusive use holdings of *Hilt* and *Peterman,* the court below simply ignores this observation in *Lorman*.

That the decision of the Michigan Supreme Court represents a sudden, unexpected, and unpredictable change in property law is evidenced by a number of

additional factors. Most obvious is the lack of any prior Michigan case holding that on the Great Lakes, public trust rights – including hunting and fishing – extend to a so-called "ordinary high water mark," regardless of title. To the contrary, each decision assumed without question that the public trust on the Great Lakes sprang from the state's title, the contrary assertion of the court below notwithstanding. Opinion, p 24 (App. 20) ("Our case law nowhere suggests that private title necessarily ends where public rights begin."). For example, in *Lincoln v Davis*, 53 Mich 375, 19 NW 103, 108 (1884), the Michigan Supreme Court considered the competing rights of a fisherman and a riparian to fish in waters beyond one mile lakeward from the shore. The decision turned on the location of the riparian's boundary, the court concluding that "[t]he paramount rights of the public to be preserved are those of navigation and fishing, and this is best accomplished by limiting the grants of lands bordering the great lakes to low water mark." *Id*. at 385-386. In *Sterling v Jackson*, 69 Mich 488, 37 NW 845 (1888), the court found that though a member of the public had a right to navigate over water on Great Lakes swampland which, under the unique facts of that case, was privately owned, he had no right to hunt there. Since the owner has "the exclusive right of fowling upon his own land . . . it can make no difference with that right whether it be upland or covered with water." *Id*. at 501. The court left open the question of fishing "on the navigible waters of the Great Lakes *at places not affected by private ownership* (emphasis added)," suggesting that the question of fishing also depends on title. *Id*. Notably, even the dissent would have granted public rights over private land only while "*covered* with navigable water," and only "until such waters recede, or the land is otherwise reclaimed, and so long as it continues navigable

(emphasis added)." *Id*. at 870. In other words, public rights extend "to all who have a right to row a boat or push a scow" on "bodies of water while open to navigation." *Id*. at 872. In *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580, 87 NW 117 (1901), Justice Hooker wrote that the right of boating, "and that of fishing and fowling, extends to all parts of navigable water." *Id*. at 121. He then noted that "navigable water extends to low water mark," where he found the riparian's title to begin under "settled law." *Id*. at 122. His concurring opinion was referred to with approval in *State v Venice of America Land Co*, 160 Mich 680, 702, 125 NW 770 (1910).[7] In light of these decisions, the conclusion of the court below that Michigan "case law nowhere suggests that private title necessarily ends where public rights begin" is simply wrong. Opinion, p 24 (App. 20).

The Michigan Supreme Court's new rule was not suggested by the Court of Appeals in its decision below. The new rule is not suggested by any scholarly article or commentary on Michigan law mentioned by the majority. Indeed, the court below has not cited any Great Lakes case finding a right to walk the dry Great Lakes shore, and to Petitioners' knowledge, none exists. Simply put, as applied to the Great Lakes, the rule is a new judicial creation of the court below.

The new rule must also be rejected as contrary to common usage. *Lorman*, 8 Mich at 33. Since at least 1930, as a result of the Michigan Supreme Court's decisions and pronouncements both before and after *Hilt, Kavanaugh*

[7] The court below mistakenly represents Justice Hooker's opinion as that of the majority. Opinion, p 22 (App. 19).

(On Rehearing), and *Staub (On Rehearing)*, and including *Peterman*, riparians have as a matter of fact enjoyed exclusive use of their property. The State's chief law enforcement officer – the Attorney General – has consistently acknowledged the riparian's right of exclusive use,[8] and law enforcement officials throughout the State have presumably enforced the rule.[9] The State, through its Departments of Attorney General, Environmental Quality, and Natural Resources, has consistently acknowledged and followed the rule, distributing materials advising of the rule for public consumption. *See, eg*, "Public Rights on Michigan Waters," <http://www.michigan.gov/dnr/0,1607,7-153-0366_15383-31718–,00.html> (viewed December 5, 2005); Amicus Brief of Save Our Shoreline, Appendix 21. Indeed, the Attorney General, in his amicus brief in the court below submitted on behalf of the Michigan Departments of Environmental Quality and Natural Resources, conceded that Plaintiff "did not have the right to access

[8] *See, eg*, OAG 1978, No 5327 (July 6, 1978) ("The riparian has the exclusive use of the bank and shore . . . ") and correspondence from Frank J. Kelley, Attorney General, to Robert M. Hea dated June 5, 1968 ("with respect to the Great Lakes, a riparian owner (one who owns land bordering the lake), owns the land between the meander line and the water, has exclusive use of the bank and shore, and may erect bathing houses and structures thereon . . . "). *See* Brief in Support of Defendants'/Appellees' Motion For Rehearing, p 20, n 16, and exhibit 5 thereto. Note that former Michigan Attorney General Frank J. Kelley, who served as the state's chief law enforcement officer for 37 years, has submitted a brief in the court below supporting Petitioners' position. *See* Amicus Brief of Legislator Amici.

[9] *See, eg*, correspondence dated 9-25-87 from Arenac County Prosecutor Jack W. Scully to James Balten ("A riparian owns to the water. The above being the case, a riparian may prohibit non-owners from the use of the strip of land between the upland and the water's edge."). *See* Brief in Support of Defendants'/Appellees' Motion for Rehearing, Exhibit 5.

Defendants'/ Appellees' dry beach areas." Brief of Amici Curiae, the Michigan Departments of Environmental Quality and Natural Resources, p 29.

The rule of exclusive riparian use has been the firm, consistent, applied, and acknowledged rule among the courts, the bar, the State, and its law enforcement departments since at least 1930. The court below implicitly concedes its creation of new rights by resorting to Wisconsin law to define the extent of rights "found," and then – in what seems to be an invitation – reminds us that the legislature can regulate those rights. Opinion, p 36 (App. 30). This reminder is hauntingly familiar to the suggestion in *Kavanaugh v Baird*, 241 Mich 240, 254, for "further legislation" to "solve . . . problems" created by that court's attempt to create new rights. The foregoing analysis demonstrates that the new rule of the court below was a sudden, unexpected, and unprecedented change in state law, the result of which is nothing less than the confiscation of private rights to 3,288 miles of Michigan shoreline, seventy percent of which is privately owned, without compensation to its aggrieved owners.

II. THE DECISION BELOW IS CONTRARY TO DECISIONS OF THIS COURT.

The extent of the boundary of the public trust and the extent of riparian ownership are questions of state law. *Shively v Bowlby*, 152 US 1, 26, 14 S Ct 548, 38 L Ed 331 (1894); *Oregon v Corvallis Sand & Gravel Co*, 429 US 363, 372, 97 S Ct 582, 50 L Ed2d 550 (1977). Nevertheless, in *Illinois Central R Co v Illinois*, 146 US 387, 453, 13 S Ct 110, 36 L Ed 1018 (1892), this Court found the public trust limited to "lands *under* the navigable waters of Lake

Michigan (emphasis added)," and thereby excluded the dry shore. On at least two other occasions, this Court was more specific, observing "there are no public rights in the shores of nontidal waters," including the right "to cross the shore to the water." *See Massachusetts v New York,* 271 US 65, 93, 46 S Ct 357, 70 L Ed 838 (1926); *Vermont v New Hampshire*, 289 US 593, 605, 53 S Ct 708, 77 L Ed 1392 (1933). The water at issue in *Massachusetts v New York, supra,* was Lake Ontario. *Id*., 271 US at 67.

III. THE MICHIGAN SUPREME COURT HAS EFFECTED AN UNCONSTITUTIONAL TAKING CONTRARY TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND HAS VIOLATED PETITIONERS' RIGHTS OF DUE PROCESS.

While "the states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit,"[10] once defined, a court may not deny those rights without just compensation. Moreover, while the Michigan Supreme Court defines Michigan's common law, its right to do so is not without limits. The principle that there are constitutional limits to what the Michigan Supreme Court may do in interpreting state common law is best explained by Justice Stewart in *Hughes v Washington*, 389 US 290, 296-298, 88 S Ct 438, 19 L Ed2d 530 (1967). In his concurring opinion, he wrote:

> Such a conclusion by the State's highest court on a question of state law would ordinarily bind this

[10] Opinion, p 43 (App. 35), citing *Phillips Petroleum Co v Mississippi*, 484 US 469, 475, 108 S Ct 791, 98 L Ed2d 877 (1988).

> Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.
>
> We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, *unpredictable in terms of the relevant precedents*, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court (emphasis added).

In *Lucas v South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed2d 798 (1992), this Court quoted with approval from *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155, 164, 101 S Ct 446, 452, 66 L Ed2d 358 (1980), opining that "a state by *ipse dixit*, may not transform private property into public property without compensation."

Two years later, after an Oregon city denied a building permit to construct a seawall on the dry sand portion of their beach, the aggrieved property owners sought review by this Court. Justice Scalia, joined by Justice O'Connor, wrote a five page dissent to the denial stating:

> As a general matter, the Constitution leaves the law of real property to the states. But . . . a state may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate "background law" – regardless of whether it is really such – could eliminate property rights.

Stevens v City of Cannon Beach, 510 US 1207, 1211, 114 S Ct 1332, 127 L Ed2d 679 (1994) (Scalia, J, dissenting from denial of certiorari), citing *Lucas v South Carolina Coastal Council*, *supra*. *See* generally Sarratt, *Note: Judicial Takings and the Course Pursued*, 90 Va L Rev 1487 (2004).

Finally, in *Phillips v Washington Legal Foundation*, 524 US 156, 167, 118 S Ct 1925, 141 L Ed2d 174 (1998), this Court indicated that "a state may not sidestep the takings clause by disavowing traditional property interests long recognized under state law."

Opening private property to public use constitutes a taking. *See Nollan v California Coastal Commission*, 483 US at 831; *Kaiser Aetna v United States*, 444 US 164, 178, 100 S Ct 383, 392, 62 L Ed2d 332 (1979). The court's decision in the case at bar – ignoring *Hilt*'s longstanding exclusive use rule, among other things, and opening Petitioners' private property to public use – effects a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and violates due process.

IV. THE COURT'S DECISION IMPERMISSIBLY GRANTS PUBLIC RIGHTS SOUGHT BY THE STATE OF MICHIGAN – BUT DENIED BY ITS COURTS – FOR EIGHT DECADES.

Since the *Kavanaugh* cases of the 1920's, the State of Michigan through its executive branch, legislative branch, and now its judicial branch, has taken systematic steps to obtain control of the state's Great Lakes shores. Central to these steps was the 1923 decision in *Kavanaugh v Rabior*, *supra*, which held that the State owned to the meander line. At that time, the director of the Michigan Department of Conservation, John Baird, encouraged cottagers on the shore to withhold rent from upland owners. Steinberg at 77, 78. One observer charged that there existed "a move on the part of ambitious politicians acting for the State of Michigan, to confiscate farmers' and resorters' property without paying a cent for it." *Id.* at 78. From these State claims sprang *Kavanaugh v Baird*, 241 Mich 240, a suit brought against Director Baird in his official capacity. He successfully asserted that title to the meander line "is in the state in trust for its people." *Id*. at 241. Public uproar and legislative action was the result, leading the Michigan Supreme Court to promptly reexamine the issue. Steinberg at 82; *Hilt* at 202.

Although the State was not a party litigant in *Hilt*, it filed an amicus brief strenuously arguing "the meander line is a fixed boundary between the upland owner and the State, regardless of the stage of the water level." *See* Amicus Brief of Save Our Shoreline, Appendix 5. The State's position did not prevail, and in 1933, a published attorney general opinion conceded the boundary at the water's edge. OAG 1932-34, p 287 (July 13, 1933). But only fifteen years later, a new attorney general opinion found a

new definition for "reliction," and inaccurately concluded that *Hilt* "does not cover land temporarily made bare by water level changes." OAG 1945-46, No 0-3984, p 506 (October 1945); *Cf* OAG 1944-45, No 0-2249 (May 12, 1944). Still, as revealed in *People v Broedell*, 365 Mich 201, 112 NW2d 517 (1961), the position of the Michigan Department of Conservation was consistent with *Hilt*.

But just two months after the *Broedell* court suggested in dictum that the law as to boundary might be open to question,[11] the State Department of Conservation sought legislation granting the State an easement to an "ordinary high water mark," and on March 9, 1962, briefed legislators on its view of the law. *See* Amicus Brief of Save Our Shoreline, p 39. The Department in May of 1962 commissioned an engineering survey to determine the "ordinary high water mark," and worked on legislation which would set the "ordinary high water mark [as] the dividing line between the upland and the lake bed *which separates the public trust area from the upland* (emphasis added)." *Id*. at 43. The Department then obtained a memorandum from the Department of Attorney General by which "[i]t is suggested that in Michigan that the ordinary high water mark [be] used as the separation line in determining the extent of the public trust on inland waters and also the extent of the state ownership on the Great Lakes." *Id*. at 44. Curiously missing from that memorandum is any discussion of how that goal could be accomplished without violation of constitutional protections of private property.

[11] Notably, the *Broedell* court acknowledged that prior Michigan Supreme Court decisions "referred to the low water mark as the boundary." *Broedell* at 205.

In 1968, the state legislature passed legislation which defined, in terms of elevation, an "ordinary high water mark" on each of the Great Lakes. *See* MCL 324.32501 *et seq*. According to its sponsor, the bill was "a much-needed permanent reference point for determining public and private rights where Great Lakes shorelines are involved." A press release quoting him stated that "[h]eretofore, the location of property lines were clouded due to the constantly fluctuating water levels." Amicus Brief of Tip of the Mitt Watershed Council, Appendix 8-9. Thereafter, the State asserted that it owned to the defined ordinary high water mark, but curiously conceded that the riparian had exclusive use rights to the water's edge based on its reading of the *Hilt* decision. OAG 1977-78, No 5327 (July 6, 1978). Thus, set in motion by judicial dictum, the state's executive and legislative branches moved swiftly in the 1960's in a conceded attempt to take title – and what control it offered – to the Great Lakes shores denied them in *Hilt*, *Kavanaugh (On Rehearing)*, and *Staub (On Rehearing)*.

Relying on its claims of ownership to "ordinary high water mark," the State in *Peterman*, *supra*, refused to reimburse a riparian for its destruction of his beach. Once again, the State's claim of ownership was rebuffed, and the Michigan Supreme Court required that the State compensate the riparian for the loss of his beach. Undaunted, the State continued with its claims of ownership and public trust rights based on the legislation. *See, eg,* Amicus Brief of Save Our Shoreline, Exhibit 21.[12] Even after the decision in the

[12] In the late 1990's, as state agencies in Michigan and Ohio became more aggressive in their claims, shoreline owners united in opposition. In Michigan, shoreline owners formed Save Our Shoreline, now with 3,000 households as members. *See* <http://www.saveourshoreline.org> (viewed December 6, 2005). In Ohio, riparians independently

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court below authorized beachwalking, the State quickly aimed for more. *See* "Court Defines Where People Can Walk," *Kalamazoo Gazette*, August 19, 2005 (spokesman for Michigan Department of Environmental Quality suggesting that the public "can use the beach in whatever way you want as long as it is not disruptive. So putting down your blanket is ok . . . ").

The State is not without supporters for its efforts to confiscate Michigan's private shoreline for the use of the public. When the Michigan Court of Appeals affirmed *Hilt*'s exclusive use rule, virtually every major state newspaper editorialized, many – like the influential *Detroit Free Press* – clamoring for beach walking rights. *See, eg,* "At the Beach," *Detroit Free Press,* June 10, 2004 ("Return Shoreline Strolling to the Public Trust"). The case immediately became a political lightning rod, inspiring amicus briefs not only from state departments, but from state legislators advocating both sides of the issue as well. *See* Amicus Brief of Legislator Amici (filed on behalf of forty state legislators); Amicus Brief of Senate Democratic Caucus. The decision received national media attention, and has been characterized as part of a growing trend of courts to draw "imaginary lines in the sand" to expand public rights. *See, eg,* "Battles Brew Over Beaches," *The National Law Journal*, August 29, 2005 <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1125047113195> (viewed December 6, 2006).

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formed the 4,000 member Ohio Lakefront Group, which recently instituted a quiet title action against the State of Ohio. *See* <http://www.ohiolakefrontgroup.com> (viewed December 6, 2005).

It was under this backdrop that five Justices of the Michigan Supreme Court in this case created their unprecedented expansion of the public trust, including the newly created right of beach walking. Through its decision, the State has now acquired the rights which for eight decades had eluded it. Accordingly, this case tests the very fiber of our constitutional protection of property. At stake is seventy percent of the 3,288 miles of Michigan's fresh water shoreline that, since statehood, has been considered the private property and exclusive domain of private individuals, subject to reasonable regulation by the State. The Michigan Supreme Court's decision satisfies the desires of State departments, clamoring editorial boards, and environmental organizations. But it violates the constitutional protection of Petitioners' private property, and thereby, their liberty.

CONCLUSION

The Michigan Supreme Court in 1930 found that riparians owned and had exclusive use of the Great Lakes shore. It so ruled not only because that was what prior law demanded, but because confirming title and exclusive use in the riparian would encourage "development of the lakeshores." A lifetime has now passed, and Michigan's Great Lakes shores are lined with cottages, homes, and other development. All were built on the foundation of the Michigan Supreme Court's promises of title, exclusive use, and the corresponding right of privacy. With its policy goal achieved, our Constitution does not authorize the Michigan Supreme Court to now deny the rights of title and exclusive use that it clarified and enforced eight decades ago, and followed consistently thereafter.

For the reasons set forth above, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari, reverse the decision of the Michigan Supreme Court, and determine that Petitioners hold title and exclusive rights of possession to the water's edge of Lake Huron.

Dated: December 8, 2005

Respectfully submitted,

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APPENDIX OF PETITIONER

Michigan Supreme Court
Lansing, Michigan

Opinion	Chief Justice: Clifford W. Taylor	Justices: Michael F. Cavanaugh Elizabeth A. Weaver Marilyn Kelly Maura D. Corrigan Robert P. Young, Jr. Stephen J. Markman

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FILED JULY 29, 2005

JOAN M. GLASS,

Plaintiff-Appellant,

v No. 126409

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants-Appellees.

BEFORE THE ENTIRE BENCH

CORRIGAN, J.

The issue presented in this case is whether the public has a right to walk along the shores of the Great Lakes where a private landowner ostensibly holds title to the water's edge. To resolve this issue we must consider two component questions: (1) how the public trust doctrine affects private littoral[1] title; and (2) whether the public

[1] Modern usage distinguishes between "littoral" and "riparian," with the former applying to seas and their coasts and the latter

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trust encompasses walking among the public rights protected by the public trust doctrine.

Despite the competing legal theory offered by Justice Markman, our Court unanimously agrees that plaintiff does not interfere with defendants' property rights when she walks within the area of the public trust. Yet we decline to insist, as do Justices Markman and Young, that submersion[2] at a given moment defines the boundary of the public trust. Similarly, we cannot leave uncorrected the Court of Appeals award to littoral landowners of a "right of exclusive use" down to the water's edge, which upset the balance between private title and public rights along our Great Lakes and disrupted a previously quiet status quo.

Plaintiff Joan Glass asserts that she has the right to walk along Lake Huron. Littoral landowners defendants Richard and Kathleen Goeckel maintain that plaintiff trespasses on their private land when she walks the shoreline. Plaintiff argues that the public trust doctrine,

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applying to rivers and streams. Black's Law Dictionary (7th ed). Our case law has not always precisely distinguished between the two terms. Consistent with our recognition that the common law of the sea applies to our Great Lakes, see *People v Silberwood,* 110 Mich 103, 108; 67 NW 1087 (1896), citing *Illinois Central R Co v Illinois,* 146 US 387, 437; 13 S Ct 110; 36 L Ed 1018 (1892), we will describe defendants' property as littoral property. Although we have attempted to retain consistency in terminology throughout our discussion, we will at times employ the term "riparian" when the facts or the language previously employed so dictate. For example, a *littoral* owner of property on the Great Lakes holds *riparian* rights as a consequence of owning waterfront property. See *Hilt v Weber,* 252 Mich 198, 225; 233 NW 159 (1930).

[2] We note that, in the view of our colleagues, "submerged land" includes not only land that lies beneath visible water, but wet sands that are "infused with water." See *post* at 52.

which is a legal principle as old as the common law itself, and the Great Lakes Submerged Lands Act (GLSLA), MCL 324.32501 *et seq.,*[3] protect her right to walk along the shore of Lake Huron unimpeded by the private title of littoral landowners. Plaintiff contends that the public trust doctrine and the GLSLA preserve public rights in the Great Lakes and their shores that limit any private property rights enjoyed by defendants.

Although we find plaintiff's reliance on the GLSLA misplaced, we conclude that the public trust doctrine does protect her right to walk along the shores of the Great Lakes. American law has long recognized that large bodies of navigable water, such as the oceans, are natural resources and thoroughfares that belong to the public. In our common-law tradition, the state, as sovereign, acts as trustee of public rights in these natural resources. Consequently, the state lacks the power to diminish those rights when conveying littoral property to private parties. This "public trust doctrine," as the United States Supreme Court stated in *Illinois Central R Co v Illinois,* 146 US 387, 435; 13 S Ct 110; 36 L Ed 1018 (1892) (*Illinois Central I*), and as recognized by our Court in *Nedtweg v Wallace,* 237 Mich 14, 16-23; 208 NW 51 (1926), applies not only to the oceans, but also to the Great Lakes.

Pursuant to this longstanding doctrine, when the state (or entities that predated our state's admission to the Union) conveyed littoral property to private parties, that property remained subject to the public trust. In this case,

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[3] The Great Lakes Submerged Lands Act, formerly MCL 322.701 *et seq.,* is now part of Michigan's Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.*

the property now owned by defendants was originally conveyed *subject to specific public trust rights in Lake Huron and its shores up to the ordinary high water mark.* The ordinary high water mark lies, as described by Wisconsin, another Great Lakes state, where "'the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.'" *State v Trudeau,* 139 Wis 2d 91, 102; 408 NW2d 337 (1987) (citation omitted).[4] Consequently, although defendants retain full rights of ownership in their littoral property, they hold these rights subject to the public trust.

We hold, therefore, that defendants cannot prevent plaintiff from enjoying the rights preserved by the public trust doctrine. Because walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation, our public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the ordinary high water mark. Therefore, plaintiff, like any member of the public, enjoys the right to walk along the shore of Lake Huron on land lakeward of the ordinary high water mark. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

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[4] We refer to a similarly situated sister state not for the entirety of its public trust doctrine, but for a credible definition of a term long employed in our jurisprudence. Despite Justice Markman's protestation over upsetting settled rules, see, e.g., *post* at 37, we have recourse to this persuasive definition because, as noted by Justice Young, this area of law has been characterized by critical terms receiving less than precise definition. See *post* at 1.

FACTS AND PROCEDURAL HISTORY

Defendants own property on the shore of Lake Huron, and their deed defines one boundary as "the meander line of Lake Huron."[5] Plaintiff owns property located across the highway from defendants' lakefront home. This case originally arose as a dispute over an express easement. Plaintiff's deed provides for a fifteen-foot easement across defendants' property "for ingress and egress to Lake Huron," and she asserts that she and her family members have used the easement consistently since 1967 to gain access to the lake. The parties have since resolved their dispute about plaintiff's use of that easement.

This present appeal concerns a different issue: plaintiff's right *as a member of the public* to walk along the shoreline of Lake Huron, irrespective of defendants' private title. During the proceedings below, plaintiff sought to enjoin defendants from interfering with her walking along the shoreline. Defendants sought summary disposition under MCR 2.116(C)(8) and (9), for failure to state a claim upon which relief may be granted and for failure to state a defense. Defendants argued that, as a matter of law, plaintiff could not walk on defendants' property between the ordinary high water mark and the lake without defendants' permission.

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[5] We note that the parties do not contest the terms of the deed by which defendants own their property. We take as given that defendants hold title to their property according to the terms of their deed. The record does not reflect any argument over the meaning of the term "meander line" in this context. The issue before us is not how far defendants' private littoral title extends, but how the public trust affects that title.

The trial court granted plaintiff summary disposition under MCR 2.116(I)(2). Although the court concluded that no clear precedent controls resolution of the issue, it held that plaintiff had the right to walk "lakewards of the natural ordinary high water mark" as defined by the GLSLA.

The Court of Appeals reversed the trial court's order in a published opinion. 262 Mich App. 29; 683 NW2d 719 (2004). It stated "[t]hat the state of Michigan holds in trust the *submerged lands* beneath the Great Lakes within its borders for the free and uninterrupted navigation of the public. . . . " *Id.* at 42. The Court held that, apart from navigational issues, the state holds title to previously submerged land, subject to the exclusive use of the riparian owner up to the water's edge. *Id.* at 43. Thus, under the Court of Appeals analysis, neither plaintiff nor any other member of the public has a right to traverse the land between the statutory ordinary high water mark and the literal water's edge.

We subsequently granted leave to appeal. 471 Mich 904 (2004).

STANDARD OF REVIEW

We review de novo the grant or denial of a motion for summary disposition. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). In a motion under MCR 2.116(C)(8), "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden, supra* at 119. As we stated in *Nasser v Auto Club Ins. Ass'n,* 435 Mich 33, 47; 457 NW2d 637 (1990), "a motion for summary disposition under MCR

2.116(C)(9) is tested solely by reference to the parties' pleadings."

ANALYSIS

I. THE HISTORY OF THE PUBLIC TRUST DOCTRINE

Throughout the history of American law as descended from English common law, our courts have recognized that the sovereign must preserve and protect navigable waters for its people. This obligation traces back to the Roman Emperor Justinian, whose *Institutes* provided, "Now the things which are, by natural law, common to all are these: the air, running water, the sea, and therefore the seashores. Thus, no one is barred access to the seashore. . . . " Justinian, *Institutes,* book II, title I, § 1, as translated in Thomas, *The Institutes of Justinian, Text, Translation and Commentary* (Amsterdam: North-Holland Publishing Company, 1975), p 65; see also 9 Powell, Real Property, § 65.03(2), p 65-39 n 2, quoting a different translation. The law of the sea, as developed through English common law, incorporated the understanding that

> both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum,* in such lands . . . belongs to the King as the sovereign; and the

> dominion thereof, *jus publicum,* is vested in him as the representative of the nation and for the public benefit. [*Shively v Bowlby,* 152 US 1, 11; 14 S Ct 548; 38 L Ed 331 (1894).]

This rule – that the sovereign must sedulously guard the public's interest in the seas for navigation and fishing – passed from English courts to the American colonies, to the Northwest Territory, and, ultimately, to Michigan. See *Nedtweg, supra* at 17; accord *Phillips Petroleum Co v Mississippi,* 484 US 469, 473-474; 108 S Ct 791; 98 L Ed 2d 877 (1988), quoting *Shively, supra* at 57.

Michigan's courts recognized that the principles that guaranteed public rights in the seas apply with equal force to the Great Lakes. Thus, we have held that the common law of the sea applies to the Great Lakes. See *Hilt v Weber,* 252 Mich 198, 213, 217; 233 NW 159 (1930); *People v Silberwood,* 110 Mich 103, 108; 67 NW 1087 (1896). In particular, we have held that the public trust doctrine from the common law of the sea applies to the Great Lakes.[6] See *Nedtweg, supra* at 16-23; *Silberwood, supra* at 108; *State v Venice of America Land Co,* 160 Mich 680, 702; 125 NW 770 (1910); accord *Illinois Central I, supra* at 437.

Accordingly, under longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public.[7] The state

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[6] In this decision, we consider the public trust doctrine only as it has applied to the Great Lakes and do not consider how it has applied to inland bodies of water.

[7] Although not implicated in this case, we note that the Great Lakes and the lands beneath them remain subject to the federal

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serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure. See *Nedtweg, supra* at 16; *Venice of America Land Co, supra* at 702; *State v Lake St Clair Fishing & Shooting Club,* 127 Mich 580, 586; 87 NW 117 (1901); *Lincoln v Davis,* 53 Mich 375, 388; 19 NW 103 (1884).

The state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources. As we stated in *Nedtweg, supra* at 17:

> The State may not, by grant, surrender such public rights any more than it can abdicate the police power or other essential power of government. But this does not mean that the State must, at all times, remain the proprietor of, as well as the sovereign over, the soil underlying navigable waters. . . . The State of Michigan has an undoubted right to make use of its proprietary ownership of the land in question, [subject only to the paramount right of] the public [to] enjoy the benefit of the trust.

Therefore, although the state retains the authority to convey lakefront property to private parties, it necessarily conveys such property *subject to the public trust.*

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navigational servitude. This servitude preserves for the federal government control of all navigable waters "for the purpose of regulating and improving navigation. . . ." *Gibson v United States,* 166 US 269, 271-272; 17 S Ct 578; 41 L Ed 996 (1897). "[A]lthough the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution." *Id.* at 272. Apart from this servitude, the federal government has relinquished to the state any remaining ownership rights in the Great Lakes. See 43 USC 1311.

At common law, our courts articulated a distinction between *jus privatum* and *jus publicum* to capture this principle: the alienation of littoral property to private parties leaves intact public rights in the lake and its submerged land. See *Nedtweg, supra* at 20; *McMorran Milling Co v C H Little Co,* 201 Mich 301, 313; 167 NW 990 (1918); *Sterling v Jackson,* 69 Mich 488, 506-507; 37 NW 845 (1888) (Campbell, J., dissenting); see also *Collins v Gerhardt,* 237 Mich 38, 55; 211 NW 115 (1926) (Fellows, J., concurring) (recognizing the "different character" of the rights held by the federal government as proprietor and as trustee in an inland navigable stream); *Lorman v Benson,* 8 Mich 18, 27-28 (1860) (reciting the common-law distinction between *jus publicum* and *jus privatum* in a case involving ownership of a riverbed).[8]

Jus publicum refers to public rights in navigable waters and the land covered by those waters;[9] *jus privatum,* in contrast, refers to private property rights held

[8] Indeed, other states also recognize the distinction between private title and public rights. See, e.g., *State v Longshore,* 141 Wash 2d 414, 427; 5 P3d 1256 (2000) ("The state's ownership of tidelands and shorelands is comprised of two distinct aspects – the *jus privatum* and the *jus publicum.*"); *Smith v State,* 153 AD2d 737, 739-740; 545 NYS2d 203 (1989) ("This doctrine grows out of the common-law concept of the *jus publicum,* the public right of navigation and fishery which supersedes a private right of *jus privatum.*") (citations omitted); *Bell v Town of Wells,* 557 A2d 168, 172-173 (Me, 1989) (stating that the different types of title in the same shore property "remain in force" to this day); see also *RW Docks & Slips v State,* 244 Wis 2d 497, 509-510; 628 NW2d 781 (2001) (applying the public trust doctrine as adopted in its state constitution).

[9] See Black's Law Dictionary (7th ed), defining "*jus publicum*" as "[t]he right, title, or dominion of public ownership; esp., the government's right to own real property in trust for the public benefit."

subject to the public trust.[10] As the United States Supreme Court explained in *Shively, supra* at 13:

> In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below the ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant or by prescription or usage; and that this title, *jus privatum,* whether in the King or in a subject, is held subject to the public right, *jus publicum,* of navigation and fishing. [Citations omitted.]

Thus, when a private party acquires littoral property from the sovereign, it acquires only the *jus privatum*. Our courts have continued to recognize this distinction between private title and public rights when they have applied the public trust doctrine. Public rights in certain types of access to the waters and lands beneath them remain under the protection of the state. Under the public trust doctrine, the sovereign never had the power to eliminate those rights, so any subsequent conveyances of littoral property remain subject to those public rights. See *Nedtweg, supra* at 17; see also *People ex rel Director of Conservation v Broedell,* 365 Mich 201, 205; 112 NW2d 517 (1961). Consequently, littoral landowners have always taken title subject to the limitation of public rights preserved under the public trust doctrine.

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[10] See *id.,* defining "*jus privatum*" as "[t]he right, title, or dominion of private ownership."

II. THE SCOPE OF THE PUBLIC TRUST DOCTRINE

Having established that the public trust doctrine is alive and well in Michigan, we are required in this appeal to examine the *scope* of the doctrine in Michigan: whether it extends up to the ordinary high water mark or whether, as defendants argue, it applies only to land that is *actually* below the waters of the Great Lakes at any particular moment.

A. THE GREAT LAKES SUBMERGED LANDS ACT

Plaintiff argues that the Legislature defined the scope of the public trust doctrine and established the outer limits of the doctrine in the GLSLA, thus supplanting our case law. This act, according to plaintiff, manifests a legislative intent to claim all land lakeward of the ordinary high water mark. Thus, plaintiff claims that the public trust extends to all land below the ordinary high water mark as defined in the act, which states that "the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet." MCL 324.32501.

We find plaintiff's reliance on the GLSLA to be misplaced. First, the act does not show a legislative intent to take title to all land lakeward of the ordinary high water mark. MCL 324.32502 provides:

> The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it,

> including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

The first sentence of this section states that the act applies only to "unpatented lake bottomlands" and "unpatented made lands." The fourth sentence, however, defines "land"

or "lands" in the act as including not only the bottomlands and made lands described in the first sentence, but also "patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark. . . ."[11] Thus, the act covers both publicly owned land (the lake bottomlands and made lands described in the first sentence) and privately owned land that was once owned by the state (patented land below the ordinary high water mark). In other words, the act reiterates the state's authority as trustee of the inalienable *jus publicum,* which extends over both publicly and privately owned lands. The act makes no claims to alter the delineation of the *jus privatum* of individual landowners.

Moreover, the act never purports to establish the boundaries of the public trust. Rather, the GLSLA establishes the scope of the regulatory authority that the Legislature exercises, pursuant to the public trust doctrine. Indeed, most sections of the act merely regulate the use of land below the ordinary high water mark.[12] The only

[11] A land patent is "[a]n instrument by which the government conveys a grant of public land to a private person." Black's Law Dictionary (7th ed), p 1147.

[12] Section 32503 provides that the Department of Environmental Quality (DEQ) may enter into agreements regarding land use or alienate unpatented land to the extent that doing so will not impair "the public trust in the waters. . . ." MCL 324.32503. Section 32504 governs applications for deeds or leases to unpatented lands. MCL 324.32504. Section 32504a concerns the restoration and maintenance of lighthouses. MCL 324.32504a. Section 32505 covers unpatented lake bottomlands and unpatented made lands, again providing that such lands may be conveyed as long as the public trust "will not be impaired or substantially injured." MCL 324.32505. Sections 32506 through 32509 concern the valuation of unpatented lands and various administrative matters (with § 32509 delegating authority to promulgate rules

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section of the act that purports to deal with property rights is § 32511, MCL 324.32511:

> A riparian owner may apply to the department for a certificate suitable for recording indicating the location of his or her lakeward boundary or indicating that the land involved has accreted to his or her property as a result of natural accretions or placement of a lawful, permanent structure. The application shall be accompanied by a fee of $200.00 and proof of upland ownership.

As shown previously, a vital distinction in public trust law exists between private title (*jus privatum*) and those public rights that limit that title (*jus publicum*). Section 32511 only establishes a mechanism for landowners to certify the boundary of their private property (*jus privatum*). The boundary of the public trust (*jus publicum*) – distinct from a boundary on private littoral title – remains a separate question, a question that the act does not answer.

Finally, plaintiff also relies on the following language in § 32502 to argue that the GLSLA establishes the scope of the public trust doctrine:

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to the DEQ). MCL 324.32506 through 324.32509. Section 32510 establishes that a violation of the act is a misdemeanor punishable by imprisonment or a fine. MCL 324.32510. Prohibited acts are defined in § 32512, MCL 324.32512, with § 32512a, MCL 324.32512a, specifically focusing on the removal of vegetation. Sections 32513 and 32514 return to administrative matters, such as applications for permits and public notice of hearing. MCL 324.32513 and 324.32514. Section 32515, MCL 324.32515, deals with enlargement of waterways, and § 32516, MCL 324.32516, returns again to the removal of vegetation.

> This part [the GLSLA] shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition.[13]

Again, plaintiff's reliance on this section is misplaced. This sentence states that the act will be construed to protect the public interest. But that rule of construction begs the question and cannot resolve whether the public has an interest in a littoral property in the first place. It provides no reason to expand the public trust beyond the limits established at common law. Thus, we must look elsewhere to determine the precise scope of the public trust to which § 32502 refers.[14]

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[13] MCL 324.32502.

[14] The Legislature has recognized the public trust in other contexts as well. As early as 1913, the Legislature had made provision for the disposition and preservation of the public trust by entrusting trust lands and waters to the care of the predecessor of the DEQ. See 1913 PA 326, 1915 CL 606 *et seq.*; see also *Nedtweg, supra* at 18 (upholding the constitutionality of the act because any authorized uses would yield to the "rights of the public"). In addition, the Legislature has conveyed small fractions of the lakes and shoreline to private parties, though

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B. The Public Trust Doctrine as Applied to the Great Lakes

Because the GLSLA does not define the scope of the public trust doctrine in Michigan, we must turn again to our common law.

In applying the public trust doctrine to the oceans, courts have traditionally held that rights protected by this doctrine extend from the waters themselves and the lands beneath them to a point on the shore called the "ordinary high water mark." See, e.g., *Shively, supra* at 13; *Hardin v Jordan,* 140 US 371, 381; 11 S Ct 808; 35 L Ed 428 (1891); see also Hargrave's Law Tracts, 11, 12, quoted in *Shively, supra* at 12 (" 'The shore is that ground that is between the ordinary high water and low water mark [and this ground belongs to the sovereign.]' "). The United States Supreme Court described this common-law concept of the "high water mark" in *Borax Consolidated, Ltd v Los Angeles,* 296 US 10, 22-23; 56 S Ct 23; 80 L Ed 9 (1935):

> The tideland extends to the high water mark. This does not mean . . . a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. But by the common law, the shore "is confined to the flux and reflux of the sea at ordinary tides." It is the land "between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary

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only after ensuring that such conveyances did not disturb the public trust. See, e.g., 1954 PA 41; 1959 PA 31; 1959 PA 84.

> high-water mark is always intended where the common law prevails." [Citations omitted.]

An "ordinary high water mark" therefore has an intuitive meaning when applied to tidal waters. Because of lunar influence, ocean waves ebb and flow, thus reaching one point on the shore at low tide and reaching a more landward point at high tide. The latter constitutes the high water mark on a tidal shore. The land between this mark and the low water mark is submerged on a regular basis, and so remains subject to the public trust doctrine as "submerged land." See, e.g., *Illinois Central R Co v Chicago,* 176 US 646, 660; 20 S Ct 509; 44 L Ed 622 (1900) (*Illinois Central II*) ("But it is equally well settled that, in the absence of any local statute or usage, a grant of lands by the State does not pass title to *submerged lands below [the] high water mark*. . . .") (Citations omitted; emphasis added.)

Michigan's courts have adopted the ordinary high water mark as the landward boundary of the public trust. For example, in an eminent domain case concerning property on a bay of Lake Michigan, we held that public rights end at the ordinary high water mark. *Peterman v Dep't of Natural Resources,* 446 Mich 177, 198-199; 521 NW2d 499 (1994).[15] Thus, we awarded damages for destruction of the plaintiff's property above the ordinary high water mark that resulted from construction by the state (which occurred undisputedly in the water and within the public trust). *Id.* Similarly, in an earlier case

[15] This decision relied not simply on a "navigational servitude" unique to that case, but rooted that "navigational servitude" in the public trust doctrine. See *id.* at 194 n 22, citing *Collins, supra* at 45-46; *Venice of America Land Co, supra; Nedtweg, supra* at 16-17.

where the state asserted its control under the public trust doctrine over a portion of littoral property, the Court also employed the high water mark as the boundary of the public trust. *Venice of America Land Co, supra* at 701-702.

Our Court has previously suggested that Michigan law leaves some ambiguity regarding whether the high or low water mark serves as the boundary of the public trust. See *Broedell, supra* at 205-206. But the established distinction in public trust jurisprudence between public rights (*jus publicum*) and private title (*jus privatum*) resolves this apparent ambiguity. Cases that seem to suggest, at first blush, that the public trust ends at the low water mark actually considered the boundary of the littoral owner's private property (*jus privatum*) rather than the boundary of the public trust (*jus publicum*).[16]

[16] See *La Porte v Menacon,* 220 Mich 684; 190 NW 655 (1922) (resolving a dispute between private landowners over a deed term and bounding property at the low water mark); *Lake St Clair Fishing & Shooting Club, supra* at 587, 594-595 (setting the boundary of private title at the low water mark, while simultaneously endorsing *Shively* and *Illinois Central I* and *II*); *Silberwood, supra* at 107 (reciting the holdings of other jurisdictions that a riparian owner's fee ends at the low water mark); *Lincoln, supra* at 384 (considering the boundaries of a grant made by the federal government, rather than the boundary on what the government retained). In *Collins, supra* at 60 (Fellows, J., concurring), our Court differed and used the *high* water mark as the boundary to private title, but that case involved property on an *inland stream.*

In *People v Warner,* 116 Mich 228, 239; 74 NW 705 (1898), the Court appeared to place a single boundary between the riparian owner's title and state control, stating that "[t]he adjoining proprietor's fee stops [at the high or low water mark], and there that of the State begins." Yet this boundary marks "the limit of private ownership." *Id.* This recalls the fact that the state might hold proprietary title or, separate from that title, title as trustee to preserve the waters and lands beneath them on behalf of the public. The Court proceeded to distinguish the state's interest in the waters from the interest of the

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Because the public trust doctrine preserves public rights separate from a landowner's fee title, the boundary of the public trust need not equate with the boundary of a landowner's littoral title. Rather, a landowner's littoral title might extend past the boundary of the public trust.[17] Our case law nowhere suggests that private title necessarily ends where public rights begin. To the contrary, the distinction we have drawn between private title and public rights demonstrates that the *jus privatum* and the *jus publicum* may overlap.

Nor does this recognition of the potential for overlap represent a novel invention. While not binding on Michigan, other courts have similarly accommodated the same practical challenge of fixing boundaries on shifting waters: they acknowledged the possibility of public rights coextensive

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public in navigation, fish, and fowl. *Id.* Thus, in context, the *Warner* Court recognized a boundary on a riparian title, a title that remained subject to the public trust. But the Court did not equate that boundary with the limit of the public trust.

[17] Although in the context of an inland stream case, Justice Fellows noted the possibility of different boundaries on the public trust and riparian ownership in his concurring opinion in *Collins, supra* at 52, quoting *Bickel v Polk,* 5 Del 325, 326 (Del Super, 1851):

> "The right of fishing in all public streams where the tide ebbs and flows, is a common right, and the owner of land adjoining tide water, though his title runs to low water mark, has not an exclusive right of fishing; the public have the right to take fish below high water mark, though upon soil belonging to the individual, and would not be trespassers in so doing; but if they take the fish above high water mark, or carry them above high water mark and land them on private property, this would be a trespass. . . . In all navigable rivers, where the tide ebbs and flows, the people have of common right the privilege of fishing, and of navigation, between high and low water mark; though it be over private soil."

with private title. See, e.g., *State v Korrer,* 127 Minn 60, 76; 148 NW 617 (1914) (Even if a riparian owner holds title to the ordinary low water mark, his title is absolute only to the ordinary high water mark and the intervening shore space between high and low water mark remains subject to the rights of the public.); see also *North Shore, Inc v Wakefield,* 530 NW2d 297, 301 (ND, 1995) (stating that neither the state nor the riparian owner held absolute interests between high and low water mark); *Shaffer v Baylor's Lake Ass'n, Inc,* 392 Pa 493, 496; 141 A2d 583 (1958) (subjecting private title held to low water mark to public rights up to high water mark); *Flisrand v Madson,* 35 SD 457, 470-472; 152 NW 796 (1915) (same as *Korrer, supra*); *Bess v Humboldt Co,* 3 Cal App 4th 1544, 1549; 5 Cal Rptr 2d 399 (1992) (noting that it is "well established" that riparian title to the low water mark remained subject to the public trust between high and low water marks).

In the instant case, the Court of Appeals relied extensively on *Hilt* to set a boundary on where defendants' property ended and where plaintiff's rights (as a member of the public) began. But our concern in *Hilt* was the boundary of a littoral landowner's *private* title,[18] rather than the boundary of the public trust. See *Hilt, supra* at 206 (noting that the government conveyed title "to the water's edge"). Indeed, the *Hilt* Court endorsed the *Nedtweg* Court's discussion of the public trust and decided the issue of the boundary on private littoral title within the context of

[18] Moreover, the particular issue in *Hilt* was the boundary of private title on *relicted*/*accreted* land, which is not at issue in the present case.

the public trust doctrine. See *id.* at 203, 224-225, 227.[19] Consequently, the Court of Appeals erred by granting defendants an exclusive right of use down to the water's edge, because littoral property remains subject to the public trust and because defendants hold title according to the terms of their deed.

Our public trust doctrine employs a term, "the ordinary high water mark," from the common law of the sea and applies it to our Great Lakes. While this term has an obvious meaning when applied to *tidal* waters with regularly recurring high and low tides, its application to *nontidal* waters like the Great Lakes is less apparent. See, e.g., *Lincoln, supra* at 385 (noting, amidst a discussion of the extent of private littoral title, some imperfection in an analogy between the Great Lakes and the oceans). In the Great Lakes, water levels change because of precipitation, barometric pressure, and other forces that lack the regularity of lunar tides, which themselves exert a less noticeable influence on the Great Lakes than on the oceans. Applying a term from the common law of the sea, despite the obvious difference between the oceans and the Great Lakes, has led to some apparent discontinuity in the terminology employed in our case law. Notwithstanding

[19] The *Hilt* Court concluded by stating how the public trust doctrine affected a riparian owner's private title:

> While the upland owner, in a general way, has full and exclusive use of the relicted land, his enjoyment of its use, especially his freedom to develop and sell it, is clouded by the lack of fee title, the necessity of resorting to equity or to action for damages instead of ejectment to expel a squatter, and the overhanging threat of the State's claim of right to occupy it for State purposes. The State, except for the paramount trust purposes, could make no use of the land. . . . [*Id.* at 227.]

some prior imprecision in its use, a term such as "ordinary high water mark" attempts to encapsulate the fact that water levels in the Great Lakes fluctuate. This fluctuation results in temporary exposure of land that may then remain exposed above where water currently lies. This land, although not immediately and presently submerged, falls within the ambit of the public trust because the lake has not permanently receded from that point and may yet again exert its influence up to that point. See *Nedtweg, supra* at 37 (setting apart from the public trust that land which is permanently exposed by the "recession of water" and so "rendered suitable for human occupation"). Thus, the ordinary high water mark still has meaning as applied to the Great Lakes and marks the boundary of land, even if not instantaneously submerged, included within the public trust. Our sister state, Wisconsin, defines the ordinary high water mark as

> the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark. [*Diana Shooting Club v Husting,* 156 Wis 261, 272; 145 NW 816 (1914), (citation omitted).]

Although *Diana Shooting Club* involved a river, Wisconsin has applied this definition not only to inland waters, but also to the Great Lakes. See *R W Docks & Slips, supra* at

508-510; *Trudeau, supra* at 102.[20] This definition has long served a state with which we share a border and that also has an extensive Great Lakes shoreline.

Although we do not import our sister state's public trust doctrine where this Court has already spoken, we are persuaded to adopt this definition to clarify a term long used but little defined in our jurisprudence. Indeed, Wisconsin's definition of ordinary high water mark is not far removed from meanings previously recognized in Michigan. See MCL 324.30101(i);[21]1999 AC, R 281.301(j); *Peterman, supra* at 198 n 29 (noting a statutory definition

[20] While an average member of the public may not require this degree of precision, *Trudeau* illustrates how a factual dispute over the location of the ordinary high water mark may be resolved. In that case, the parties presented evidence via expert witnesses. *Id.* at 108. For example, the state's expert testified that he "analyzed several aerial photographs . . . , the government survey maps, the site's present configuration, and stereo [three-dimensional] photographs. . . ." *Id.* Numerous resources exist to provide guidance to professionals. See, e.g., Simpson, *River & Lake Boundaries: Surveying Water Boundaries-A Manual* (Kingman, AZ: Plat Key Publishing, 1994); Cole, *Water Boundaries* (New York: J Wiley & Sons, 1997). Not surprisingly, this Court requires a survey based on proper monuments to establish an actual property line. *Hurd v Hines,* 346 Mich 70, 78-79; 77 NW2d 341 (1956). The same requirement would apply for a boundary set by one of our Great Lakes.

[21] Enacted after the GLSLA employed a standard based on International Great Lakes Datum for the Great Lakes, MCL 324.30101(i), which contains definitions previously found in the former Inland Lakes and Streams Act, in relevant part provides:

> "Ordinary-high water mark" means the line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil, and the vegetation.

regarding inland waters, now enacted as MCL 324.30101(i), when considering the ordinary high water mark on Lake Michigan). This definition also parallels that employed by the federal government. See, e.g., 33 CFR 328.3(e).[22] Thus, we clarify the meaning of "ordinary high water mark" consistently with a definition that has served another Great Lakes state for some hundred years and is in accord with the term's limited development in our own state.

The concepts behind the term "ordinary high water mark" have remained constant since the state first entered the Union up to the present: boundaries on water are dynamic and water levels in the Great Lakes fluctuate.[23] In light of this, the aforementioned factors will serve to identify the ordinary high water mark, but the precise

[22] 33 CFR 328.3(e) provides:

> The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

[23] As our Court has consistently recognized, water boundaries necessarily defy static definition. See *Hilt, supra* at 219. For example, the common law recognized riparian rights to accretion and reliction. This meant that riparian landowners gained private title to land adjacent to their property that gradually became permanently exposed through erosion or a change in water level. See *Peterman, supra* at 192-193. The recognition of these riparian rights shows that our courts have refused to fix a line that defies natural processes. Also, the concept of a "moveable freehold" to accommodate the effects of accretion and reliction on the bounds of littoral title shows our acknowledgement of the shifting nature of water boundaries. See *id., Klais v Danowski,* 373 Mich 262, 275-276; 129 NW2d 414 (1964), and *Broedell, supra* at 206, all quoting *Hilt, supra* at 219.

location of the ordinary high water mark at any given site on the shores of our Great Lakes remains a question of fact.

III. The Public Trust Includes Walking within its Boundaries

We have established thus far that the private title of littoral landowners remains subject to the public trust beneath the ordinary high water mark. But plaintiff, as a member of the public, may walk below the ordinary high water mark only if that practice receives the protection of the public trust doctrine. We hold that walking along the shore, subject to regulation (as is any exercise of public rights in the public trust) falls within the scope of the public trust.

To reiterate, the public trust doctrine serves to protect resources – here the waters of the Great Lakes and their submerged lands – shared in common by the public. See pp. 9-11 of this opinion; see also *Venice of America Land Co, supra* at 702 (noting that "the State of Michigan holds these lands in trust for the use and benefit of its people"). As trustee, the state must preserve and protect specific public rights below the ordinary high water mark and may permit only those private uses that do not interfere with these traditional notions of the public trust. See *Obrecht v Nat'l Gypsum Co,* 361 Mich 399, 412-413; 105 NW2d 143 (1960). Yet its status as trustee does not permit the state, through any of its branches of government, to secure to

itself property rights held by littoral owners. See *Hilt, supra* at 224 ("The state must be honest.").[24]

We first note that neither party contests that walking falls within public rights traditionally protected under our public trust doctrine. Rather, they dispute where, not whether, plaintiff may walk: below the literal water's edge or below the ordinary high water mark. While the parties' agreement on this point cannot determine the scope of public rights, this agreement does indicate the existence of a common sense assumption: walking along the lakeshore is inherent in the exercise of traditionally protected public rights.

Our courts have traditionally articulated rights protected by the public trust doctrine as fishing, hunting, and navigation for commerce or pleasure. See *Nedtweg, supra* at 16; *Venice of America Land Co, supra* at 702; *Lake St Clair Fishing & Shooting Club, supra* at 586; *Lincoln, supra* at 388.[25]

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[24] For example, in *Hilt, supra* at 225, we noted several riparian rights held by landowners whose property abuts water. These riparian rights include the "[u]se of the water for general purposes, as bathing, domestic use, etc.[,] . . . wharf[ing] out to navigability[,] . . . [a]ccess to navigable waters[, and] . . . [t]he right to accretions." (Citations omitted.) Moreover, "[r]iparian rights are property, for the taking or destruction of which by the State compensation must be made, unless the use has a real and substantial relation to a paramount trust purpose." *Id*.; see also *Peterman, supra* at 191. Thus, we have long recognized the value of riparian rights, but those rights remain ever subject to the "paramount" public trust.

[25] Indeed, we have even noted that the public might cut ice or, in the context of inland waters, might float logs downriver. See *Lake St Clair Fishing & Shooting Club, supra* at 587; *Grand Rapids Booming Co v Jarvis,* 30 Mich 308, 319 (1874).

In order to engage in these activities specifically protected by the public trust doctrine, the public must have a right of passage over land below the ordinary high water mark. Indeed, other courts have recognized a "right of passage" as protected with their public trust. See *Town of Orange v Resnick,* 94 Conn 573, 578; 109 A 864 (1920) (listing as public rights "fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge and . . . passing and repassing"); *Arnold v Mundy,* 6 NJL 1, 12 (1821) (reserving to the public the use of waters for "purposes of passing and repassing, navigation, fishing, fowling, [and] sustenance").

We can protect traditional public rights under our public trust doctrine only by simultaneously safeguarding activities inherent in the exercise of those rights. See e.g., *Attorney General, ex rel Director of Conservation v Taggart,* 306 Mich 432, 435, 443; 11 NW2d 193 (1943) (permitting wading in a stream pursuant to the public trust doctrine). Walking the lakeshore below the ordinary high water mark is just such an activity, because gaining access to the Great Lakes to hunt, fish, or boat required walking to reach the water.[26] Consequently, the public has always held a right of passage in and along the lakes.

Even before our state joined the Union, the Northwest Ordinance of 1787, art IV, protected our Great Lakes in trust: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free. . . ." See

[26] This does not imply a right of lateral access in the public, i.e., a right to traverse the land of littoral owners to reach the lands and waters held in trust. See, e.g., *Collins, supra* at 49.

Northwest Ordinance of 1787, art IV. Given that we must protect the Great Lakes as "common highways," see *id.,* we acknowledge that our public trust doctrine permits pedestrian use – in and of itself – of our Great Lakes, up to and including the land below the ordinary high water mark.

Yet in *Hilt, supra* at 226, our Court noted the rule stated by the Wisconsin Supreme Court in *Doemel v Jantz,* 180 Wis 225; 193 NW 393 (1923): "[T]he public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner. . . ." When read in context, this quotation does not represent a rejection of walking as impermissible within our public trust. As correctly described by Justice Markman, the *Hilt* Court cited this passage as part of its discussion regarding the Michigan Supreme Court's correction of an earlier departure from the common law.[27] See *post* at 51-53. But rather than adopting that rule from *Doemel,* the *Hilt* Court listed this rule, among others, to refute the notion that the state held "substantially absolute title" in the lakes and the lands beneath them. *Hilt, supra* at 224. Instead, "the State has title in its sovereign capacity," *id.,* pursuant to the public trust doctrine. Consequently, "the right of the State to use the bed of the lake, except for the trust purposes, is subordinate to that of the riparian owner." *Id.* at 226, citing *Town of Orange, supra* at 578. In light of this exception for the public trust, littoral owners' rights supersede public rights in the same property (by

[27] The *Kavanaugh* cases departed from the common law by fixing the meander line as the boundary on private littoral title and by fixing the legal status of land below that line, regardless of subsequent physical changes. See *Hilt, supra* at 213; see also *Kavanaugh v Rabior,* 222 Mich 68; 192 NW 623 (1923); *Kavanaugh v Baird,* 241 Mich 240; 217 NW 2 (1928).

virtue of their ownership) only to the extent that littoral owners' rights do not contravene the public trust. See *id.* When the *Hilt* Court recognized the greater rights of littoral property owners, it did not alter the public trust or preclude the public from walking within it.

We must conclude with two caveats. By no means does our public trust doctrine permit *every* use of the trust lands and waters. Rather, this doctrine protects only limited public rights, and it does not create an unlimited public right to access private land below the ordinary high water mark. See *Ryan v Brown,* 18 Mich 196, 209 (1869). The public trust doctrine cannot serve to justify trespass on private property. Finally, any exercise of these traditional public rights remains subject to criminal or civil regulation by the Legislature.

IV. RESPONSE TO OUR COLLEAGUES

Our Court unanimously agrees that defendants cannot prevent plaintiff from walking along the shore of Lake Huron within the area of the public trust. Despite the separate theory that undergirds the analysis, Justices Markman and Young agree with the majority that plaintiff may walk along Lake Huron in the area of the public trust.

Moreover, the majority and our colleagues agree on several other points. We agree that the public trust doctrine, descended at common law, applies to our Great Lakes. See *Hilt, supra* at 202 ("[T]his Court has consistently held that the State has title in fee in trust for the public to submerged beds of the Great Lakes within its boundaries."). We further agree that the public trust doctrine requires the state as trustee to preserve public

rights in the lakes and lands submerged beneath them. See *Nedtweg, supra* at 16. Finally, we agree that plaintiff retains the same right to walk along the Great Lakes she has always held. *Post* at 50-52. That our colleagues disagree with the other members of this Court over the particulars of how far those public rights extend ought not overshadow our fundamental agreement: plaintiff does not interfere with defendants' property rights when she walks within the public trust.

Despite the sound and fury of Justice Markman's concurring and dissenting opinion,[28] we do not radically depart from our precedents or destabilize property rights by upholding and applying our common law. While our colleagues in dissent claim to maintain the status quo, they do not do so. Rather, the majority retains and clarifies the status quo. The trial court correctly permitted plaintiff to walk lakeward of the ordinary high water mark. The Court of Appeals also correctly recognized the importance of the public trust doctrine, though we reverse its requirement that plaintiff walk only where water currently lies.

Yet our colleagues in dissent would repeat this error by continuing to grant an exclusive right of possession to

[28] For example, Justice Markman predicts the appearance of fences along the shore. Yet to the extent that landowners may do as they see fit on their own property, they could always erect a fence. While we share Justice Markman's desire to preserve any "long coexist[ence] in reasonable harmony," *post* at 2 n 2, we find peculiar his implication that resolving an actual instance of disharmony between these parties or correcting the lower court's departure from our common law equates with this Court's endorsement of (or even comment on) property owners using fences. Were we to adopt our colleagues' approach, littoral landowners could place fences as far down as the water's edge.

littoral landowners. Indeed, they would compound this error by granting littoral landowners all property down to where unsubmerged land ends, which they locate at the water's edge,[29] regardless of the terms of landowners' deeds.[30] We would not so casually set aside the countless deeds that order property rights for the length of our state shoreline. We would not give away to littoral landowners the absolute title to public trust land preserved for the people. Such a departure would represent a grave disturbance to the property rights of littoral landowners and of the public.

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[29] Numerous states bound their public trust, not at an instantaneously defined "water's edge," but at their high water mark. See, e.g., *Barboro v Boyle,* 119 Ark 377, 385; 178 SW 378 (1915) (high water mark for a lake); *Simons v French,* 25 Conn 346, 352-353 (1856) (high water mark on tidal waters); *Day v Day,* 22 Md 530, 537 (1865) (high water mark on tidally influenced rivers and streams); *State v Florida Natural Properties, Inc,* 338 So 2d 13, 19 (Fla, 1976) (ordinary high water mark); *Freeland v Pennsylvania R Co,* 197 Pa 529, 539; 47 A 745 (1901) (ordinary high water mark); *Allen v Allen,* 19 RI 114, 115; 32 A 166 (1895) (high water mark); *State v Hardee,* 259 SC 535, 541-542; 193 SE2d 497 (1972) (high water mark on tidally influenced stream).

Indeed, references in other states to "water's edge" often tie that term to either a high or low water mark. See, e.g., *Concord Mfg Co v Robertson,* 66 NH 1, 19-21; 25 A 718 (1890); *Lamprey v State,* 52 Minn 181, 198; 53 NW 1139 (1893); *Hazen v Perkins,* 92 Vt 414, 419-421; 105 A 249 (1918); Mont Code, § 70-16-201; ND Cent Code, § 47-01-15.

[30] In the absence of a review of the myriad deeds by which landowners hold title to property on the Great Lakes, Justice Markman assumes that their deeds will describe, in some manner, the "water's edge." Yet, as he acknowledges, that water's edge may shift. This could result in water reaching above the low water mark, even though a deed could convey title to the low water mark. See, e.g., *La Porte v Menacon,* 220 Mich 684, 687; 190 NW 655 (1922) (enforcing a deed that extended private title to the "shore," meaning the "water's edge at its lowest mark").

Notwithstanding Justice Markman's characterization of this case as "aberrational," *post* at 4, 5, and 65, we have not invented the dispute presented to us. Nor do we have the luxury of forsaking public rights; our Court is one of the "sworn guardians of Michigan's duty and responsibility as trustee of the [Great Lakes]." See *Obrecht, supra* at 412. For the reasons described earlier in the opinion, we conclude that public rights may overlap with private title. Consequently, we refuse to enshrine – for the first time in our history – a solitary boundary between them. In this way, we preserve littoral title as landowners have always held it, and we preserve public rights always held by the state as trustee.

In dissent, our colleagues resist acknowledging the boundary of the public trust as the ordinary high water mark. To reach this conclusion, Justice Markman relies on cases concerning the boundary of *private title,* rather than the boundary of the public trust. See e.g., *Silberwood; Lake St Clair Hunting & Fishing; Hilt.*[31] He refuses to accept our Court's holding – in a case involving Lake Michigan – that " 'the limit of the public's right is the ordinary high water mark. . . .' " *Peterman, supra* at 198

[31] Justice Markman makes frequent reference to colonial cases, particularly relying on Massachusetts. But as that state's high court has made clear, at common law the state owned to the mean high water line subject to public rights in navigation and fishing. See *Opinion of the Justices to the House of Representatives,* 365 Mass 681, 684-685; 313 NE2d 561 (1974). What the court described as the colonial ordinance of 1641 to 1647 changed the common law to allow private title to the low water mark, but even that extended title remained subject to public rights. *Id.* Unlike Massachusetts, no colonial ordinance altered the common-law concepts in Michigan.

(citation omitted).[32] Although he criticizes the majority for vagueness with regard to the definition of that term,[33] we clarify the meaning of that term in a way that allows for the fact-specific inquiry necessary to account for the range of physical forces and variety of landforms along our shoreline.[34] We decline to draw, merely for a charade of clarity, a universal line along the Great Lakes without any factual development of the point in the instant case or

[32] In seeming contradiction to his reading of *Peterman,* Justice Markman does accept that "the 'ordinary high water mark' is simply the outside edge of property that may . . . be regulated to preserve future navigational interests at times of high water. . . ." *Post* at 29. He also goes so far as to suggest that our Court has equated the high and low water marks, see *post* at 55, but the *Warner* Court on which he relies did not address that issue. *Warner, supra* at 239 ("If the absence of tides upon the Lakes, or their trifling effect if they can be said to exist, practically makes high and low water mark identical for the purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked.").

Additionally, our precedent stands in contradiction to Justice Young's intuition that the ordinary high water mark has no application in Michigan. See, e.g., *Peterman, supra* at 198-199 (calculating damages, at least in part, on the basis of the location of the ordinary high water mark). In contrast, the "wet sand" standard supported by Justice Young appears for the first time in our state in this case. We have serious reservations about adopting the view that he joins Justice Markman in advancing. See *post* at 49-51.

[33] In apparent tension with his claim that the majority fails to rely on Michigan common law, Justice Markman purports to offer an authoritative definition for ordinary high water mark that derives from a federal case and a 1997 dictionary. See *post* at 41-42 & n 35.

[34] We are unpersuaded that Justice Markman's recitation of natural forces demonstrates a difficulty in ascertaining the ordinary high water mark, because those same forces operate to shift the "water's edge." See *post* at 43-48. If anything, the results of this scientific expedition show the complexity of arriving at a water-tight definition, rather than prove that the "water's edge" concept escapes similar difficulties.

legal argument on an issue of significance to our state's jurisprudence.

Nor does our colleagues' "water's edge" concept provide superior clarity. Although the term might intuitively appear to mean where the water meets land, Justice Markman expands the term to include sand dampened by water. See, e.g., *post* at 50 ("Because by definition such sands are infused with water, the wet sands fall within the definition of 'submerged lands.' "). Our colleagues' conception of "water's edge" neglects to account for (1) geography where sand is absent; (2) sudden changes in water levels such as storm surges; (3) what degree of dampness suffices: that identified by touch, sight, or a scientific review that could identify the presence of a single water molecule; and (4) the source of the water, where dampness may arise because of contact with a liquid, such as rain, other than water from the Great Lakes. Also, the instant-by-instant determination of a property boundary affords little certainty to littoral landowners. Given these serious difficulties in applying our colleagues' "water's edge" rule *and* the absence of support in our case law, we refuse to shift the boundary on the public trust away from the ordinary high water mark.

As trustee, the state has an obligation to protect the public trust. The state cannot take what it already owns. Because private littoral title remains subject to the public trust, no taking occurs when the state protects and retains that which it could not alienate: public rights held pursuant to the public trust doctrine.[35] Certainly, the loss of

[35] The United States Supreme Court has held that the issue before us is a matter of state property law. See *Phillips Petroleum Co v Mississippi,* 484 US 469, 475; 108 S Ct 791; 98 L Ed 2d 877 (1988)

(Continued on following page)

littoral property or riparian rights could result from an unconstitutional taking. See, e.g., *Peterman, supra* at 198, 208 (compensating the plaintiffs for losses above the ordinary high water mark); see also *Bott v Natural Resources Comm,* 415 Mich 45, 80; 327 NW2d 838 (1982); *Hilt, supra* at 225. Yet, here, defendants have not lost any property rights. Rather, they retain their property subject to the public trust, just as all property that abuts the Great Lakes in Michigan remains subject to the public trust, pursuant to our common law.

Justice Markman also criticizes the majority for leaving unanswered many questions, several of which require the adoption of the legal framework that he proposed. Yet this case raises none of the questions that Justice Markman poses. In general, we reserve the judgment of this Court for "actual cases and controversies" and do not "declare principles or rules of law that have no practical legal effect in the case before us. . . ." *Federated Publications, Inc v City of Lansing,* 467 Mich 98, 112; 649 NW2d 383 (2002). Accordingly, we decline to rule on issues that are not before us.

("[T]he individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."); see also *Shively, supra* at 40 ("[T]he title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution.").

V. CONCLUSION

We conclude that plaintiff, as a member of the public, may walk the shores of the Great Lakes below the ordinary high water mark. Under longstanding common-law principles, defendants hold private title to their littoral property according to the terms of their deed and subject to the public trust. We therefore reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

Maura D. Corrigan
Clifford W. Taylor
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly

YOUNG, J. (*concurring in part and dissenting in part*).

This case poses a deceptively simple question: where, if anywhere, can a member of the public walk on the private beach of one of our Great Lakes without trespassing on a lakefront (littoral) owner's property?

Although the question is simple, the answer, as amply demonstrated by the more than one hundred pages of the rival opinions filed in this case, is muddled by an abstruse body of precedent that has been less than precise in defining critical terms and issues. This was a well-briefed and argued case that has resulted in a vigorous debate within the Court. The opinions of the majority and Justice Markman present compelling, principled, but *competing* constructions of an ambiguous body of Michigan law and that of other jurisdictions concerning Great Lakes property rights. In the final analysis, I believe that answer

offered by Justice Markman is more firmly anchored than that of the majority in the admittedly obscure property law of the Great Lakes.

I concur in the majority's determination that the Great Lakes Submerged Lands Act (GLSLA), MCL 324.32501 *et seq.*, does not create a right to walk the shores of our Great Lakes. The Act plainly evinces the Legislature's intent to regulate the use of land below what the International Great Lakes Datum identifies as the "ordinary high water mark," rather than to define new public rights or limit established property rights.[1]

However, I join Justice Markman's opinion with respect to the other issues presented by this appeal. Like Justice Markman, I believe the majority errs by recognizing a right that we have never before recognized – the right to "walk" the private beaches of our Great Lakes – and by granting public access to private shore land up to an ill-defined and utterly chimerical "ordinary high water mark" as described in the majority opinion.[2]

To be sure, the majority's opinion constitutes a concerted and honest effort to give coherence to a very vague body of precedent. However admirable the majority's

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[1] See *ante* at 14-19.

[2] See *ante* at 19-30. The majority concedes that: "Applying a term [ordinary high water mark] from the common law of the sea, despite the obvious difference between the oceans and the Great Lakes, has lead to some apparent discontinuity in the terminology employed in our case law." *Ante* at 26-27. Precisely so. In effort to employ a term that does not adequately reflect the physical realities of our Great Lakes, the majority has borrowed definitions variously from statutes and Wisconsin cases in a struggle to make this tidal term fit where it does not, and in so doing, has immeasurably expanded the scope of the public trust.

effort, I remain convinced that the "ordinary high water mark" concept on which the majority relies applies only to tidal waters, with their regularly recurring high and low tides.[3] The only "water mark" that one can find on the Great Lakes is the water's edge – viz., the wet portion of the shore over which the lake is presently ebbing and flowing. I believe it is only in this area of wet shoreline that the public may walk. They may do so, not because of a recognized "right to walk" the otherwise private beaches of our Great Lakes, for no such "right" has ever been recognized previously to be a part of Michigan's public trust doctrine.[4] Nor, in my view, is the public's opportunity to walk the shoreline a product of an overlap between private and public property titles as the majority asserts. Rather, I believe that the littoral landowner has no property claim to assert over submerged land – land over which the waters of a Great Lake is presently ebbing and flowing and which constitutes the lake bed. This area is the outer boundary of the public trust that is owned by and maintained for the People of Michigan.

The difficulty of the majority's rule and the soundness of Justice Markman's approach is evident when one actually tries to apply their different standards to the shore. In the attached photograph,[5] an area of darker, wet

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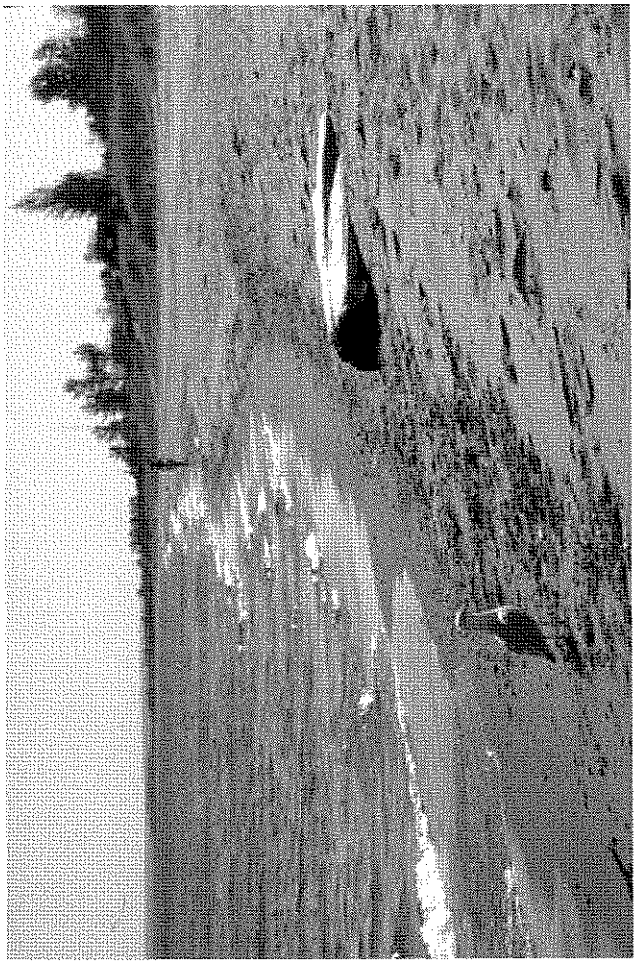
[3] See *post* at 31-35.

[4] Until today, Michigan cases have only recognized the right of the public to use the public trust for navigation, hunting, fishing, and fowling. See, e.g., *Hilt v Weber*, 252 Mich 198, 224; 233 NW 159 (1930); *Collins v Gerhardt*, 237 Mich 38, 46; 211 NW 115 (1926); *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580, 586; 87 NW 117 (1901).

[5] Photograph by David Hansen, Minnesota Agricultural Experiment Station, University of Minnesota. Reproduced with permission.

sand forms the outer boundary of the lake bed. The water is presently acting on this portion of the beach, as evidenced by the fact that the land is waterlogged. Under Justice Markman's view and my own, it is only in this area that the public may walk, and it may do so because the land is *presently* subject to reinundation and is part of the lake bed. Thus, in the photograph, both the seagull and the beach walker are within the public trust.[6]

[6] Accordingly, I would hold that plaintiff may walk in the zone of wet sands on Lake Huron, provided that she does so without creating a nuisance, because the defendants have no property interests in the bed of that lake.



Where, however, lies the majority's "ordinary high water mark" in this photograph? Presumably, the majority would identify the point where sand gives way to vegetation in the upper right-hand corner of the picture. The lake water is nowhere near that point now and, absent a storm, the water is unlikely to reach that point any time in the near future. Even if the lake did rise to meet the vegetation line due to extremely high precipitation or powerful barometric forces, in what sense would the line of vegetation be an *ordinary* high water mark in the sense suggested by the majority's definition?

Moreover, the majority notes that its ordinary high water mark excludes all dry land except that "temporar[ily] expos[ed]"[7] by the water. The pictorial beach illustration shows how unsatisfactory is the majority's formulation of its definition of "ordinary high water mark" as applied to our Great Lakes: What exactly does the majority mean by "temporary" exposure? If it simply means land from which the lake waters have "not permanently receded,"[8] at what point may anyone determine that the recession of the water is "permanent"? If the portion of the shore between the lake bed (including the wet sand area over which the lake is presently lapping) and the vegetation line has been dry for a season or more, can it truly be argued that this area of the beach is "*temporarily*" exposed? These are apparently pure questions of fact for the majority,[9] but I believe they are critical threshold questions that must be posed and answered when giving the term "ordinary high water mark" a workable legal definition as applied to the Great Lakes.

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[7] *Ante* at 27.

[8] *Ante* at 27.

[9] *Ante* at 30.

In essence, then, I believe that the majority concludes that the dry sandy area in the attached picture is entirely below the "ordinary high water mark" (thus within the protected, state-owned public trust) because this area *looks* like it may have been subject to the influence of water at some unidentifiable point in the past and because it may again, at some unidentifiable point in the future, be covered by the lake. If nothing else, this is an impractical proposition because it requires the uncritical application to our nontidal Great Lakes of a term – the "ordinary high water mark" – that is applicable *only* to tidal waters.

I believe the analysis offered by Justice Markman is more persuasive than that offered by the majority. In my view, not only has Justice Markman analyzed the applicable common law decisions with greater accuracy but, in contrast with the majority opinion, he has articulated a rule that is both faithful to the physical realities of our Great Lakes and consonant with the available confused precedent that we have all valiantly struggled to decipher.[10]

For these reasons, I concur in part II(A) of the majority opinion but join parts I-III and V of Justice Markman's opinion in respectfully dissenting from the remainder of the majority opinion.

Robert P. Young, Jr.

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[10] If we must transform the term "ordinary high water mark" in order to use it, I believe that we ought at least define and apply it in a way that reflects the physical nature of our non-tidal Great Lakes and that does least damage to heretofore stable lakefront property rights in the State.

MARKMAN, J. (*concurring in part and dissenting*).

Because I would not alter the longstanding status quo in our state concerning the competing rights of the public and lakefront property owners, I respectfully dissent. In concluding that the "public trust doctrine" permits members of the public to use unsubmerged lakefront property up to the "ordinary high water mark," the majority creates new legal rules in Michigan out of whole cloth by adopting Wisconsin law in piecemeal fashion and discarding Michigan rules that have defined the relationship between the public and lakefront property owners for virtually the entirety of our state's history.[1] Equally troubling, the majority replaces clear and well-understood rules – rules that have produced reasonable harmony over the decades in Michigan – with obscure rules. One of the few things that is clear about the majority's opinion is that it will lead inevitably to more litigation – more litigation in an area of the law that, mercifully, has been largely free from such litigation for the past century and a half in our state. In the place of the reasonable harmony that has developed between the public and littoral property owners, there will be litigation. In the place of open beaches, there almost certainly will be a proliferation of fences erected by property owners determined to protect their now uncertain rights.[2] In the place of rules that have *both* upheld the

[1] Although, quite remarkably, the majority purports that it "retains and clarifies the status quo," *ante* at 38, there is not a scintilla of support for the proposition that Wisconsin law has ever been the law of Michigan, not a single Michigan case referencing the majority's new test, and not a paragraph of argument in any of the briefs of plaintiffs, defendants, or amici identifying Wisconsin law as the law of Michigan.

[2] The majority fails to recognize why its new rules are a prescription for fences. It is, of course, true that a lakefront property owner

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property rights of lakefront landowners and provided an environment in which reasonable public use of lakefront property, including beach-walking, could routinely take place, the majority introduces new rules that will create tensions between the public and lakefront property owners. In the place of a boundary that can be determined by simple observation, the majority's new rules would require property owners and the public to bring "aerial photographs," a "government survey map[ ]" and "stereo [three-dimensional] photographs," *ante* at 28 n 20, in order to determine where their rights begin and end. In the place of rules in which property rights have been clearly defined by law, the majority expands the "public trust" in an uncertain fashion, in accordance with rules and regulations to be issued at some future time by the administrative agencies of state government. In the place of the clear rule of law in which property rights have been respected in a consistent fashion for more than a century and a half, there will be political dispute and negotiation.

This is the *first* such dispute to come before this Court in our history. Rather than recognizing the harmony that has been produced by the present rules in the course of the millions of interactions that occur each year between the public and property owners along the Great Lakes, the

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"could always erect a fence," as the majority observes. *Ante* at 37 n 28. However, fences have not heretofore generally been thought necessary. Under current law, which I would not alter, members of the public and lakefront property owners have long coexisted in reasonable harmony. It is the majority's actions today in departing from our precedents and creating new and vague law that will almost certainly transform this relationship and cause at least some property owners to believe that they must erect fences in order to protect boundaries that now have been called into question and that apparently will be subject to definition by the Department of Natural Resources.

majority instead creates new rules on the basis of an isolated and aberrational dispute between the present parties.

The majority departs from the longstanding status quo in our state, despite the following: (1) there is no realm of the law in which there is a greater need to maintain stability and continuity than with regard to property rights; (2) the parties in this case have all asserted that they favor a maintenance of the status quo;[3] (3) there is no evidence that the status quo has not reasonably balanced the interests of property owners and the public in Michigan for more than a century and a half; and (4) there is no

[3] Plaintiff argues that use of the term " 'water's edge' [in *Hilt v Weber*, 252 Mich 198; 233 NW 159 (1930)] is consistent with the nomenclature of many other state and federal cases using 'water's edge' to mean 'high water mark.' " Plaintiff's brief at 24. See, also, amicus brief of the Tip of the Mitt Watershed Council at 18; amicus brief of the Michigan Senate Democratic Caucus at 2; amicus brief of the Michigan Land Use Institute at 10; and amici brief of the Michigan Departments of Environmental Quality and Natural Resources at 11. Defendants argue that the status quo gives the littoral owner "exclusive use of the beachfront to the water's edge as it exists from time to time." Defendants' brief at 13. See, also, amici brief of the Michigan Chamber of Commerce, National Federation of Independent Business Legal Foundation, Michigan Bankers Association, and Michigan Hotel, Motel & Resort Association at 11 ("The relevant Michigan authorities thus compel the conclusion that the public trust applies only to submerged lands when they are actually submerged"); amici brief of the Save our Shoreline and the Great Lakes Coalition, Inc at 9 ("[t]hat the water's edge was the boundary between public and [littoral] ownership was first suggested in [*La Plaisance*]"); amici brief of the legislators at 4 (arguing that numerous Michigan cases establish that littoral owners "have *title* to their property to the water's edge, free of any public trust interest in the submerged lands of the Great Lakes"); and amicus brief of the Defenders of Property Rights at 12 (noting that in the past sixty-four years, this Court has rejected any attempt to expand public rights to areas landward of the water's edge).

evidence that the present dispute is anything other than an isolated and aberrational dispute, not one upon which to predicate the reversal of a century-and-a-half-old conception of private property rights.

This Court has recognized the importance of maintaining the security of private property by "declar[ing] that stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance." *Bott v Natural Resources Comm*, 415 Mich 45, 77-78; 327 NW2d 838 (1982). In *Bott*, we noted that "[j]udicial 'rules of property' create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital." *Id.* at 78. Therefore, such rules should be closely respected and overturned only for "the very best of reasons." See, e.g., *Dolby v State Hwy Comm'r*, 283 Mich 609, 615; 278 NW 694 (1938); *Lewis v Sheldon*, 103 Mich 102, 103; 61 NW 269 (1894).

The public's right to use property abutting the Great Lakes under the public trust doctrine has traditionally been limited to "submerged lands," i.e., those lands covered by the Great Lakes, including their wet sands. The "water's edge" is that point at which wet sands give way to dry sands, thus marking the limit of the public's rights under the public trust doctrine. This has been the rule in our state since this Court's decision in *Hilt v Weber*, 252 Mich 198; 233 NW 159 (1930), a case that for seventy-five years has defined the limits of the public's rights of use of littoral property.[4] Indeed, except for the seven-year period

[4] As noted by the majority, "[o]ur case law has not always precisely distinguished" between the terms "littoral" and "riparian." *Ante* at 1 n 1. The former applies to oceans, seas, the Great Lakes, and their coasts, while the latter applies to rivers and streams. Black's Law

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immediately preceding *Hilt*, this water's edge principle is consistent with Michigan case law dating back over 160 years and probably even earlier. Lakefront property owners, including businesses,[5] have invested in reliance on present rules concerning the relationship between the public and lakefront property owners. This reliance on longstanding rules should have given the majority considerable pause before it altered the status quo and redefined the public trust doctrine.

This is not the first time this Court has upset settled rules of property on the Great Lakes, but the lessons of the first time do not seem to have been well-learned by the majority. Before the 1920s, property owners believed that their title extended to the water's edge. Steinberg, *God's terminus: Boundaries, nature, and property on the Michigan shore*, 37 Am J Legal Hist 65, 72 (1993). However, in

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Dictionary (7th ed). Unfortunately, the misuse of these terms appears to at times have led this Court to misapply aspects of the public trust doctrine as they relate to rivers and streams as if those aspects also related to the Great Lakes. See, e.g., *Peterman v Dep't of Natural Resources*, 446 Mich 177, 195; 521 NW2d 499 (1994). I will use the term "littoral" when discussing property abutting the Great Lakes.

[5] In particular, the consequences of the majority's new rules are uncertain for those in the tourism industry in Michigan who have invested in reliance on the rule set forth in *Hilt*. The majority, in using the "ordinary high water mark" as "defined" under Wisconsin law, has opened to public use unsubmerged lands up to a wholly unspecified point landward of the water and this change would seem to have implications for the ability of at least some Great Lakes tourists to enjoy the type of tranquil retreat offered by private beaches within Michigan. See, generally, the amici brief of the Michigan Chamber of Commerce, National Federation of Independent Business Legal Foundation, Michigan Bankers Association, and Michigan Hotel, Motel & Resort Association.

the *Kavanaugh* cases,[6] this Court abruptly overruled eighty years of then-existing case law and held that a littoral owner's title extended only to the "meander line," a survey line used by the federal government to determine the amount of property available for sale in the Michigan Territory.[7] While this Court recognized at the time that this decision was "against the overwhelming weight of authority,"[8] unlike the majority's decision today, it was at least arguably grounded in dictum from a prior Michigan decision.[9] Nevertheless, by deviating from an established rule of property rights in favor of establishing a boundary at an imaginary line that property owners could not easily identify, the *Kavanaugh* cases threw Michigan's lakeshores into disarray. For example, renters of property between the meander line and the water's edge withheld their rent and in fact were advised to do so by the director of the Department of Conservation. *Id.* at 77-78. Further, littoral owners found that third parties were building on property between the meander line and the water's edge, thus effectively blocking their access to the lake. Other littoral owners were forced to hire surveyors in order to determine with any certainty what property they actually owned. The chaos caused by the departure from the traditional rule in the *Kavanaugh* cases was so dramatic

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[6] *Kavanaugh v Rabior*, 222 Mich 68; 192 NW 623 (1923), and *Kavanaugh v Baird*, 241 Mich 240; 217 NW 2 (1928).

[7] *Hilt*, *supra* at 204-205.

[8] *Baird*, *supra* at 252.

[9] In *Ainsworth v Munoskong Hunting & Fishing Club*, 159 Mich 61, 64; 123 NW 802 (1909), we stated that "[littoral] owners along the Great Lakes own only to the meander line. . . ." Later, however, in *Hilt*, *supra* at 207, we noted that in *Ainsworth*, the meander line and water's edge were the same on the bay in question.

that just seven years later this Court corrected its error and reestablished the rules of property as they had existed on the Great Lakes for at least the prior eighty years. *Hilt*, *supra* at 227.

The majority today revamps the public trust doctrine on the basis of *Wisconsin* law – or at least on the portions of it that the majority finds to their liking – and, in so doing, announces new rules of law regarding lands subject to the public trust doctrine. Because I believe that the public's rights under the doctrine have always been limited to the use of submerged lands, which includes the wet sands, I do not believe that the Court of Appeals erred in holding that the public may not walk on unsubmerged lands. However, I do believe the Court of Appeals erred in holding that the state's title begins at the "ordinary high water mark." Therefore, I would affirm in part and reverse in part the decision of the Court of Appeals and remand to the trial court to apply the principles set forth in this opinion.

I. MISUNDERSTANDING THE "ORDINARY HIGH WATER MARK"

The majority concludes that the "ordinary high water mark" is the landward boundary of the public trust doctrine.[10] While the majority does not necessarily disagree

[10] The majority also creates a new rhetorical formulation for the test determining whether a use is permitted by the public trust doctrine, although I fail to see any significant distinction between a use that is "inherent in the exercise of traditionally protected public rights," *ante* at 32, and a use that bears "a real and substantial relation to a paramount trust purpose." *Hilt*, *supra* at 225. I agree with the majority that beach-walking is a permissible public trust use. Walking in submerged lands is an activity that bears a "necessary and substantial

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that the water's edge serves as the boundary of the littoral owner's title, it would expand the public's legal right to use property up to the utterly indiscernible "'point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.'" *Ante* at 27 (citation omitted). The majority further adds that this newly described "ordinary high water mark," one never before seen in Michigan, includes unsubmerged lands that are the product of "fluctuation" in the level of the lake that "results in temporary exposure of land that may then remain exposed above where water currently lies." *Id.* I disagree. The majority replaces a workable and easily identifiable boundary with one whose exact location is anyone's guess and it has done so on the basis of the *Wisconsin* public trust doctrine, or at least that part of Wisconsin's doctrine that supports the majority's new rule.[11] Instead, I believe that the public's entitlement to use property under the public trust doctrine of Michigan is

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relation" to other water-borne recreational activities protected by the doctrine, e.g., boating, swimming, and fishing.

[11] Curiously, the majority adopts Wisconsin law in this area, despite the fact that Wisconsin's 820 miles of Great Lakes shoreline is dwarfed by the 3,288 miles of shoreline in this state. <http://www.michigan.gov/deq/0,1607,7-135-3313_3677-15959–,00.html> (accessed June 24, 2005). Nonetheless, the critical point is not whether it is the law of a state with a longer or shorter shoreline than Michigan's that has been adopted by the majority. Rather, it is why *any* new law has been adopted when current law has proven workable for many decades of our state – clearly setting forth the rights of the public and the property owner, minimizing litigation, and simultaneously protecting private property rights while allowing reasonable public use of the Great Lakes, including beach-walking.

limited to submerged lands, i.e., the Great Lakes and their wet sands.

The majority's creation of this new rule is rooted in its misunderstanding of the importance of the "ordinary high water mark" for the purpose of defining the boundary of the public trust on the nontidal Great Lakes. The public trust doctrine in the United States is derived from the English common law, which extended to tidal land below the ordinary high water mark. *Borax Consolidated, Ltd v Los Angeles*, 296 US 10, 23; 56 S Ct 23; 80 L Ed 9 (1935). The rights protected by the English common law included use of tidal lands up to the ordinary high water mark for "navigation and commerce . . . and for the purposes of fishing. . . ." *Shively v Bowlby*, 152 US 1, 11; 14 S Ct 548; 38 L Ed 331 (1894).

Following the American Revolution, the title held for the public trust by the King passed to the states, subject only to those rights surrendered by the states to the federal government. *Id.* at 14-15. While each state is required to protect the uses permitted by the public trust doctrine, *Illinois Central R Co v Illinois*, 146 US 387, 453; 13 S Ct 110; 36 L Ed 1018 (1892) (*Illinois Central I*), the scope of property subject to that trust is governed by "the local laws of the several States. . . ."[12] *Shively*, *supra* at 40.

[12] The majority also notes that in *Illinois Central R Co v Chicago*, 176 US 646, 660; 20 S Ct 509; 44 L Ed 622 (1900) (*Illinois Central II*), the United States Supreme Court found that "a grant of lands by the State does not pass title to submerged lands below high-water mark. . . ." However, as stated in *Shively*, the scope of lands subject to the public trust is determined by state law. In determining the scope of the trust doctrine in *Illinois Central II*, the United States Supreme Court looked to "the law of the State of Illinois, as laid down by the Supreme Court. . . ." *Id.* at 659. In finding that Illinois's title went to

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Thus, it cannot be said that the American public trust doctrine uniformly extends to the "ordinary high water mark." *Id.* While a majority of the original thirteen colonies followed the English common-law rule, *Shively* noted that four of the original colonies held that the littoral owner holds title to the "low water mark," subject only to the public's right to use the water for navigation and fishing when it is above that point. *Id.* at 18-25.[13] For example, in *Commonwealth v Alger*, 61 Mass 53, 70 (1851), the Supreme Court of Massachusetts held, under the "local laws" of that state,[14] a littoral owner's title extends to the low water mark. However, the littoral owner's title is

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the high water mark, the point emphasized by the majority, the United States Supreme Court cited Illinois case law directly. *Id.* at 660 citing *Seaman v Smith*, 24 Ill 521 (1860), *People ex rel Attorney General v Kirk*, 162 Ill 138, 146; 45 NE 830 (1896), and *Revell v People*, 177 Ill 468, 479; 52 NE 1052 (1898). Because *Illinois Central II* applied Illinois law, its holding regarding the scope of lands subject to the public trust doctrine is not binding on this Court. Rather, the common law as developed in *this* state determines the scope of lands subject to the doctrine.

[13] Those states are: Massachusetts, *Shively*, *supra* at 18-19 (littoral owner takes title in fee to the low water mark "subject to the public rights of navigation and fishery"); New Hampshire, *id.* at 20 ("a right in the shore has been recognized to belong to the owner of the adjoining upland"); Pennsylvania, *id.* at 23 ("the owner of lands bounded by navigable water has the title in the soil between high and low water mark, subject to the public right of navigation"); and Virginia, *id.* at 24-25 ("the owner of land bounded by tide waters has the title to ordinary low water mark, and the right to build wharves, provided they do not obstruct navigation").

[14] As noted by the majority, *ante* at 40 n 31, Massachusetts adopted the low water mark by colonial ordinance. *Alger*, *supra* at 66. Thus, while obviously not directly applicable to the public trust doctrine in Michigan, *Alger* does make clear that the "ordinary high water mark" has not been as universally accepted as the majority apparently believes.

limited because "whilst [lands above the low water mark] are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation." *Id.* at 74-75. In other words, the public's rights under the public trust doctrine are limited to the use of property that is *currently* submerged. Thus, the public trust doctrine as defined in the "low water mark" colonies restricts the public's right of use to either land below the low water mark or to such land as is currently covered by the waters of the ocean.[15]

Likewise, the "local laws" of Michigan did not adopt the English definition of public trust lands, but rather restricted the public's rights under the public trust doctrine to the use of submerged lands. In *La Plaisance Bay Harbor Co v Monroe City Council*, Walker Chancery Rep. 155 (1843), the issue of public ownership of the Great Lakes was addressed for the first time by a Michigan court. In *La Plaisance*, the Court of Chancery addressed the state's right to improve navigation in Lake Erie. The Legislature had authorized the city of Monroe to build a canal connecting the River Raisin to the lake. The harbor company brought suit to enjoin the project, claiming that the canal would divert so much water from the river that its downriver warehouses would be rendered inaccessible by boat. However, the court held that the harbor company did not have a right to the flow of water in the river in its natural bed because "[t]he public owns the bed of this class

[15] In light of the majority's reliance on Wisconsin law, it is interesting to note that the Wisconsin Supreme Court similarly held that the public's right to use submerged lands up to the high water mark is only applicable when the waters actually extend to such mark. *Doemel v Jantz*, 180 Wis 225, 236; 193 NW 393 (1923).

of rivers, and is not limited in its right to an easement, or right of way only." *Id.* at 168. The court also noted that "with regard to our large lakes, or such parts of them as lie within the limits of the state[,][t]he proprietor of the adjacent shore has no property whatever in the *land covered by the water of the lake.*" *Id.* (emphasis added). Moreover, it should be noted that before *La Plaisance*, and before statehood, Michigan was part of the Northwest Territory, which was ceded to the United States by Virginia in 1784. Under Virginia law, a littoral owner held title to soil in tidewaters to the low water mark. *Shively*, *supra* at 24-25.

The understanding that the public's interest under the public trust doctrine is limited to the submerged lands of the Great Lakes was also expressed by Justice Champlin in his concurring opinion in *Lincoln v Davis*, 53 Mich 375; 9 NW 103 (1884). In *Lincoln*, a fisherman had placed stakes in Thunder Bay, off an island, in order to set some fishing nets. The island's owner removed the stakes, claiming that he had the exclusive right to fish in the waters off his island. The *Lincoln* majority, while not discussing the boundary between littoral property and public trust property, held that the owner had no right to interfere with the fisherman's stakes. Justice Champlin noted that "when [Michigan] was admitted into the Union this political jurisdiction devolved upon the State, and the title to the *soil under the navigable waters* of the Great Lakes became vested in the State as sovereign to the same extent and for the same reasons that the title of the bed of the sea was vested in the king." *Id.* at 384 (emphasis added). However, the state's title only extends to the "*low-water mark.*" *Id.* at 384-385 (emphasis added). In fact, according to Justice Champlin, "The paramount rights of

the public to be preserved are those of navigation and fishing, and this is best accomplished by limiting the grants of lands bordering on the Great Lakes to [the] low-water mark." *Id.* at 385-386.

The United States Supreme Court defined the scope of the public trust doctrine as applied to the submerged lands of the Great Lakes in *Illinois Central I*, *supra* at 437. In *Illinois Central I*, the Illinois legislature had granted the railroad title to one thousand acres of submerged land on Lake Michigan. Four years later, the Illinois legislature repealed this act and sought to quiet title to submerged lands. The Supreme Court held that "the State holds the title to the *lands under the navigable waters of Lake Michigan* . . . and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use." *Id.* at 452 (emphasis added). Because the state's public-trust title is a function of its sovereignty, the lands covered by the doctrine cannot be alienated, except when such alienation promotes the public use of them and the public use of the lands and waters remaining is not harmed. *Id.* at 452-453.

Just four years later, in *People v Silberwood*, 110 Mich 103, 107; 67 NW 1087 (1896), this Court seized upon the *Illinois Central I* explanation of the public trust doctrine to support its holding that the boundary between public trust lands and littoral lands is the low water mark. In *Silberwood*, the defendant was convicted of cutting submarine vegetation on Lake Erie. The defendant claimed that the owners of land lying adjacent to Lake Erie, including his employer who ordered removal of the vegetation, owned the land to the center of that Great Lake, subject to the rights of navigation. The Court, quoting *La Plaisance*, held that a littoral owner does not have any title in land covered by the

Great Lakes. *Id.* at 106. The Court then noted that the *Illinois Central I* decision

> is in harmony with the doctrine laid down in the early case of *La Plaisance Bay Harbor Co v Council of City of Monroe*, which I do not think has ever been overruled in this State so far as it affects the rights of shore owners on the borders of the Great Lakes. This doctrine, too, is in harmony with the decisions in all of the States bordering on these great seas. [*Id.* at 108-109.]

Further, the Court noted that decisions of other Great Lakes states were in line with both *La Plaisance* and *Illinois Central I:*

> The decisions in New York (*Champlain, etc., R. Co v Valentine*, 19 Barb. 484 [NY Sup (1853)]), in Pennsylvania *Fulmer v Williams*, 122 Pa. St. 191 [15 A. 726 (1888)]), and in Ohio (*Sloan v Biemiller*, 34 Ohio St. 492 [1878]), all hold that the fee of the [littoral] owner ceases at the low-water mark. [*Id.* at 107.]

This Court reaffirmed the principle that the public trust doctrine applies only to submerged lands in *People v Warner*, 116 Mich 228; 74 NW 705 (1898). At issue in *Warner* was ownership of a marshy island that was previously submerged under Saginaw Bay. The defendant claimed ownership of the marshy island as an accretion to his adjacent island. In placing the boundary at the water's edge, the Court stated:

> The depth of water upon *submerged land* is not important in determining the ownership. If the absence of tides upon the Lakes, or their trifling effect if they can be said to exist, practically makes high and low water mark identical for the

> purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked. The adjoining proprietor's fee stops there, and there that of the State begins, whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation. The right of navigation is not the only interest that the public, as contradistinguished from the State, has in these waters. It has also the right to pursue and take fish and wild fowl, which abound in such places; and the act cited has attempted to extend this right over the lands belonging to the State adjoining that portion of the water known to be adapted to their sustenance and increase. [*Id.* at 239 (emphasis added).][16]

[16] The majority claims that when read "in context," *Warner* does not recognize "a single boundary between the riparian owner's title and state control. . . ." *Ante* at 22 n 16. Specifically, the "context" relied upon by the majority is *Warner's* distinction between the state's and the public's interests in submerged lands. However, there is no context under which *Warner* can reasonably be read to support the majority's new rule of law. The passage cited by the majority comes directly after this Court's holding that the state holds title to all submerged lands, regardless of navigability. In justifying the state's title to lands "unfit for navigation," *Warner* notes that the public has interests in those submerged lands above and beyond a navigational interest, i.e., "the right to pursue and take fish and wild fowl. . . ." Further, in an opinion replete with novel concepts of law, perhaps the most creative statement by the majority is that somehow the phrase "[t]he adjoining proprietor's fee *stops there* [i.e., where the water is], and *there* that of the State *begins*" does not represent a single boundary. If the state's title *begins* at the point where the adjoining proprietor's title *ends*, there can only be one boundary and, therefore, there cannot be an overlapping of titles as suggested by the majority. Accordingly, and despite the majority's claims to the contrary, this Court has explicitly "enshrined" a solitary boundary between littoral lands and public trust lands for at least 107 years.

The Court found that a connection between the marshy island and the defendant's island, which existed during times of low water, raised an issue of material fact. If the connection was evidence that land washed up against the defendant's island and that eventually caused the marshy island to rise from the water, then the defendant held title to such land by accretion. However, if the island arose from the water first and only then began to extend towards the defendant's island, then title belonged to the state. In any case, the Court held that summary disposition was inappropriate and remanded the case for a new trial.

One of the most thorough opinions addressing the public trust doctrine was Justice Hooker's concurring opinion in *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580; 87 NW 117 (1901).[17] Justice Hooker began his analysis by noting that the "title that Michigan took when it was admitted to the Union in 1836 is not limited to water sufficiently deep to float craft, but extends to the point where it joins the ground of the [littoral] owner, 'whether the water be deep or shallow, and although it be grown up to aquatic plants and unfit for navigation.'" *Id.* at 586 quoting *Warner*, *supra* at 239. Likewise, the title of the abutting littoral owner extends to the shoreline. *Fishing & Shooting Club*, *supra* at 587. Thus, "when the water in the lakes stands at *low-water mark*, . . . the title [is] in the State, and all land between low-water mark and

[17] Justice Hooker's analysis of the public trust doctrine was subsequently cited with approval by the unanimous opinion of this Court in *State v Venice of America Land Co*, 160 Mich 680, 702; 125 NW 770 (1910).

the meander line belongs to the abutting proprietor. . . ." *Id.* at 590 (emphasis added).

The common-law limitation of the scope of the public trust doctrine was reaffirmed by this Court in *Hilt*. In overruling the short-lived *Kavanaugh* cases, we held that "the purchaser from the government of public land on the Great Lakes took title to the water's edge." *Hilt*, *supra* at 206. We also noted that the waters of our Great Lakes commonly change the landscape surrounding them, by erosion or deposits made by the water, in a gradual and imperceptible manner. *Id.* at 219. In order to account for this constant change, the title of a littoral owner "follows the shore line under what has been graphically called 'a movable freehold.'" *Id.* (citation omitted). The title to land above the water's edge is "'independent of the law governing the title in the soil covered by the water.'" *Id.*, quoting *Shively*, supra at 35.[18]

To summarize, under the common law as it has developed in Michigan, when the water is at a low point, the state holds title to the submerged land, including the wet sands, while title to unsubmerged land is in the littoral owner. *Warner*, *supra*; *Fishing & Shooting Club*, *supra*. As the water level rises, the public gains the right to use the entire surface of the lake up to the water's edge – the point at which wet sands give way to dry sands – for public trust purposes. *Hilt*, *supra*; *Warner*, *supra*. Likewise, the littoral owner's title follows the rise and fall of

[18] *Hilt* also noted that to hold otherwise would effectively cut the littoral owner off from the water, thereby destroying the very characteristic that defines property as "littoral" – its contact with the water. *Hilt*, *supra* at 219.

the waters.[19] *Id.* Accordingly, the boundary of the littoral owner's title is the most landward of either the "low water mark" or the current location of the water itself.[20] The

[19] The majority misstates my position as "granting littoral landowners all property down to where unsubmerged land ends, which [I] locate[ ] at the water's edge, regardless of the terms of landowners' deeds." *Ante* at 38-39. There is no basis for this statement. The characteristic that defines property as "littoral" is its contact with the water. *Hilt*, *supra* at 219. In other words, a property owner whose deed does not extend to the water's edge is not a littoral owner and, therefore, would have no more rights in unsubmerged property than any other member of the public. Obviously, a property owner is only a littoral owner if the deed gives title to the water's edge, however the "water's edge" may be described. For example, in the instant case, defendants' deed states that the "meander line of Lake Huron" forms part of the boundary of their property. As we held in *Farabaugh v Rhode*, 305 Mich 234, 242; 9 NW2d 562 (1943), "the meander line of Lake Michigan is a line of description and not one of boundary and that one owning to such meander line owns to the water's edge subject to accretion and reliction unless a contrary intention is expressed in the conveyance." There is no evidence of a contrary intention in this case and, therefore, defendants hold title to the water's edge.

[20] The majority notes that this Court has identified "some ambiguity regarding whether the high or low water mark serves as the boundary of the public trust." *Ante* at 22, citing *People*, *ex rel Director of Conservation v Broedell*, 365 Mich 201, 205-206; 112 NW2d 517 (1961). *Broedell* cited two cases with "language seemingly favorable to the high-water-mark theory." *Id.* at 206. One of those cases, *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926), defined the public trust doctrine as it applies to *rivers*. The other case, *Venice of America Land Co*, *supra* at 702, discussed the location of a certain island at the time of statehood. If the island was completely submerged at statehood and only afterwards arose out of Lake St. Clair, then the island belonged to the state. See, e.g., *Warner*, *supra*. The Court noted that, during periods of high water, the island at issue was completely submerged. According to the Court, Lake St. Clair experienced one such period of high water in 1837-1838. Therefore, because the island was submerged land at the time of statehood and only arose out of the water afterwards, title to such property was in the state. *Id.* Further, *Venice of America Land Co* expressly adopted Justice Hooker's concurring opinion from *Fishing & Shooting Club*. As argued earlier, Justice Hooker found that the

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state's public trust title, then, "begins [where the water is], whether the water be deep or shallow. . . ." *Warner*, *supra* at 239.[21]

In rejecting this understanding, the majority's opinion virtually ignores 162 years of case law, and instead simply announces that "Michigan's courts have adopted the ordinary high water mark as the landward boundary of the public trust" doctrine. *Ante* at 21. Thus, according to the majority, unsubmerged land up to the "high water mark" remains subject to the trust. To support its assertion, the majority cites with approval this Court's holding in *Peterman v Dep't of Natural Resources*, 446 Mich 177, 198-199; 521 NW2d 499 (1994). In doing so, the majority fails to acknowledge that *Peterman* did not address the public's right to use property under the public trust doctrine at all,[22] but rather addressed the *state's* right to improve navigation under the navigational servitude.[23] We

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boundary between a littoral owner's property and property held by the state in trust is the low water mark, at least at times of low water.

[21] The majority has interpreted the "water's edge" principle as creating a "universal line along the Great Lakes. . . ." *Ante* at 41. However, the water's edge is not a "universal line," but rather a dynamic boundary that moves as the waters of the Great Lakes move.

[22] Even if *Peterman* did apply in the public trust context – which it does not – an examination of its holding indicates a definition of the public trust doctrine far more in line with "low water mark" cases such as *Alger* than with the "high water mark" cases cited by the majority.

[23] The majority argues that this decision "relied not simply on a 'navigational servitude' unique to that case but rooted that 'navigational servitude' in the public trust doctrine." *Ante* at 21 n 15. However, *Peterman* specifically states that "plaintiffs' [littoral] rights are subject to the navigational servitude retained by the State of Michigan." *Peterman*, *supra* at 193-194. *Peterman* does not state that littoral rights are subordinate to the right to fish and hunt or the right to walk.

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began our analysis in *Peterman* by affirming that the "title of the [littoral] owner follows the shore line under what has been graphically called 'a moveable freehold.'" *Id.* at 192, quoting *Hilt*, *supra* at 219. However, we also found that such title is not absolute. Rather, the state retains a navigational servitude on unsubmerged property landward of the water's edge that may again become submerged during periods of high water.[24] In order to accommodate both the rights of the littoral owner and the potential use of unsubmerged land for navigation, we determined that the littoral owner's title is "a limited title . . . that is subject to the power of the state to improve *navigation*." *Peterman*, *supra* at 195 (emphasis added). That is, the state has the right to *regulate* this unsubmerged land to ensure that the littoral owner does not interfere with the public's future right to use the land for navigational purposes when it again becomes covered by the waters of the Great Lakes. Also, the state has the right to take this unsubmerged land or otherwise take action inconsistent with the owner's littoral rights without giving due compensation to the littoral owner when it is necessary to make navigational improvements or when the taking possesses an "essential nexus" to navigation. *Id.* at 201. However, just as in *Alger*, the public may only use the land in question for navigational purposes[25] *when the land is covered by the waters of the Great Lakes.*

Rather, the Court limited its holding to the *state's* right to improve navigation.

[24] The federal government also retains a navigational servitude on the Great Lakes and the lands beneath them.

[25] We have recognized fishing as an incident of the navigational servitude in inland rivers and lakes. *Collins*, *supra* at 48-49. In *Collins*, we noted that the right to fish was limited to the stream itself and that

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Because the majority misapprehends the nature of this limited title, it has misconstrued the importance of the "ordinary high water mark" as it is described in *Peterman*. While recognizing the state's right to improve navigation, we also sought to limit the property that could be adversely affected by such improvements. To determine the scope of this limitation, we examined former MCL 281.952, which was part of the Inland Lakes and Streams Act, as well as cases defining the scope of the public trust doctrine on rivers, including *Grand Rapids Booming Co v Jarvis*, 30 Mich 308, 318-321 (1874) (holding that the public right of navigation was confined to the stream itself and that its boundary was the line of ordinary high water), and *Hall v Alford*, 114 Mich 165, 167-168; 72 NW 137 (1897) (noting that land alongside a river above the high water line could not be taken without just compensation and due process). On the basis of our review of these authorities, we determined that "'the limit of the public's right is the ordinary high water mark of the river.[26] This means that the ownership of fast land[27] is unqualified and

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"in exercising this right people cannot go upon the uplands of riparian owners in order to gain access to the water. If they do that they are guilty of trespass." *Id.* at 49. See also *Bott*, *supra* at 64-65, in which the servitude was further limited.

[26] We adopted the definition of "ordinary high water mark" from the Inland Lakes and Streams Act, former MCL 281.952(h). *Peterman*, *supra* at 198 n 29. That statute defined the mark as,

> the line between upland and bottomland which persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil, and the vegetation.

[27] "Fast land" is "property that is 'above the high-water mark of' the stream, river, or other body of water that abuts the property."

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not burdened with [the state's right to improve navigation].'" *Peterman*, *supra* at 198 (citation omitted). Applying this rule of rivers to the Great Lakes, we held that destruction of the littoral owner's property above the "ordinary high water mark" was "an unconstitutional taking of property without due process and just compensation."[28] *Id.* at 200.

Thus, contrary to the claims of the majority, *Peterman* did not alter the rule of *Warner* and *Hilt* that the public's right to use property under the public trust doctrine is limited to submerged lands. Rather, the "ordinary high water mark" is simply the outside edge of property that may either be regulated to preserve future navigational interests at times of high water or taken without compensation for navigational improvements. *Id.* at 202. The majority fails to recognize that this Court's holding applied only to the "public's rights" under the *navigational servitude*. As a result, the majority unwarrantedly expands the

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Peterman, *supra* at 181 n 4, quoting 26 Am Jur 2d, Eminent Domain, § 192, p 873.

[28] The plaintiffs' recovery in *Peterman* was not limited to compensation for the damage done to the fast lands. We also concluded:

> While generally the navigational trust permits the state to improve waterways without compensating for nonfast lands, the trust does not grant blanket authority to destroy private property – the loss of the property must be necessary or possess an essential nexus to the navigational improvement in question. In the instant case, no essential nexus existed between the construction of the boat launch and the utter destruction of plaintiffs' beach. The taking of the property served no public interest because the ramp could have been built without destroying plaintiffs' property. Thus, we affirm the trial court's award of damages for the loss of plaintiffs' property [i.e., the property below the "ordinary high water mark"]. [*Id.* at 201-202.]

scope of our holding in *Peterman* to create new rights under the public trust doctrine, rights that were never contemplated in that case.

II. Misdefinition Of Lands Within The Public Trust Doctrine.

Even if the majority were correct in its understanding of the "ordinary high water mark," which for the reasons set forth I do not believe it to be, its definition of lands encompassed by the public trust doctrine is inconsistent with both the common-law scope of the public trust doctrine and the realities of the Great Lakes. The majority does not apply Michigan law, but instead, without analysis or explanation, summarily adopts Wisconsin's definition of the "ordinary high water mark," which it derives from a case involving a Wisconsin *river*. Further, while the majority admits that the "ordinary high water mark" is a term used to define the scope of the public trust doctrine in tidal waters, it fails to account for the fact that the Great Lakes have no true scientific low and high water marks as exist on the seashore. Even given the majority's attempt to graft this tidal-based term upon the nontidal Great Lakes, its definition bears little resemblance to the common-law standard. In creating a new definition of "ordinary high water mark" based on the portions of the common law of Wisconsin it finds amenable, the majority fails to provide either lakefront property owners or the public with the slightest guidance in understanding the lands in which the new rights granted to the public may be exercised.

The majority defines the "ordinary high water mark" as "'the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a

distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.'"[29] *Ante* at 27, quoting *Diana Shooting Club v Husting*, 156 Wis 261, 272; 145 NW 816 (1914). This definition is derived from a State of Wisconsin case involving that state's public trust doctrine as it applies to an *inland river*. Why this court now finds it necessary to abandon Michigan common law and replace it with Wisconsin's common law, or at least those portions the majority finds persuasive, is not explained. As the United States Supreme Court noted in *Shively*, *supra* at 26 the determination of what lands fall within the scope of the public trust doctrine is different in each state. After reviewing the laws of several states, that Court remarked

> that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. *Great caution, therefore, is necessary in applying precedents in*

[29] The majority concludes that the boundary of the public trust doctrine is the "ordinary high water mark" because the "lake has not permanently receded from that point and may yet again assert its influence up to that point." *Ante* at 27. Does the majority mean that the public has access to a littoral owner's property that, although currently dry, has been wet at some point in the past and *may* again be wet some day in the future? If so, what is the relevant time frame to determine if the water has permanently receded or not? Is it a day? Or a month? Or a year? Or a decade? Or since statehood? Or since the retreat of the glaciers 14,000 years ago? The majority does not say. Further, how is a member of the public or a property owner to ascertain whether lands in question "may yet again" become submerged? Again, the majority does not say.

> *one State to cases arising in another.* [*Id.* (emphasis added).]

The majority has failed to pay heed to the United States Supreme Court's advice in this matter. The majority has also failed to examine the Wisconsin public trust doctrine in order to determine whether the policy reasons underlying the majority's adoption of the Wisconsin understanding of the "ordinary high water mark" is even compatible with *Michigan's* "views of justice and policy. . . ." *Id.* Rather than conduct such a review, the majority concludes that this definition is apt because it "has served another Great Lakes state for some hundred years and is in accord with the term's limited development in our own state." *Ante* at 29-30.[30]

However, even a cursory review of the Wisconsin cases cited by the majority suggests a rule more in line with the decision of our Court of Appeals – a decision unanimously rejected by this Court – than the rule favored by the majority. In *Diana Shooting Club*, a hunter had floated his boat into an area overgrown by vegetation for the purpose of shooting wild ducks. The riparian owner claimed that, pursuant to its ownership of the soil beneath the river, the members of its organization had the exclusive right to hunt in those waters. The Wisconsin Supreme Court recognized the riparian owner's title in the soil beneath the river, but also found that the waters themselves "should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now

[30] While the *Diana Shooting Club* definition has been used by Wisconsin for nearly one hundred years, the initial express definition of the water's edge principle in *Warner* predates the *Diana Shooting Club* rule by sixteen years.

mainly certain forms of recreation." *Diana Shooting Club*, *supra* at 271. It ultimately held that:

> Hunting on navigable waters is lawful when *it is confined strictly to such waters* while they are in a navigable stage, and between the boundaries of ordinary high water marks. When so confined it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation. By ordinary highwater mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. [*Id.* at 272 (emphasis added).]

Thus, unlike the majority, *Diana Shooting Club* restricted public trust activity to the *waters themselves.* Indeed, the Wisconsin Supreme Court confirmed this interpretation in *Doemel v Jantz*, 180 Wis 225, 236; 193 NW 393 (1923), noting that:

> What was said in the *Diana Shooting Club Case* on the subject of the rights of a hunter to pursue his game up to the ordinary high-water mark, merely affirmed the public right to pursue the sport of hunting to the ordinary high-water mark of a navigable river while the waters of the river actually extended to such mark.[31]

[31] *Doemel* addressed the public trust doctrine as it applied to inland lakes. Interestingly, while the majority claims that a case applying the public trust to rivers is perfectly legitimate to apply in the littoral context, it concludes that *Doemel* is inapplicable, presumably because it applies to an inland lake.

The Wisconsin Supreme Court later suggested that the *Diana Shooting Club's* definition of the ordinary high water mark also applied to the Great Lakes. *State v Trudeau*, 139 Wis 2d 91; 408 NW2d 337 (1987).[32] In *Trudeau*, a littoral owner along Lake Superior sought to build condominiums within an area below the "ordinary high water mark" of Lake Superior. The littoral owner argued that the area in question was not navigable and, therefore, he was entitled to use the lake bed. The Wisconsin Supreme Court disagreed, reasoning that the state's interest extended to the "ordinary high water mark" of Lake Superior. *Id.* at 103. In discussing the "ordinary high water mark," the court cited with approval the definition from *Diana Shooting Club.* However, the court's ultimate disposition in that case was to remand "for findings concerning those portions of the site higher than 602 feet [above sea level, according to the International Great Lakes Datum], the [ordinary high water mark] of Lake Superior." *Id.* at 110. Thus, *Trudeau* held that the "ordinary high water mark" is defined by the International Great Lakes Datum ("IGLD") level – the very standard

[32] The majority observes that its new definition was also invoked in a footnote by the Wisconsin Supreme Court in *R W Docks & Slips v State*, 244 Wis 2d 497, 510 n 2; 628 NW2d 781 (2001) (citing *Trudeau*, *supra*, for the definition). *Ante* at 28. However, the *R W Docks* case involved a claimed regulatory taking, based on Wisconsin's refusal to issue a dredging permit. The location of the ordinary high water mark was not at issue and the case did not involve a question of public access to land within the public trust. Thus, the majority apparently is basing its new rule on mere *dictum* from the decision of another state's Supreme Court.

that has been unanimously rejected by the justices of this Court.[33]

To summarize, none of the few Wisconsin cases cited by the majority addresses the issue of whether the public has a right to use currently unsubmerged land below the "ordinary high water mark" for public trust purposes. Indeed, the Wisconsin public trust doctrine specifically limits the public's use of submerged lands to when those lands are covered by the waters themselves. In addition, to the extent that the majority believes that *Trudeau* makes the *Diana Shooting Club* definition applicable to the Great Lakes, the majority fails to note that *Trudeau* adopted the IGLD definition of the "ordinary high water mark" on the Great Lakes. *Trudeau*, *supra* at 110. In determining the location of the "ordinary high water mark," *Trudeau* specifically relied on the following evidence:

> The DNR's area water management specialist, Richard Knitter, testified that he determined the lake's OHWM [ordinary high water mark] approximately one-half mile from the site at a

[33] The majority, apparently recognizing the vagueness of its definition of the "ordinary high water mark," observes, "the precise location of the ordinary high water mark at any given site on the shores of our Great Lakes remains a question of fact." *Ante* at 30. While the majority again cites *Trudeau* as an example of how such a "question of fact" can be answered, *ante* at 28 n 20, it neglects to note that *Trudeau* adopted the International Great Lakes Datum (IGLD) definition of ordinary high water mark. *Trudeau*, *supra* at 110. However, the majority has held that the Great Lakes Submerged Lands Act (GLSLA), which also uses that datum, is *not* dispositive in defining the landward boundary of the public trust. *Ante* at 14-19. Does the majority mean to suggest that, despite this Court's holding that the GLSLA is not dispositive, the ILGD is still relevant in determining the location of the ordinary high water mark for public trust purposes in this state? The majority does not say.

> protected location with a clear erosion line that was free from excessive wave action. Knitter then determined that this site's elevation was 602 feet I.G.L.D. He transferred the elevation of the OHWM site to a number of points at the project site and concluded that approximately half of the site was below Lake Superior's OHWM. The developers' surveyor did not determine the OHWM of the site or Lake Superior. [*Id.* at 106-107.]

The court concluded that "[a]ny part of the site at or below 602 feet I.G.L.D. is within the OHWM of Lake Superior and is therefore protected lake-bed upon which building is prohibited." *Id.* at 109. The presence of this single, clear definition stands in stark contrast to the vague and ever-changing, "fact-specific," "ordinary high water mark" newly promulgated by the majority. In contrast to the Wisconsin Supreme Court, this Court expends its energies explaining why our Great Lakes Submerged Lands Act (GLSLA), MCL 324.32501 *et seq*., which relies upon the IGLD, is *not* dispositive in defining the landward boundary of the public trust. *Ante* at 14-19.

In stating that "we are persuaded to adopt [the *Diana Shooting Club* definition of 'ordinary high water mark'] to clarify a term long used but little defined in our jurisprudence," *ante* at 28, the majority adopts the law of another state, without much explanation as to why that law has been chosen from among the laws of the fifty states or, even more significantly, why the law of *any* other state is seen as necessary to replace the long-settled law of Michigan. Further, the majority adopts only a part of the law of that other state, again without much explanation as to why it has chosen to adopt only parts of that other state's law. Finally, to compound this inexplicable process, the

majority fails to accord significant consideration to the manner in which the courts of the other state have interpreted its own law, misconstruing in the process even the few decisions to which it gives consideration.

Even absent the differences between Wisconsin and Michigan law, the *Diana Shooting Club* standard was derived from the very different context of *riparian* property.[34] Undeterred, the majority simply utilizes this standard without explanation of how it should be modified for application on the Great Lakes. The result is a definition that is doubly vague, because the majority not only fails to explain what kind of "distinct mark" is considered to be so "easily recognizable" that it can be allowed to determine the limits of the public trust, but it also fails to provide any time frame for determining how "continuous" the "presence and action of the water" must be in order to leave such a mark. The majority fails to define either of these terms in a manner that will enable the public or property owners to determine which lands are within the public trust. What kind of "distinct mark" is sufficiently "recognizable" to bring unsubmerged land within the scope of the public trust? Since it cannot be that point at which wet sands give way to dry sands – the majority having

[34] The majority observes that the *Diana Shooting Club* definition is not "far removed from meanings previously recognized in Michigan." *Ante* at 29. In support, the majority cites MCL 324.30101(i), a part of the current version of the former Inland Lakes and Streams Act. However, the majority fails to acknowledge that this statute *expressly states* that it does not apply to the Great Lakes. MCL 324.30101(f). I also assume that the majority in characterizing its definition as "not far removed" from another definition – that which, in fact, has *been* the law of Michigan – is acknowledging, albeit euphemistically, that it is adopting a new rule. The majority alternates between the adoption of new rules and disclaiming that it has adopted such new rules.

rejected the position of this dissent – is this "distinct mark" a function of where the waves have deposited seashells? Is it a function of where debris has been washed ashore? Is it a function of where some line of vegetation can be identified? Or is it a function of where sand castles are no longer standing? The majority does not say. Moreover, even if the public or the property owner could discern the relevant "distinct mark," how would such persons determine how "continuous" the "presence and action of the water" has been – or indeed must be – in leaving such a mark. It cannot be limited to the "current ebb and flow of the waves," as that too is the position of this dissent which the majority rejects. How continuous then is "continuous?" Is it a month, a season, a year, a century, or an epoch? Again, the majority does not say.

Moreover, the majority would apparently expand public access to private littoral lands even *beyond* its new definition of the "ordinary high water mark." The majority states, "'where the bank or shore at any particular place is of such a character that it is impossible or *difficult* to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.'" *Ante* at 27-28, quoting *Diana Shooting Club*, *supra* at 272 (emphasis added). Does the majority intend by this to say that the public may now cross onto private littoral property in order to determine where the new "ordinary high water mark" lies? If so, the public would seem to have access to such property even beyond the "ordinary high water mark." The only apparent limitation on the public's right of access is that the "ordinary high water mark" must be "difficult" to ascertain. Given that

under the majority's new definition the "ordinary high water mark" will never be anything *other* than difficult to ascertain – and, as the majority admits, will generally constitute a "question of fact" *ante* at 30 – there appears to be considerable potential for access by the public upon private littoral lands even beyond the "ordinary high water mark." Still, the majority is indisposed to answer any of the questions that are most dispositive in determining where private and public rights begin and end. In eventual course, these questions, so indispensable to the determination of individual property rights, will have to be addressed by the Department of Natural Resources (DNR) with virtually no guidance from this Court.

In leaving such questions to the DNR, the majority adopts the premises of administrative law in the very different realm of property law, by defining critical questions of property rights not in well-understood terms that conduce toward specific boundaries, but in language drawn from the modern administrative process in which vague and empty terms are given meaning by regulatory agencies, such as the DNR, with subsequent deferential review by the courts. This is a prescription for uncertainty, and uncertainty is a prescription for litigation, and the majority with its eyes wide open has chosen to give Michigan both.

Further, the majority's inclusion of unsubmerged lands within the public trust because "the lake has not permanently receded from that point and may yet again exert its influence up to that point," *ante* at 27, conflicts with the traditional common-law definition of the public trust doctrine. At common law, the high water mark was

defined as "'the line of the medium high tide between the springs and the neaps.[35] All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea.'" *Borax Consolidated*, *supra* at 25 quoting *Attorney-General v Chambers*, 4 De G M & G 206, 217; 43 Eng Rep 486 (1854).[36] High tides move with the moon as it revolves around the Earth. At most ocean shores throughout the world, two high tides and two low tides occur every lunar day.[37] A typical seaport will alternate between

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[35] The "spring tide" is defined as "the large rise and fall of the tide at or soon after the new or full moon." The "neap" tide is defined as "those tides, midway between spring tides, that attain the least height." *Random House Webster's College Dictionary* (1997).

[36] The majority asserts that I offer this as an "authoritative definition for ordinary high water mark" and that somehow there is a tension between this definition and my criticism of the majority's creation of new law in this case. *Ante* at 41 n 33. That the majority does not recognize the English common-law definition of the ordinary high water mark is not surprising given that its novel definitions of the term bear no resemblance. According to the majority:

> [The] ebb and flow, thus reaching one point on the shore at low tide and reaching a more landward point at high tide. The latter constitutes the high water mark on a tidal shore. The land between *this mark* and the low water mark is submerged on a regular basis, and so remains subject to the public trust doctrine as "submerged land." [*Ante* at 20-21 (emphasis added).]

Thus, it appears that the majority takes the position that the public trust extends to the highest high tide. However, as noted in *Borax Consolidated*, the ordinary high water mark is *not* the highest high tide, but rather the medium high tide between the spring and neaps, which is rarely exposed to the open air for more than twenty-four hours.

[37] A lunar day is the time it takes for the moon to return to a point above the Earth: approximately twenty-four hours and fifty minutes. See definition of "day, lunar" at <http://www.ngs.noaa.gov/CORS-Proxy/cocoon/glossary/xml/D.xml> (accessed June 24, 2005).

high and low tides about every six hours. Thus, while the ocean bed may be temporarily exposed to the open air during low tide, such land will again be submerged during the next high tide. Because the land is continually being affected by the action of the water, it falls within the scope of the English common-law doctrine, even when exposed to open air.

In contrast, tidal forces acting on the Great Lakes are of such a "trifling effect," *Warner*, *supra* at 239, that they cannot even be measured without precise instruments.[38] Thus, there is no "high" or "low" water marks, as they are scientifically understood. Instead, lake levels are affected seasonally by the natural operation of the hydrologic cycle, which includes precipitation, evaporation, condensation, and transpiration.[39] During the winter, the air above the lakes is cold and dry, compared to the relatively warm temperature of the lake. As a result, the amount of water that evaporates into the air exceeds the water vapor that condenses back into the lakes. Any precipitation that falls on the lands surrounding the lakes is in the solid form of snow, and, thus, is not returned to the lake via runoff. As a result, more water leaves the lake than enters it in this season, resulting in a decline in lake levels.[40] As snow

[38] According to the National Oceanic and Atmospheric Administration, spring tide in the Great Lakes is less than 2 inches (5 cm) in height. See <http://co-ops.nos.noaa.gov/faq2.html> (accessed June 24, 2005).

[39] See, generally, United States Army Corps of Engineers and the Great Lakes Commission, *Living with the Lakes* (1999), pp 13-18. This publication may be accessed at <http://www.glc.org/living/> (accessed June 24, 2005).

[40] According to the United States Army Corps of Engineers, the lowest average lake level from 1918 to 2003 occurred as follows: Lake Superior (March, 601.21 feet above sea level); Lakes Michigan and

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begins to melt in the early spring, runoff into the lakes increases. Further, as temperatures increase, the warm, moist air above the relatively cold lakes limits evaporation to an amount less than the rate of condensation. As a result, average water levels rise throughout the spring and eventually peak during midsummer.[41]

These natural phenomena suggest the unworkability of placing the public trust boundary at the "ordinary high water mark" as it is defined by the majority. If the "ordinary high water mark" is defined as a static boundary, then the public trust doctrine would include unsubmerged lands that are only covered by the water on an infrequent basis. Under the English common-law definition, such lands should be treated in a manner similar to lands covered by the spring tides, i.e., they are not subject to the public trust doctrine. If the "ordinary high water mark" is defined as a floating boundary, then it becomes nearly impossible for either a beach user or a littoral property owner to determine where the boundary is located. To account for the hydrologic cycle, the "ordinary high water mark" would need to be redefined on a monthly or seasonal basis. Further, the boundary would have to be readjusted on a year-by-year basis to account for long-term

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Huron (February, 578.48 feet above sea level); Lake St. Clair (February, 573.43 feet above sea level); and Lake Erie (February, 570.8 feet above sea level). See <http://www.lre.usace.army.mil/greatlakes/hh/greatlakeswaterlevels/historicdata/longtermaveragemin-maxwaterlevels/> (accessed June 24, 2005).

[41] According to the United States Army Corps of Engineers, the highest average lake level from 1918 to 2003 occurred as follows: Lake Superior (September, 602.23 feet above sea level); Lakes Michigan and Huron (July, 579.43 feet above sea level); Lake St. Clair (July, 574.77 feet above sea level); Lake Erie (June, 571.95 feet above sea level). *Id.*

changes to lake levels caused by weather fluctuations. Since 1918, the Great Lakes have experienced three periods of extremely low water levels, in the late 1920s, mid-1930s, and mid-1960s. Periods of extreme high water were experienced in the early 1950s, early 1970s, mid-1980s, and mid-1990s. The "point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic" in 1926 would have been in a completely different location than the point reached in 1986. Likewise, that point in February of each year would be a completely different location than the same point in July of each year. Thus, any definition of where "the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic" must vary depending on what method is used to calculate that level.[42]

The majority's "ordinary high water mark" also fails to account for changes to the location of the waterline caused by events unrelated to lake levels. First, wind and barometric forces can raise water at one end of the lake, causing a dip in water level at the opposite end. If the forces raising the water on one end suddenly cease, the entire lake may move in a see-saw fashion, alternatively rising and falling on each end in a "pendulum-like" movement. This

[42] For example, on Lake Huron, the average yearly level of the lake in 2003 was 577.07 feet above sea level. The average yearly level of the lake from 1918 to 2003 was 578.94 feet above sea level. The monthly average for June 2003 was 577.43 feet above sea level. The monthly average for the month of June, from 1918 to 2003, was 579.33 feet above sea level.

phenomenon, called "seiche," can last from minutes to hours to days. Second, ice or foreign bodies such as plants may block the normal flow of rivers and channels connected to the Great Lakes, thereby causing an increase or decrease in the water level of connected lakes. Finally, most of the Great Lakes basin is rising, as the Earth's crust slowly rebounds from the removed weight of the glaciers that covered the area around 14,000 years ago. Because the glaciers were thickest in the northern part of the basin around Lake Superior, this region is rebounding at a faster rate, nearly twenty-one inches a century, than the rest of the basin. As a result, the Great Lakes are "tipping" in a way that causes water increasingly to pool in the southern portions of the Great Lakes basin. The shoreline is receding in the northern basin and advancing in the southern basin. Thus, while the "ordinary high water mark" makes sense in tidal waters, it does not make sense in the nontidal Great Lakes because of the irregular nature of lake level fluctuations.

Further, the majority's new definition fails to account for those times when the waters of the Great Lakes go *beyond* the "ordinary high water mark," assuming that such an event could even occur under the majority's new definition. The majority justifies its new rule, on the basis of this Court's statement in *Peterman*, *supra* at 198, that "'the limit of the public's right is the ordinary high water mark. . . .'" (Citation omitted.) *Ante* at 40. However, the majority also states that the public trust doctrine serves to protect "the waters of the Great Lakes and their submerged lands. . . ." *Ante* at 31. Thus, when the water's edge is beyond the "ordinary high water mark," there is a conflict between the majority's stated limit of the public right to the "ordinary high water mark" and its inclusion

of submerged lands within the public trust. Is a property owner or a member of the public to understand that use of submerged lands between the "ordinary high water mark" and the water's edge is forbidden? Does this mean that a member of the swimming or walking public is trapped within the Great Lakes until the water recedes to the "ordinary high water mark?" How does a member of the public or a property owner determine where the "ordinary high water mark" is in such a circumstance? Does limiting public access to a submerged "ordinary high water mark" conflict with our holding in *Warner*, *supra* at 239 that the public trust begins where the water is, "whether the water be deep or shallow"? Or is the majority's reliance on *Peterman* somehow silently qualified to apply only when water levels on the Great Lakes lie below the "ordinary high water mark"? The majority again does not say.

By contrast, limiting the public's right of access to the "water's edge," i.e., the point at which wet sands give way to dry sands, addresses all of the various forces at work on the lakes and is consistent with the common-law definition of the high water mark. First, the "water's edge" principle reflects the dynamic natural forces at work on the Great Lakes. As the waters of the Great Lakes move, so too does the area where wet sands give way to dry sands. The littoral property owner's title, and with it his or her littoral rights, including the right of exclusive possession, follows the movement of the water.[43] As we explained in

[43] However, as noted in *Peterman*, *supra* at 193-198, the littoral owner's rights are subject to regulation by the state. See e.g., MCL 324.32503 (prohibiting filling or altering land below the statutorily defined high water mark without a permit), MCL 324.32512 (prohibiting certain acts of waterway maintenance without a permit), and MCL

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Warner, the littoral property owner's rights end where the water is "whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation." *Warner*, *supra* at 239. At that point, the state's public trust title begins. *Id.* As correctly observed by the DNR, the area "where the water is" includes the wet sands where the waters of the Great Lakes have marked their current and continuous presence. Because by definition such sands are infused with water, the wet sands fall within the definition of "submerged lands." As a result, the "water's edge" is the point at which wet sands give way to dry sands. The water's edge marks the boundary between submerged and unsubmerged lands.[44] This position is consistent with the position of the defendant littoral owners in the instant case. Contrary to plaintiff's expressions of concern that she would be forced to walk in the water, as a member of the public she has always had the right to walk along the wet sands abutting the Great Lakes. Because the wet sands are submerged lands, a littoral owner has never had the right to prevent a member of the public from using such lands.

324.32512a (prohibiting mowing or removing vegetation except as permitted by the DNR).

[44] The majority claims that I would "grant an exclusive right of possession to littoral landowners . . . down to where unsubmerged land ends, which [I] locate[ ] at the water's edge. . . ." *Ante* at 38. A significantly more precise statement of my position is that the littoral landowner has the right of exclusive possession to unsubmerged land, while the public has the right to use submerged land under the public trust doctrine. The water's edge, i.e., where the wet sands give way to dry sands, where submerged land meets unsubmerged land, marks the limit of each of these rights.

While I agree with the DNR's inclusion of the wet sands as submerged lands, the DNR reaches the same erroneous conclusion as the Court of Appeals, namely that the littoral owner holds title only to the "ordinary high water mark."[45] This interpretation apparently is based on the following passage from *Hilt*, *supra* at 226:

> The riparian owner has the exclusive use of the bank and shore, and may erect bathing houses and structures thereon for his business or pleasure (45 C.J. p 505; 22 L.R.A. [N.S.] 345; *Town of Orange v. Resnick*, [94 Conn 573, 578; 109 A 864 (1920)]); although it also has been held that he cannot extend structures into the space between low and high-water mark, without consent of the State (*Thiesen v. Railway Co*, 75 Fla. 28 [78 South. 491; L.R.A. 1918E, 718]). And it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner, although the title is in the State. *Doemel v Jantz*, [*supra*].

However, this statement from *Hilt* does not represent a conclusion of this Court. Rather, it is cited as part of this Court's response to the notion that *Kavanaugh* "gave the State substantially absolute title . . . to the upland or to use them for any public purposes." *Id.* at 224. In rejecting this theory as a justification for maintaining *Kavanaugh*, we noted that the "title" conferred to the state in *Kavanaugh*

[45] The DNR's position is consistent with the Attorney General's opinion in 1978 noting that title to property between the high water mark and the water's edge remains in the state, but the right of exclusive use remains in the littoral owner. OAG, 1977-1978, No 5,327, p 518 (July 6, 1978).

was confined "to the same trust which applies to the bed of the lake, i.e., that the State has title in its sovereign capacity and only for the preservation of the public rights of navigation, fishing, and hunting." *Id.* Thus, "the right of the State to use the bed of the lake, except for the trust purposes, is subordinate to that of the riparian owner. . . ." *Id.* at 226 citing *Town of Orange*, *supra* at 578. To support this point, *Hilt* noted that "it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner, although the title is in the State." *Hilt*, *supra* at 226, citing *Doemel.*

This demonstrates that *Hilt* was not adopting the rule from *Doemel*, but rather was using that case to demonstrate that *Kavanaugh* did not give unlimited title to the state and, therefore, that the title granted to the state by *Kavanaugh* was not a valid basis for maintaining the meander line as a boundary. Thus, the only basis for holding that the state holds title to unsubmerged land up to the so-called high water mark is to misunderstand the importance of *Hilt*'s reference to *Doemel.* It is clear that when *Hilt* said that a littoral owner's title goes to the water's edge, it *meant* "water's edge." Likewise, when *Warner* said that the state's title begins where the water is, it *meant* "where the water is."

Second, the "water's edge" principle is consistent with the common-law definition of the high water mark.[46] At

[46] Although I do not agree that the "wet sands area" as it applies to the public trust doctrine is equivalent to the "ordinary high water mark" as it applies to the navigational servitude, at least one commentator has observed that the "wet beach" is the area "between ordinary high watermark and ordinary low watermark." Pratt, *The legal rights*

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common law, the area of medium high tide would seldom be dry for more than twenty-four hours at a time. *Lorman v Benson*, 8 Mich 18, 29 (1860). In other words, the land at or below medium high tide was generally covered by the ocean during the daily tidal cycle. Therefore, this tidal land was considered "waste land" that was "'not capable of ordinary cultivation or occupation.'" *Id.* at 28-29 (citation omitted). Similarly, in the instant case, the wet sands are being inundated with water by the current ebb and flow of the waves. However, when lake levels fluctuate, any land that is no longer subject to the ebb and flow of the waves becomes unsubmerged land, which is suitable for "ordinary occupation" and, therefore, as with lands affected by the spring tides, is not within the scope of the public trust doctrine.

Finally, the "water's edge" principle is significantly more workable than the majority's "ordinary high water mark." A member of the public can, by simple observation, without the use of "aerial photographs, government survey maps . . . and stereo [three-dimensional] photographs," *ante* at 28 n 20, determine where he or she is allowed to use land without seeking the littoral owner's permission.[47]

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of the public in the foreshores of the Great Lakes, 10 Mich Real Prop Rev 237, 237 (1983). According to this commentator, the "high water mark" and the "water's edge" are, for all practical purposes, the same in the nontidal Great Lakes.

[47] The majority claims that the "water's edge" principle provides no greater "clarity" than its new rule and that the "water's edge" standard constitutes a "charade of clarity." *Ante* at 41-42. The reader might wish to ponder this assertion. On the one hand, the traditional standard for delineating between public and private lands – the standard that I would retain – requires merely that a person be able to distinguish between wetness and dryness, between wet sands and dry sands, between where there is water and where there is not. Even a Supreme

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When the waters recede, land that is no longer subject to the current ebb and flow of the waves will become unsubmerged land and, therefore, will again be under the exclusive control of the littoral property owner.

In conclusion, as we noted in *Warner*, *supra* at 239, although in dictum, the absence of tides "practically makes high and low water mark identical for the purpose of determining boundaries [along the Great Lakes]." The "water's edge" principle recognizes this reality by defining the rights of both the littoral property owner and the public in terms of the actual location of the water. This definition is consistent with the natural forces at work on the Great Lakes; it is consistent with the common-law scope of the public trust doctrine; it is consistent with historical practice in Michigan; and it creates a public trust area that can readily be identified. The majority has presented no reason why this longstanding rule no longer represents a reasonable balance between the competing interests at issue in this case. Yet, the majority discards this clear standard, which has operated for most of the history of our state to create harmonious relations between the public and littoral property owners, and replaces it with an unknowable standard of its own

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Court justice, I would submit, should be reasonably able to draw such distinctions. Contrast this to the majority's test that would require a person to locate "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." The majority does not even *attempt* to offer guidance to the public or property owners as to the meaning of this standard. Rather, the majority suggests that expert witnesses will be able to identify this mark by using "aerial photographs . . . , the government survey maps, the site's present configuration, and stereo [three-dimensional] photographs. . . ." *Ante* at 28 n 20.

invention that requires littoral property owners and the public to guess where the "ordinary high water mark" is located.

III. MISUNDERSTANDING OF JUS PRIVATUM/JUS PUBLICUM

The majority's determination to apply what it has defined as the "ordinary high water mark," despite a lack of foundation in Michigan law, appears to be rooted in its fundamental misunderstanding of the distinction between the *jus privatum* and *jus publicum*. The majority notes, correctly, that the title to the submerged lands of navigable waters is bifurcated; with the *jus publicum* safeguarding the rights to the public and the *jus privatum* safeguarding private property rights, subject always to the *jus publicum*. *Nedtweg v Wallace*, 237 Mich 14, 20; 208 NW2d 51 (1927). However, rather than limit application of the doctrine to *submerged* lands, the majority instead holds that *any* conveyance of lakefront property consists solely of the *jus privatum*, with the state's *jus publicum* title including unsubmerged lands up to the "ordinary high water mark." I disagree, and instead believe that the *jus publicum* applies only to the submerged lands of the Great Lakes.

The distinction between *jus privatum* and *jus publicum* was first addressed by this Court in *Lorman*, *supra*. In *Lorman*, a former lessee of property abutting the Detroit River claimed that he had a right to use and maintain a boom constructed in the water.[48] Under the English common law, private title to the bed of a navigable

[48] A "boom" is defined as "a chain, cable, etc., serving to obstruct navigation." *Random House Webster's College Dictionary* (1997).

river was determined by whether the river was subject to the ebb and flow of the tides. *Lorman*, *supra* at 26-27. However, regardless of who held the *jus privatum*, the private owner's rights were limited to those uses that would not interfere with "the public easement of navigation[.]" *Id.* at 27. In tidal rivers, the *jus privatum* was subject to the public's "right of navigation over the whole bed of the stream at high tide, and over the water, so far as it was practicable, at all tides." *Id.* at 27-28. However, the public's rights too were not without limit. First, the public's rights did not extend to land "not commonly submerged by the average ordinary high tides, which would seldom leave any of the shore dry more than twenty-four hours at a time." *Id.* at 29. Second, the public's use of the *jus publicum* was limited to "water rights," i.e., the right of navigation and fishing. *Id.* at 30. No matter who held title to the river bed, the public's right to use the river was always limited to the water itself. Because the former lessee sought to use the Detroit River for purposes other than navigation or fishing, the Court determined that the former lessee's use was not superior to that of the riparian owner and, therefore, the riparian owner could bring an action for trespass.

The limitation of the *jus publicum* to use of the water itself was also expressed by this Court in *McMorran Milling Co v C H Little Co*, 201 Mich 301; 167 NW 990 (1918).[49] In *McMorran Milling*, a dredger entered into a

[49] The majority cites Justice Campbell's *dissenting* opinion in *Sterling v Jackson*, 69 Mich 488, 506-507; 37 NW 845 (1888), in support of its *jus privatum*/*jus publicum* analysis. *Ante* at 11. The *Sterling* majority observed that title to the river bed belongs to the riparian owner, but that such title is limited by the public's right of navigation. *Sterling*, *supra* at 500. However, the public's rights in that case were

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contract with the riparian owner for the right to remove sand from the river bed. The federal government, concerned that such dredging would adversely affect navigation, ordered the dredger to cease operation. After the dredger complied with this order, the riparian owner brought suit demanding the dredger continue to pay for the right to remove sand. This Court began its analysis by noting that the riparian owner "holds the naked legal title [the *jus privatum*], and with it he takes such proprietary rights as are consistent with the public right of navigation [the *jus publicum*], and the control of congress over that right." *Id.* at 314 (citation omitted). Thus, the riparian owner's title is "'held at all times subordinate to such use of the *submerged lands and of the waters flowing over them* as may be consistent with or demanded by the public right of navigation.'" *Id.* at 310 (emphasis added; citation omitted). The Court concluded that the dredger was evicted from the river bed by the government, which on the basis of its right to protect navigation had superior title over the riparian owner. Therefore, the riparian owner was not entitled to further payment after the date of eviction. *Id.* at 318.

Unlike rivers and inland lakes, the state holds both the *jus privatum* and *jus publicum* title to the submerged lands of the Great Lakes. *Nedtweg*, *supra.* In *Nedtweg*, the state sought to lease several thousand acres of relicted land abutting Lake St. Clair that were considered submerged in

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limited to "using the waters of the bay for the purpose of a public highway in the navigation of [the defendant's] boat over it. . . ." *Id.* at 501. Aside from the right of navigation, all other uses of the river bed belonged exclusively to the riparian owner. *Id.* In other words, the riparian owner's *jus privatum* was limited only by the uses *expressly* allowed under the *jus publicum*, i.e., the right of navigation. *Id.*

law.[50] In order to do so, the Legislature passed legislation authorizing long-term leases of such land to private individuals. The Department of Conservation refused to enter into such leases, arguing that the submerged-in-law land was held in trust for the public and could not be conveyed. We noted that the title to submerged land is bifurcated between the *jus publicum* and the *jus privatum*. *Nedtweg*, *supra* at 17.

> The State may not, by grant, surrender such public rights any more than it can abdicate the police power or other essential power of government. But this does not mean that the State must, at all times, remain the proprietor of, as well as the sovereign over, the soil underlying navigable waters. [*Id.*]

In other words, the state may convey the *jus privatum* in submerged Great Lakes land, as long as that conveyance does not interfere with the public's "rights of navigation, hunting and fishing." *Id.* at 18. The Court noted that, because the land in question was now dry land, it was no longer suited for the purposes protected by the *jus publicum*. *Id.* at 22. In other words, contrary to the majority's understanding, while the "submerged" lands in question were still *part* of the public trust, the lease was permissible because there was no interference with the *uses* protected by the public trust doctrine.[51]

To summarize, under the common law as it has developed in Michigan, the *jus privatum* is held by either

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[50] *Nedtweg* was decided during the reign of the *Kavanaugh* cases.

[51] The majority claims that the lands at issue in *Nedtweg* were "set[ ] apart from the public trust." *Ante* at 27.

the adjoining property owner (in the case of rivers or inland lakes), or by the state itself (in the case of the Great Lakes). In either case, the *jus privatum* title is held subject to the public's rights under the *jus publicum.* However, the public's *jus publicum* rights are limited to use of the waters themselves. *Lorman*, *supra*; *McMorran Milling*, *supra.* Further, the *jus publicum* only protects the public's right to use private property for specific purposes, such as navigation, fishing, and hunting. *Nedtweg*, *supra.* There are no cases that support the majority's view that the *jus publicum* extends beyond the water's themselves to include unsubmerged land. *Lorman*, *supra* at 29. On the Great Lakes, the overlap between *jus privatum* and *jus publicum* would only come into play when the Legislature conveyed a portion of the submerged lands to a third party. Because, as argued previously, the littoral owner's title never extends past the wet sands, unsubmerged land between the wet sands and the "ordinary high water mark" is simply not, and has never been, part of the *jus publicum.*

IV. QUESTIONS RAISED BY MAJORITY OPINION

Questions directly raised by the majority's departure from the longstanding status quo in our state include the following:[52]

[52] The majority maintains that this case "raises none of the questions that [this dissent] poses," while, of course, choosing to answer none of these questions. *Ante* at 44. The majority is mistaken if it believes that it can replace settled law in Michigan with a selective part of the law of another state – indeed the least clear part of that other state's law – and create a new legal relationship between littoral property owners and the public, all the while avoiding giving rise to

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(1) Are there property tax consequences to the fact that the exclusive rights of littoral property owners would now extend not to the water's edge, but only to the "ordinary high water mark"?

(2) Given that the majority has expanded the lands subject to the public trust doctrine, will there be a corresponding expansion of uses that are considered "inherent in the exercise of traditional public trust uses"? That is, given that the public trust now encompasses dry land up to at least the "ordinary high water mark," are there new uses of these lands that arguably can be connected to traditional public trust uses?

(3) Given that there are always more members of the public who may wish to use a property in a particular manner than there are property owners, what permanent protections exist to ensure that the Department of Natural Resources, as a political institution, will not seize upon the vagueness and lack of definition of the majority opinion increasingly to broaden the "public trust" at the expense of littoral property rights?

(4) What are the implications of the majority's opinion for the rights of other littoral property owners on

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new legal questions and generating litigation. Each of the questions set forth in this section, as well as a great many more that neither I nor the majority can anticipate, will be introduced into the legal system as a direct result of the majority's opinion. This opinion will be subject to cryptanalysis for many years to come and will produce litigation and dispute where up to now there has been none. Perhaps equally troubling, when clarity in the law is once again established in the area of littoral property rights – many years from now, and only after what is likely to be an unnecessary period of fractiousness and contention – it will likely come as a function of *administrative determinations of private property rights.*

lakes other than the Great Lakes, whose properties also afford access to recreational opportunities for the public?

(5) Given the majority's conclusion that "the public trust doctrine serves to protect resources," what are the implications of the majority's opinion for the rights of non-littoral property owners, whose properties abut or have an impact upon state lands used by the public for recreational purposes?

V. CONCLUSION

I would not alter the longstanding status quo in Michigan, and I, therefore, dissent. The majority has altered this status quo by: (1) redefining the lands subject to the public trust doctrine on the basis of Wisconsin's definition of the "ordinary high water mark"; and (2) holding for the first time that the use of unsubmerged lands is permitted by the public trust doctrine.

The majority fails to identify any defects in the present rules of this state, rules that have endured since statehood, that would justify its departure from the "water's edge" principle in favor of unclear rules of its own design. The present rules have created a reasonable and harmonious balance between the rights of the public and the rights of littoral property owners. Under these rules, the littoral owner's title follows the shoreline, i.e., where the wet sands give way to the dry sands, wherever this may be from time to time. Because the boundary is dependent on the natural condition of the Great Lakes, it is easily identifiable, thus, creating a practical and workable rule. The public's legal right to use private property along the shores of the Great Lakes should remain, as it has always been, within this realm.

The critical flaw in the majority's decision making is that it creates new law, not on the basis of the millions of amicable interactions that occur each year between the public and lakefront property owners, but instead on the basis of the single aberrational dispute in this case. In the place of a stable and well-understood law that has worked well for more than a century and a half to define the rights of the public and littoral property owners and to minimize litigation, the majority, in reaction to the present dispute, finds it necessary to introduce a range of novel concepts into Michigan property law. Apart from lacking any basis in present Michigan law, these concepts are essentially undecipherable. Thus, in an area of the law in which stability and clarity are paramount, the majority offers rules that are obscure and that will be subject to evolving definition by environmental regulatory agencies. Almost certainly, these new rules, in conjunction with the majority's disinclination to define the critical aspects of these rules, will lead to an escalation in the number of disputes between members of the public and property owners along the Great Lakes. In the place of harmony, there will be litigation.[53] In the place of unobstructed beachfront, there

[53] In the end, it will not be surprising if the day-to-day rights of the public even to beach-walk – the ostensible triggering concern of this case – were to be diminished by the majority's decision. For, in the place of a rule in which property rights are clearly defined and protected, and in the place of a regime in which most littoral property owners have easily accommodated the public's interest in activities such as beach-walking, the majority creates a far more uncertain rule, one in which property rights have become more ambiguous and uncertain, and more subject to political regulation and definition. Just as some members of the public are likely to become more assertive in their claim of a "right" to use the property of another, so too will some property owners become more assertive in purporting to "defend" their properties from the encroachments of such persons. At least some of these owners can be

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will be fences. Five hundred cases from now, and after the expenditure of enormous litigation costs and legal resources, Michigan, if it is fortunate, will once again reach the state of equilibrium that it enjoys today and that it has enjoyed for many decades under current law.

I would affirm the result of the Court of Appeals, reverse that portion of the Court of Appeals opinion giving the state title to land below the "ordinary high water mark," and reaffirm the longstanding principle of *Hilt* that the littoral property owner's title extends to unsubmerged land and the public's legal rights under the public trust doctrine extend to the submerged lands, including the wet sands.[54]

Stephen J. Markman

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expected to assert their property rights in circumstances where today this has been thought unnecessary. It may well be that a legacy of the majority opinion is the proliferation of fences along the beaches of the Great Lakes. Fences and more fences. As a result of the majority's decision to replace clearly understood and longstanding rules of private property rights with new rules in which the public trust is to be expanded in an uncertain manner, the rights of both the public and the property owner will likely become less well protected.

[54] Because I agree with the majority that the GLSLA does not establish the boundaries of the public trust, I concur in part II(A) of the majority opinion.

Order
Entered: November 19, 2004

126409 (65)

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

JOAN M. GLASS,

Plaintiff-Appellant,

v

RICHARD A. GOECKEL and KATHLEEN D. GOECKEL,

Defendants-Appellees.
/

SC: 126409
COA: 242641
Alcona CC: 01-010713-CK

On order of the Court, the motion to confirm that the issue of title to previously submerged land will be heard by this Court and should be briefed by the parties is considered, and it is GRANTED.

Order
Entered: October 28, 2004

126409 & (57)(58)(62)(63)

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

JOAN M. GLASS,

Plaintiff-Appellant,

v

RICHARD A. GOECKEL and KATHLEEN D. GOECKEL,

Defendants-Appellees.
/

SC: 126409
COA: 242641
Alcona CC: 01-010713-CK

On order of the Court, the application for leave to appeal the May 13, 2004 judgment of the Court of Appeals is considered, and it is GRANTED. The motion for leave to file reply brief and the motions for leave to file briefs amicus curiae are also considered, they are GRANTED.

STATE OF MICHIGAN

COURT OF APPEALS

JOAN M. GLASS, Plaintiff-Appellee, v RICHARD A. GOECKEL and KATHLEEN D. GOECKEL Defendants-Appellants.	FOR PUBLICATION May 13, 2004 9:00 a.m. No. 242641 Alcona Circuit Court LC No. 01-10713-CK

Before: O'Connell, P.J., and Wilder and Murray, JJ.

MURRAY, J.

I. Introduction

Plaintiff, a neighbor of defendants, asserts that as a member of the general public, she "has the right to navigate and walk across those portions of the shore and waters of Lake Huron lying below and lakeward of the natural ordinary high-water mark, free from obstruction or interference by defendants." Defendants argue that their property rights extend to the waters' edge, and that plaintiff could not walk beyond the waters' edge and onto their property. The trial court held that plaintiff was entitled to freely traverse the "shore of Lake Huron lying below and lakewards of the natural ordinary high water mark as specifically defined in MCL 324.32502." We conclude otherwise, and therefore reverse the trial court's order granting plaintiff's motion for summary disposition and remand for entry of an order granting defendants' motion for summary disposition.

II. Material Facts and Proceedings

Since 1997, defendants have owned property east of US-23 in Alcona County that abuts Lake Huron. Plaintiff has, since 1967, owned property in Alcona County west of US-23 and, essentially, on the other side of US-23 from defendants' property. In the deed to her property, plaintiff was granted a fifteen-foot easement across defendants' property "for ingress and egress to Lake Huron."

According to plaintiff's first amended complaint, a dispute between plaintiff and defendants arose in August 2000, when plaintiff trimmed several tree branches that were impeding her use of the easement. In spring 2001, the dispute continued with defendants[1] objecting to any pruning of trees or bushes. According to plaintiff, defendant obstructed the entrance to the easement by parking Mr. Goeckel's vehicle at the entrance. Additionally, plaintiff claimed that defendants threatened or did interfere with her right to walk across the beach area, between the ordinary high-water mark and Lake Huron, in front of defendants' property. As a result, plaintiff filed a three-count first amended complaint, asking the trial court to enjoin defendants from interfering with her rights to the express easement and the usage of the shoreline.

The parties eventually resolved the issues pertaining to the express easement, resulting in plaintiff being able to utilize the easement for ingress and egress to Lake Huron, to use the beach portion of the easement for sunbathing

[1] In her first amended complaint, plaintiff only asserts that Mr. Goeckel attempted to interfere with her easement and statutory rights. However, because both Mr. and Mrs. Goeckel are defendants, we will refer to them collectively.

and lounging, and to do certain pruning to ensure that the easement remain unimpeded in at least a ten-foot wide area.

Regarding the remaining issue, defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (9), arguing that, as a matter of law, plaintiff was not entitled, over defendants' objections, to walk across the beach fronting defendants' property between the high-water mark and the lake. Plaintiff filed a response seeking summary disposition in favor of her right engage in such activity. The trial court, stating that "there is no clear precedent here," granted plaintiff summary disposition in favor of plaintiff on the following basis:

> However, it appears to this Court that Plaintiff has the better argument and the Court therefore rules in Plaintiff's favor. The Great lakes Submerged Land Act, MCL § 324.32501 *et seq[.],* does provide for a specific definition of the high water mark of Lake Huron and does seem to support the argument that the Plaintiff's [sic] have the right to use the shore of Lake Huron lying below and lakewards of the natural ordinary high water mark for pedestrian travel.

III. Analysis

A. Standard of Review

Although the trial court did not indicate under which court rule it granted summary disposition, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(l0). Therefore, we will consider the trial court's ruling as if it were granted under that subrule. We review a decision granting summary disposition de novo, *Psaila v Shiloh Industries, Inc,* 258 Mich App 388, 391; 671 NW2d 563

(2003), applying the same standard under MCR 2.116(C)(10) that the trial court was required to utilize:

> Summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue about any material fact. When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider all pleadings, affidavits, depositions, and other documentary evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The nonmoving party has the burden of rebutting the motion by showing, through evidentiary materials, that a genuine issue of disputed fact does exist. *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999). [*Old Kent Bank v Kal Kustom, Inc,* 255 Mich App 524, 528-529; 660 NW2d 384 (2003).]

Additionally, "[t]he trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washburn v Michailoff,"* 240 Mich App 669, 672; 613 NW2d 405 (2000).

B. Riparian Rights and The Public Trust Doctrine

Defendants claim that, as owners of property abutting Lake Huron, they have the exclusive right to use the land up to the waters' edge, and that they can therefore preclude plaintiff from traversing anywhere on their property above the waters' edge. In support of this position, defendants principally rely on *Hilt v Weber,* 252 Mich 198; 233 NW 159 (1930). *Hilt* which we will review in detail later in

this opinion, contains a thorough discussion of the rights of riparian owners along our Great Lakes. However, in order to properly understand the context under which *Hilt* was decided, we must first review the so-called "*Kavanaugh* Cases," *Kavanaugh v Rabior;* 222 Mich 68; 192 NW 623 (1923) and *Kavanaugh v Baird,* 241 Mich 240; 217 NW 2 (1928), which were both overruled in *Hilt.*

In *Rabior, supra,* the plaintiff was the owner of Saginaw Bay waterfront property. The defendant built a summer cottage on a 280-foot wide strip of land between the plaintiff's lots and the shoreline, which the plaintiff claimed ownership to because the strip of land was created through accretions.[2] The Supreme Court held that the strip of land, which was located between the meander line[3] and the water line, was "in the law, submerged land and lake bottom." *Id.* at 69. This conclusion was compelled because, according to the Court, the strip of land had been

[2] The terms "accretion" and "reliction" are used frequently in the cases discussed in this opinion. "Accretion" is defined as "the gradual accumulation of land by natural forces, especially as alluvium is added to land situated on the bank of a river or on the seashore." Black's Law Dictionary (7th ed) at 21. "Reliction" is defined as "the alteration of a boundary line because of the gradual removal of land by a river or stream." Black's Law Dictionary (7th ed) at 1293. These terms are not particularly useful in this case, however, because we are here dealing with land resulting from receding waters, which is defined as, but not always referred to as, "dereliction." Black's Law Dictionary (7th ed) at 454.

[3] Meander lines were established by surveyors to determine acreage and values of property, not to create a strict boundary. *Whitaker v McBride,* 197 US 510, 512; 25 S Ct 530; 49 L Ed 857 (1905). The meander line for the Great Lakes was originally established by government survey in 1851, *Boekeloo v Kuschinski,* 117 Mich App 619, 630; 324 NW2d 104 (1982), fourteen years after our state entered the Union in 1837.

submerged when the meander line was drawn, the strip of land only appeared because of a gradual recession of the water, and, therefore, the land should continue to be regarded in the law as lake bottom:

> We think a fair inference is, from the meager testimony, that the disputed strip was submerged when the meander line was established, and that the disputed strip is the result of the recession of the waters and not of accretions. If this be true, the disputed area must be regarded in the law as lake bottom. When the meander line was established it fixed the status of the disputed strip as lake bottom, and this status in the law would not change even though a portion of it had become dry land. [*Id*. at 70-71.]

This conclusion was based upon the Court's view that "riparian owners along the Great Lakes own only to the meander line, and that title, outside this meander line, subject to the rights of navigation, is held in trust by the state for the use of its citizens." *Id.* at 71, quoting *Ainsworth v Munosicong Hunting & Fishing Club,* 159 Mich 61; 123 NW 802 (1909). Thus, because the plaintiff did not have title to the strip of land that resulted from the water receding, he was not entitled to eject the defendant from the strip of land.

Five years later, the Court decided another case regarding the same property, but involving partially different parties. In *Baird, supra,* the plaintiff brought suit against the defendant, the State Director of Conservation, seeking to quiet title to the same strip of land. Much as he did in the prior case, the plaintiff argued that he held title to the land by means of accretion and reliction. The defendant, on the other hand, asserted title in the

name of the state, which held title to the land in trust for the benefit of the people.

The trial court ruled in favor of the defendant. In affirming the trial court, the Court took judicial notice that the land was created by both accretion and reliction, but most potently through reliction, for "Saginaw Bay is very shallow at the shores, and but slight recession of the water uncovers a large area." *Id.* at 242. Relying upon its holding in *Rabior,* the Court held that the land had previously been submerged land, and therefore the relicted land (which had grown in size since *Rabior* was decided) was held by the state in trust for the people:

> If the title to the lake bottom passed to the state in trust upon its admission to the Union, and that title did not shift and change with the shifting and changes in conditions, and we so held in that case, then the title to the property here in question is in the State in trust, and is not in the plaintiff, and to sustain the plaintiff's contention necessitates the overruling of the *Rabior Case* and the cases which have preceded it. [*Id.* at 243.]

Although the Court recognized that it would have to reverse *Rabior* in order to hold that the plaintiff owned the land to the waters' edge, it refused to do so even while conceding that its decisions in *Rabior* and *Baird* were "against the overwhelming weight of authority." *Id.* at 252-253. Thus, the Court held that all land that was Great Lakes bottomland at the time the state entered the Union, but which was now dry because of accretion or reliction, was held by the state and not the riparian owner:

> Changes in condition from year to year do not change the title or rights of the state. They

> are fixed as of the date of the admission of the State into the Union. So, likewise, are the rights of the riparian owner. When the State was admitted into the Union the lands here bordering on Saginaw Bay were owned by the Federal government. It held them as proprietor and when it sold, the right of a riparian owner as of that date passed to its grantee. [*Id.* at 253.]

As noted, *Hilt* expressly overruled the *Kavanaugh* cases. *Hilt, supra* at 227. *Hilt* involved a land contract foreclosure. The property at issue, which the defendants had purchased from the plaintiffs, abutted Lake Michigan. The meander line was some 277 feet from the waters' edge, and the plaintiffs' real estate agent had placed a stake in the ground one hundred feet from the water, informing the defendants (at that point prospective purchasers) that the stake represented the boundary of the plaintiffs' property. The defendants prevailed in the trial court, and were awarded damages for the plaintiffs' failure to pass title to the 177 feet of land between the stake and the meander line, which under the *Kavanaugh* cases was land held in trust by the state subject to riparian rights of the upland owner. *Id.* at 201. The issue on appeal concerned the damages recovered by the defendants, which required the Court to examine "the respective rights of the State and the riparian owner in the strip of relicted land." *Id.*[4] In doing so, the Court had to reexamine the *Kavanaugh* cases, since they specifically dealt with the respective

[4] The Court noted that some of the land at issue had been upland since the state entered into the Union, but that the remainder became dry by accretion and reliction. *Id*.

rights between the state and riparian owners to relicted land.[5]

The *Hilt* Court first addressed the proposition from the *Kavanaugh* cases that the meander line was drawn at the waters' edge and to be considered a boundary line. The Court flatly rejected such a conclusion, instead holding that, at least until the *Kavanaugh* cases, precedent had uniformly established that the meander line was not a boundary, nor was it run at the waters' edge:

> It is well know [sic] that, in innumerable instances, as in that at bar, the meander line was not run at the waters' edge in fact. It is also established that it is not a boundary in law. In *Railroad Co v Schurmeir* [74 US 272; 7 Wall 272; 19 L Ed 74 (1869)], it was pointed out that, by the act of congress providing for the survey, while the straight lines were given the force of boundaries, no mention was made of meander lines in the act; that they were a device of the surveyor for the purpose of reporting the contents of the subdivision and to enable the surveyor general to make a plat required by law. They were run as merely general, not accurate, representations of the shore. *Blodgett & Davis Lbr. Co. v. Peters,* 87 Mich. 498[; 49 NW 917;] (24 Am. St. Rep. 175) [(1891)]; *United States v. Lane,* 260 U.S. 662[; 43 S Ct 236; 67 L Ed 448 (1923)]. [*Hilt, supra* at 204.]

[5] The Court emphasized that its opinion only addressed dry land "extending meandered upland by gradual and imperceptible accession or recession of the water, on the lake side of the meander line," as opposed to submerged lands. *Id.* at 203.

See, also, *id*., at 212 (the meander line was not meant to be strictly accurate in depicting the precise sinuosities of the shore. The boundary was where nature had placed it – at the water's edge.").

Having rejected this first proposition underlying the holdings in the *Kavanaugh* cases, the Court turned to "the second proposition of the *Kavanaugh Cases,* that the status of land as lake bottom, fixed when the meander line was run, did not change in law even though a portion of it afterward became dry land." *Id.* at 213. In rejecting the holding that previously submerged dry land remained submerged land under the law, the Court examined the two cases relied upon by the *Baird Court Sterling v Jackson,* 69 Mich 488; 37 NW 845 (1888), and *State v Venice of America Land Co,* 160 Mich 680; 125 NW 770 (1910). The *Hilt* Court concluded that neither *Sterling* nor *Venice of America* supported the holdings in the *Kavanaugh* cases, *id.* at 216, and instead held that title to private lake front[6] land follows the shore, even when the shoreline changes over the years:

> On the contrary, this court often had declared the effect of a meander line upon the Great Lakes in harmony with authority elsewhere, and, at least inferentially, had recognized that title would follow the shore in case of change of condition under private ownership, in accordance with the common law. [*Id.* at 216-217.]

[6] The rules of riparian rights and the public trust doctrine set forth in *Hilt* and its progeny only apply to the shoreline of the Great Lakes and their connecting navigable waterways. *Bott v Comm of Natural Resources,* 415 Mich 45, 71; 327 NW2d 838 (1982).

Indeed, throughout its opinion, the Court noted how the *Kavanaugh* cases had "put the Great Lakes in a legal straightjacket" by deviating from prior Michigan law and common law, which held that riparian owners hold title to the land up to the waters' edge:

> Prior to the *Kavanaugh Cases* there appears to have been little or no conflict of law upon the effect of reliction on title. The law of the sea applies to the Great Lakes. *Hardin v. Jordan*[*,* 140 US 371; 11 S Ct 808; 35 L Ed 428 (1891)], *supra.* All maritime nations, recognizing the vagaries of the sea, beyond human control and anticipation, have evolved systems of law, founded upon rational conceptions of common justice, to adjust and compensate its effects. *The most ordinary effect of a large body of water is to change the shoreline by deposits or erosion gradually and imperceptibly. In such cases it is the general, possibly universal, rule,* except for the *Kavanaugh Cases,* and except in a few States where riparian rights have been extinguished by Constitution or statute, *that the title of the riparian owner follows the shoreline under what has been graphically called "a movable freehold."* 28 Hallsbury, Laws of England, 361. [*Id.* at 219 (emphasis added).]

As support for its holding, the *Hilt* Court relied upon many state and federal decisions. *See id.* at 220. In particular, the following passage from *Shively v Bowlby,* 152 US 1; 14 S Ct 548; 38 L Ed 331 (1894), clarified both the distinction between the title to submerged lands held by the states, and the riparian right to land as the water recedes and rises over the years:

> "The rule, *everywhere admitted,* that where the land encroaches upon the water by gradual

> and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King, or the State as to private persons; and *is independent of the law governing the title* in soil covered by the water.'
>
> "The reason ordinarily given for the rule is that it is necessary to preserve the, riparian owner's right of access. Other reasons sometimes are that it is within the maxim, de minimis non curat lex, or that *since the riparian owner may lose soil by the action of the water he should have the benefit of any land gained by the same action."* 45 C. J. p. 525. [*Id.* at 219-220 (emphasis modified in part).]

Hence, under *Hilt,* a riparian owner has the exclusive right to the use of relicted land subject only to the state's navigational servitude, and therefore "it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner. . . ." *Id.* at 226.[7] Although the riparian owner has the exclusive right to utilize such land while it remains dry, because it once again may become submerged, title remains with the state pursuant to the public trust doctrine. *Id.* This is so because a riparian owner cannot interfere with the public's right to the free and unobstructed use of navigable *waters* for navigation purposes. *Id.*

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[7] This principle in *Hilt* is dicta, since the dispute in that case did not involve the public's right to access relicted land. However, the principle was endorsed by the *Hilt* Court, and it is consistent with and germane to the actual holding in *Hilt*, i.e., that the riparian owner has exclusive use to the land running to the waters' edge. *People v Schaub,* 254 Mich App 110, 117 n 2; 656 NW2d 824 (2002).

As the foregoing demonstrates, the *Hilt* Court placed Michigan riparian law, as it pertains to navigable waters, back in conformity with the common law as it existed in Michigan before the *Kavanaugh* cases. Courts since then have recognized that under *Hilt,* a riparian owner has exclusive use of the dry land to the waters' edge, and loses the exclusive right to use that same dry land when it becomes submerged by the rising waters. See, e.g., *Peterman v Dept of Natural Resources,* 446 Mich 177, 192-193; 521 NW2d 499 (1994) (quoting *Hilt,* the Supreme Court stated that it "has long held" that "'the right to acquisitions to land, through accession or reliction, is itself one of the riparian rights.' *Hilt, supra* at 218. Hence, the 'title of the riparian owner follows the shoreline under what has been graphically called 'a moveable freehold.'"); *Bott v Comm of Natural Resources,* 415 Mich 45, 82-84; 327 NW2d 838 (1982) ("In *Hilt, a* recent holding in the *Kavanaugh Cases* that owners adjacent to the Great Lakes hold title to land running along the meander line but not to the waters' edge was re-examined and overruled."); *Klais v Danowski,* 373 Mich 262, 279; 129 NW2d 414 (1964) (recognizing under *Hilt* that a riparian owner has use of the land to the waters' edge, including any new land occurring through accretions or reliction); *Donohue v Russell,* 264 Mich 217, 218; 249 NW 830 (1933) (recognizing that *Hilt* "held that the riparian owner owns the land beyond the meander line to the edge of the water."); *Boekeloo v Kuschinski,* 117 Mich App 619, 626-627; 324 NW2d 104 (1982); *Turner Subdivision Prop Owners Ass'n v Schneider,* 4 Mich App 388, 391; 144 NW2d 848 (1966) ("*Hilt* established that a riparian owner owns land between the meander line and the water."); *Nordale v Waxberg,* 84 F Supp 1004, 1006 (D Alas, 1949) (recognizing that in *Hilt* "it was held that the boundary line of riparian

owners along the Great Lakes is the waters' edge, and not the meander line. The riparian owner has the right to accretion.").

The *Hilt* conclusion that a riparian owner has the right to the exclusive use of relicted land is entirely consistent with the title held by the State under the public trust doctrine. This doctrine, which places lands submerged beneath the Great Lakes and those waters themselves in trust with the state, was explained by the United States Supreme Court in *Illinois Central R Co v Illinois,* 146 US 387, 452; 13 S Ct 110; 36 L Ed 1018 (1892):

> That the state holds the title to the lands *under the navigable waters* of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. [Emphasis added.]

That the state of Michigan holds in trust the *submerged lands* beneath the Great Lakes within its borders for the free and uninterrupted navigation of the public is without doubt. See *Peterman, supra* at 194; *Nedtweg v Wallace,* 237 Mich 14, 16-17; 208 NW 51 (1926); *People v Massey,* 137 Mich App 480, 485; 358 NW2d 615 (1984). Importantly, the

public trust doctrine "is not limited to water sufficiently deep to float craft, but extends to the point where it joins the ground of the riparian owner, 'whether the water be deep or shallow, and although it be grown up to aquatic plants and unfit for navigation.'" *State v Lake St Clair Fishing & Shooting Club,* 127 Mich 580, 586; 87 NW 117 (1901) (Hooker, J., concurring), quoting *People v Warner,* 116 Mich 228, 239; 74 NW 705 (1898).

The law of riparian rights and the public trust doctrine therefore go hand-in-hand. As the *Peterman* Court accurately described the two principles:

> The State of Michigan holds in trust the navigable waters of the state in behalf of its citizens, and riparian owners hold "the right to use and enjoy" their riparian property "subject to the public right of navigation. . . ." *Hall v Alford,* 114 Mich 165, 167; 72 NW 137 (1897). [*Peterman, supra* at 194.]

The dividing line between the two is the waters' edge. *Warner, supra.* After all, an indispensable requisite to the riparian doctrine is actual contact of the land with the water. *Klais, supra* at 279; *Turner Subdivision, supra* at 391. It is therefore clear that, in this case, defendants' riparian rights provided them with the exclusive use of the relicted land and beach in front of their land up to the edge of Lake Huron. *Hilt, supra.* Although the state holds title to land previously submerged, the state's title is subject to the riparian owner's exclusive use, except as it pertains to navigational issues. *Id.; Peterman, supra* at 195. However, if and when the Great Lakes rise, the riparian owner no longer has exclusive use to that submerged land, for the state's title in public trust for navigational purposes becomes paramount. *Id.* Accordingly,

because defendants have the right to the exclusive use and enjoyment of their land to the waters' edge, we hold that they may properly prohibit plaintiff from traversing beyond the waters' edge while adjacent to defendants' property. *Hilt, supra.*

C. Great Lakes Submerged Land

Plaintiff argues that, despite the foregoing case law, MCL 324.32502 provides her with a statutory right to traverse defendants' property anywhere between the ordinary high water *mark* and the lake. The trial court, in fact, so held. That statutory provision,[8] which sets forth how the entire part 325 is to be construed, establishes the ordinary high-water mark for Lake Huron at 579.8 feet above sea level. The remainder of the statute provides as follows:

> Sec. 32502. The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made *lands* in the Great Lakes, including the bays and harbors of the Great Lakes, *belonging to the state or held in trust by it,* including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part *shall be construed* so as to preserve and protect the interests of the general public in the lands and waters described in this section, to

[8] MCL 324.32502 is a section within Part 325 of the Natural Resources and Environmental Protection Act. Part 325 was added by 1994 PA 451, and the predecessor to the part, The Great Lakes Submerged Lands Act, MCL 322.701 *et seq.,* was repealed by 1995 PA 59.

> provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands *whenever it is determined by the department* that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure *boating,* or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark, *but this part does not affect property rights* secured by virtue of a swamp land grant or rights *acquired by accretions occurring through natural means or reliction.* [Emphasis added.]

Applying as we must the unambiguous language of this statute, *Charter T'wp of Northville v Northville Pub Schools,* 469 Mich 285, 290; 666 NW 2d 213 (2003), it is clear that this section merely sets forth the rules for construing the different sections within part 325, and that it provides no substantive rights. Moreover, even if the statute did set forth substantive rights, it would not afford plaintiff relief. The statute addresses six particular matters: (1) it identifies the lands that are covered and affected by the part; (2) it instructs that the part shall be construed to preserve and protect the public's interest in the lands and waters described in the section; (3) it provides for the state's ability to sell, lease, or exchange unpatented submerged lands; (4) it provides for the

private or public use of waters over patented and unpatented lands; (5) it permits the filling in of submerged lands whenever the appropriate state department determines it will not substantially affect the public's right to use such lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or impair the public trust in the state; and (6) it declares that the entire part "does not affect property rights . . . acquired by accretions occurring through natural means or reliction." Thus, MCL 324.32502 contains no provision guaranteeing any member of the public the right to walk on a beach fronting private property along one of the Great Lakes. Moreover, it specifically preserves those riparian rights set forth in *Hilt* and its progeny. Therefore, the trial court erred in holding that MCL 324.32502 grants plaintiff the right to walk on defendants' beach over defendants' objection.

Finally, we reject plaintiff's argument that upholding defendants' riparian property rights will preclude residents or visitors to our Great Lakes and connecting waterways from enjoying the vast beaches bordering our state. Our Supreme Court has repeatedly noted that the state has several means available to it in order to preserve Great Lakes beaches for public use without interfering with a riparian owner's property rights:

> It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The State should provide proper parks and playgrounds and camping sites and other

> instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the State has authority to acquire land by gift, negotiation, or, if necessary, condemnation. [*Hilt, supra* at 224.]

Accord *Peterman, supra* at 193; *Bolt, supra* at 83-84.

IV. Conclusion

As riparian owners, defendants have the exclusive right to the use and enjoyment of the land which, once submerged, has now become exposed by receding waters. Plaintiff has neither a statutory nor a common law right to interfere with that use. However, as a member of the public, plaintiff is entitled to utilize the lake bottom until it first reaches dry land, for purposes of navigating the Lake Huron shoreline. The trial court's ruling, to the extent it allowed plaintiff to traverse between the statutory ordinary high-water mark and the waters' edge, is therefore reversed.

Reversed and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF ALCONA

JOAN M. GLASS,	Case No. 01-10713-CH(K)
Plaintiff,	Hon. John F. Kowalski
v	
RICHARD A. GOECKEL and KATHLEEN D. GOECKEL,	
Defendants. /	

Pamela S. Burt (P47857) WEINER & BURT, P.C. 635 N. US-23, P.O. Box 186 Harrisville, MI 48740 (989) 724-7400 Attorney for Plaintiff	Brent R. Babcock (P23533) 450 West Lake Street, P.O. Box 786 Tawas City, MI 48764-0786 (989) 362-6196 Attorney for Defendants

/

ORDER

At a session of said Court held the
25th day of April, 2002
in the 26th Judicial Circuit Courtroom
for the County of Alcona
PRESENT: HONORABLE JOHN F. KOWALSKI

This matter having been brought on to be heard upon Defendants' Motion for Summary Disposition seeking dismissal of Plaintiff's Counts 2 and 3; the Plaintiff having filed an opposing brief with affidavits, depositions, and exhibits; and the Court being fully advised in the premises,

IT IS ORDERED that Defendants are denied summary disposition, and instead Plaintiff is granted summary

disposition in her favor, under MCR 2.116(I)(2), of her Count 3 for interference with Plaintiff's rights to navigate along the Lake Huron shore;

IT IS FURTHER ORDERED that, pursuant to the Great Lakes Submerged Land Act, MCL § 324.32501 *et seq,* Plaintiff has the right to use for pedestrian travel, without interference from Defendants, the shore of Lake Huron lying below and lakewards of the natural ordinary high mark as specifically defined in MCL § 324.32502; and

IT IS FURTHER ORDERED that the parties shall submit a written consent judgment defining the scope of Plaintiff's fifteen foot easement in accordance with the settlement placed on the record at the March 11, 2002 hearing by the parties' respective attorneys.

This is not a final order, and does not resolve the last pending claim nor close the case.

Entered this 25th day of April, 2002.

/s/ JOHN F. KOWALSKI
HON. JOHN F. KOWALSKI,
CIRCUIT JUDGE

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF ALCONA

JOAN M. GLASS,	Case No. 01-10713-CH(K)
Plaintiff,	Hon. John F. Kowalski

v

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants. /

Pamela S. Burt (P47857)	William A. Pfeifer (P45263)
WEINER & BURT, P.C.	Isackson & Wallace, P.C.
635 N. US-23, P.O. Box 186	114 S. Second Avenue
Harrisville, MI 48740	Alpena, MI 49707
(989) 724-7400	(989) 354-8242
Attorney for Plaintiff	Attorney for Defendants

/

ORDER ESTABLISHING EASEMENT RIGHTS

At a session of said Court held the
25th day of June, 2002
in the 26th Judicial Circuit Courtroom
for the County of Alcona
PRESENT: HONORABLE JOHN F. KOWALSKI

This matter having been brought on to be heard upon Defendant's Motion for Summary Disposition, the Plaintiff having filed an opposing brief with affidavits and exhibits seeking summary disposition in her favor; Plaintiff and Defendants having appeared by their respective attorneys and placed an agreement concerning various terms of an Order on the record with the Court's approval, with the Court having rendered decision on other terms; and the Court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED THAT:

An Order be and is hereby entered, as set out below, with respect to the real property which is the subject of the easement in favor of Plaintiff situated in the Township of Greenbush, County of Alcona, and State of Michigan, described as follows:

> The North 15 feet of South 400 feet of the North 500 feet of Government Lot 2 lying East of the US-23 right-of-way in Section 26, Township 25 North, Range 9 East;

1. The scope of Plaintiff's easement, which runs with Plaintiffs land, includes the right of Plaintiff, her guests, invitees, successors in interest, and assigns to use the easement for ingress and egress to Lake Huron, and to use the beach portion of the easement for sunbathing and lounging, but excludes any right to have bonfires or fireworks anywhere on the easement, or to drive motorized vehicles on the easement. The right of Plaintiff, her guests, invitees, successors in interest, and assigns to transport boats over the easement is limited by the prohibition against vehicle travel;

2. Plaintiff has the right to maintain the easement by removing ground cover and other vegetation, tree branches, stumps, and/or trees, as necessary to ensure a clear and unimpeded area at least ten (10) feet wide along the length of the easement, which ten-foot wide clear area is not necessarily straight but may meander with the vegetation line; and to level a five (5) -foot wide area of sand at the sand bluff area as necessary to ensure safe and convenient passage by foot to the beach, while maintaining the existing natural state of vegetation and trees along peripheral portions of the easement to the greatest extent

possible. In the event Plaintiff intends to remove an entire tree from the easement, or to use any motorized earthmoving equipment on the easement, Plaintiff shall provide fourteen (14) days advance notice in writing to Defendants;

3. Defendants, their successors, and assigns are permanently enjoined from any interference or obstruction of Plaintiff's use of the easement as set out herein, including refraining from positioning, placing, or planting any obstruction of any kind on the easement, or parking any vehicle on the easement, except that Defendants may park a vehicle on the easement for no more than three (3) hours for the limited purpose of performing necessary work on their property. Defendants may also post a "no trespassing" or "private property" sign which does not obstruct the 15-foot easement itself;

4. Defendants are permanently enjoined from harassing Plaintiff, her guests or invitees in any manner while they are using the easement as set out herein;

5. The parties shall have a joint survey performed by a licensed surveyor to locate the high water mark of Lake Huron on the easement, and permanently mark same at an edge portion of the easement. However, if Defendants' counsel fails to communicate with Plaintiff's counsel to arrange a joint survey within fourteen (14) days after entry of this Order, then Plaintiff shall proceed to have the survey and permanent marking performed without consultation with Defendants or their counsel;

6. Plaintiff is hereby granted leave to record this Order in the office of the Alcona County Register of Deeds; and

7. This Court retains continuing jurisdiction of this case to the extent necessary to enforce the specific provisions of this Order, which provisions are in all respects final, and/or to resolve any future issues not embraced herein which may arise with respect to the easement.

This is a final order which resolves the last pending claim and closes the case.

Entered this 25th day of June, 2002.

/s/ JOHN F. KOWALSKI
HON. JOHN F. KOWALSKI

Order
September 14, 2005

Supreme Court
Lansing, Michigan

Clifford W. Taylor
Chief Justice

Rehearing No. 526

126409

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan,
Robert P. Young, Jr.
Stephen J. Markman,
Justices

JOAN M. GLASS,

Plaintiff-Appellant,

v

RICHARD A. GOECKEL and KATHLEEN D. GOECKEL,

Defendants-Appellees.

SC: 126409
COA: 242641
Alcona CC: 01-010713-CK

In this cause, a motion for rehearing is considered and it is DENIED.

Young, Jr., and Markman, JJ., would grant rehearing.
