STATE OF MICHIGAN
IN THE COURT OF APPEALS

JOAN M. GLASS,

Plaintiff/Appellee

v

RICHARD A. GOECKEL
and KATHLEEN D. GOECKEL,

Defendants/Appellants
_____/

Court of Appeals No. 242641

Lower Court Case #01-10713-CK(K)
Alcona County Circuit Court

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AMICUS CURIAE BRIEF

Dated: November 12, 2003

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TABLE OF CONTENTS

Page(s)

INDEX OF AUTHORITIES

Federal Cases: **Page #**

State Cases:

Statutes:

Other Authorities:

STATEMENT OF QUESTIONS PRESENTED

I. UNDER MICHIGAN LAW, DO OWNERS OF PROPERTY ABUTTING THE GREAT LAKES OWN TO THE WATER'S EDGE?

Trial Court's Answer	:	No
Plaintiff/Appellee's Answer	:	No
Defendant/Appellant's Answer	:	Yes
Amicus' Answer	:	Yes

II. DOES THE GREAT LAKES SUBMERGED LANDS ACT MODIFY THE RULE OF OWNERSHIP TO THE WATER'S EDGE ESTABLISHED BY HILT v WEBER?

Trial Court's Answer:	:	Yes
Plaintiff/Appellee's Answer:	:	Yes
Defendant/Appellant's Answer:	:	No
Amicus' Answer	:	No

INTEREST OF AMICUS CURIAE

Formed in August of 2001, Save Our Shoreline (SOS) is a Michigan nonprofit membership corporation committed to the preservation of riparian rights, which in Michigan includes the right of ownership of Great Lakes riparian lands to the water's edge, wherever that may be at any given time. Since its formation in 2001, the grass-roots group has rapidly grown to nearly 2,000 households. SOS members have a direct and substantial interest in this court's decision regarding the extent and nature of their ownership of Great Lakes riparian lands. In addition to its amicus effort in this litigation, the group recently pursued and obtained passage in this state of 2003 PA 14, which relates to a riparian's right to maintain waterfront property, including the control of vegetation on Michigan's beaches. The group has also participated by way of amicus brief in Borden Ranch Partnership v US Army Corps of Engineers, 536 US 903, 122 S Ct 2355 (mem); 153 L Ed 2d 178 (2002), regarding the reach of federal statutes over Great Lakes beaches as well as other matters. The organization is responding to what it perceives as an organized effort, which includes units of state and federal government, and others, to increase public control of the lakeshores, to the prejudice of private owners and the principle of private property.

ARGUMENT

I. UNDER MICHIGAN LAW, OWNERS OF PROPERTY ABUTTING THE GREAT LAKES OWN TO THE WATER'S EDGE.

A. The Seminal Case of Hilt v Weber Governs this Case.

The issue at bar is governed by the landmark decision of Hilt v Weber, 252 Mich 198; 233 NW 159 (1930), in which the Michigan Supreme Court clearly and unambiguously held that shoreline property owners on the Great Lakes own to the water's edge, at whatever stage. The decision also specifically dispelled the notion that the public trust extended landward beyond the water's edge. Since its issuance in 1930, the decision has stood unscarred, being neither overturned nor criticized, by any Michigan case. To the contrary, its principle of ownership to the water's edge at whatever stage was reaffirmed by the Michigan Supreme Court in Peterman v DNR, 446 Mich 177; 521 NW2d 499 (1994), a case which specifically held that the riparian owner, and not the public, owned the beach between the water's edge and the so-called "ordinary high water mark."[1] Under the authority of these cases, the argument that the public has any ownership interest in property between the water's edge and the so-called "ordinary high water mark" must fail.

[1] The concept of "ordinary high water mark" is often referred to, but seldom defined, in case law, and is further clouded by many varied judicial, statutory and administrative definitions and references. As a result, the term means different things to different people. For

The decision of Hilt v Weber, supra, is widely cited by state and national authorities for its determination of the boundary for the intersection between the Great Lakes and riparian land. In Hilt, a land contract purchaser of shoreline property, in defending against foreclosure, asserted that the seller misrepresented the property line as a boundary near the water. He argued that the meander line[2], being 277 feet from the water, was the boundary under the authority of Kavanaugh v Rabior, 222 Mich 68; 192 NW 623 (1923) and Kavanaugh v Baird, 241 Mich 240; 217 NW2d (1928) (hereinafter the "Kavanaugh cases"). The Hilt court expressly overruled the Kavanaugh cases, and held that because the boundary line extended to the water's edge, no damage occurred.

A study of the Hilt decision and its history reveals its intellectual and historical significance. According to Professor Theodore Steinberg, a presidential scholar at the University of Michigan, "[b]efore the Kavanaugh case, property owners along Michigan's shores believed that they owned to the water's edge," which "seemed to be a sensible boundary." Steinberg, "God's Terminus: Boundaries, Nature, and Property on the Michigan

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this reason, this brief will treat the term guardedly.

[2] 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.

Shore," The American Journal of Legal History, Vol. XXXVII (1993) (See Exhibit A).

The Kavanaugh cases changed that historical and legal understanding, and "converted to public property Michigan's hundreds and hundreds of miles" of shore. Id. at 77.

According to Steinberg, the judicial appropriation effected by the Kavanaugh cases caused a flurry of new activity. Shoreline renters began to withhold rent. Surveyors began marking the new property lines. Shoreline owners organized. Real estate brokers complained, and a bill before the legislature to clarify the water's edge as the boundary was passed, but vetoed by the governor. In some areas of the state, hundreds of feet of property between the water's edge and upland property was declared public land. Id. at 77-78, 82. In light of this legal turmoil, the Michigan Supreme Court promptly accepted the Hilt case for review and set forth its reason for doing so:

> Because of the conflict of authority, and also because the executive and legislative branches of the state government have felt the need of more precise statement of the legal situation as a basis of legislation, we finally determined upon a frank re-examination of the Kavanaugh cases . . .

Hilt at 202. The court noted that in addition to the briefs of the parties, it had the benefit of those of "the attorney

general and others representing public and private interests as amicus curae." Id. Hence, the Hilt decision is not some ordinary decision on the topic; it was a momentous decision intended to clarify a serious legal problem to a young, developing state. A studied reading of the exhaustive decision evidences the fact that the court intended the decision to be the final word on the issue, not only by the decision's legal standing, but by the strength of its reasoning. In its analysis, the Hilt court carefully and methodically addressed all of the arguments that might be brought to bear on the issue, including an historical analysis of relevant federal and state decisions and consideration of the public trust doctrine. With virtually every page of the Hilt decision carefully crafted, and in light of the historical background, there can be no doubt that the Michigan Supreme Court knew of the import of its decision; that it applied the appropriate amount of resources in finding and determining the law; and that it intended to bring final resolution to the issue of shoreline ownership in Michigan.

(1) Federal and State Decisions; Ownership to Water's Edge.

On commencing its analysis, the Hilt court first noted that even in the earlier, contrary case of Kavanaugh v Baird, supra, the court had acknowledged that "the decision was against the weight of authority, supported by the fact that the contrary

authority is substantially unanimous, in state and federal courts, in this country and England." Hilt at 203. As for federal law, the court cited St Paul & P Railroad Co v Schurmeier, 7 Wall 272, 286; 19 LEd 74 (1868) ("the water-course, and not the meander-line, as actually run on the land, is the true boundary") and Hardin v Jordan, 140 US 371, 380; 11 S Ct 808, 811; 35 L Ed 428 (1890) ("the waters themselves constitute the real boundary"). After citing additional cases from other Great Lakes states, the court concluded that under federal law, "the purchaser from the government of public land on the Great Lakes took title to the water's edge (emphasis added)." Hilt at 206.

(2) Michigan Property Rights Are Defined By Michigan Law.

The Hilt court next held that once waterfront property was acquired by a private person, state law, and not federal law, controlled the extent of that person's rights:

> The state law became paramount on the title after it vested in a private person.

Id., citing Hardin v Jordan, supra. This remains the law today. See Oregon v Corvallis Sand and Gravel Co, 429 US 363, 372; 97 S Ct 582; 50 L Ed 2d 550 (1977) ("that land had long been in private ownership and, hence, under the great weight of

precedent from this court, subject to the general body of state property law").

(3) Under Michigan Law Prior to Hilt, Shoreline Owners Owned To the Water's Edge.

After examining and exposing the underpinnings of previous cases on the subject, the Hilt court concluded that prior to the Kavanaugh decisions, "this 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 . . . (emphasis added)." Id. at 212. In its decision, the Hilt court cited with approval People v Warner, 116 Mich 228; 74 NW 705, 711 (1898)[3] and People v Silberwood, 110 Mich 103; 67 NW 1087 (1896), as well as the concurring opinion in State v Fishing & Shooting Club, 127 Mich 580; 87 NW 117 (1901), all of which held that private ownership extends to the water. Hilt, pp 208, 209.

(4) The Public Trust Doctrine Ends At The Water's Edge.

The Hilt court acknowledged that the so-called public trust doctrine (termed the "trust doctrine" by the court) had been recognized by Michigan courts as early as 1843 in La Plaisance Bay Harbor Co v City of Monroe, Walker's Ch 155 (1843), which

[3] After noting that the high and low water marks may be synonymous, the Warner court stated that "[t]he adjoining proprietor's fee stops there, and there that of the State begins, whether the water be deep

decision noted that "the proprietor of the adjacent shore has no property whatever in the land covered by the water of the lake." Hilt at 208. The court also noted the reference to the doctrine in several other cases. Id. Finally, the Hilt court acknowledged heated and vigorous arguments, presumably made by the state Conservation Department and others by way of amicus briefs, that the trust doctrine should not end at the water's edge, but should extend upward across the dry shore. Hilt at 224. The Hilt court clearly and unequivocally rejected this extension of the public trust doctrine for "public control of the lakeshores":

> With much vigor and some temperature, the loss to the State of financial and recreational benefit has been urged as a reason for sustaining the Kavanaugh doctrine. 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 to enjoy the benefits of nature. But to do this, the State has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The State must be honest.

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or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation." Id. at 239.

Hilt at 224. The Court went on to point out that even under the Kavanaugh cases, the alleged title to the meander line was merely that of trustee under the public trust: "only for the preservation of the public rights of navigation, fishing, and hunting." Id. at 224. So when the Hilt court opined that the state's title ended at the water's edge, it was speaking in terms of that title which is held in public trust. There can be no mistaking this intention of the court in light of this statement from the dissent:

> My brother's opinion is far reaching, for it constitutes the Michigan shoreline of 1624 miles private property, and thus destroys for all time the trust vested in the State of Michigan for the use and benefit of its citizens. Id. at 231.

Of course, the majority's decision indicated that no trust was destroyed by its decision, because it never existed in the first place. But in any event, it is clear from the Hilt decision that no public trust extended beyond the water's edge and onto the lakeshore.

B. Hilt v Weber Remains the Law in Michigan.

A number of decisions issued since Hilt have affirmed its holding, and the decision continues to represent the law in Michigan. See, eg, Boekeloo v Kuschinski, 117 Mich App 619; 324 NW2d 104 (1982). Most notably, the decision was upheld and followed by the Michigan Supreme Court 64 years after Hilt in

Peterman v DNR, 446 Mich 177 521 NW2d 499 (1994). In that case, beachowners sued the DNR for compensation due to the destruction of their beach caused by the DNR's negligently installed boat launch and jetties. Citing Hilt v Weber, the Michigan Supreme Court held that the state must compensate the riparian owner for its negligent destruction and the resulting "loss of the beach below the ordinary high water mark." Peterman at 200-202. In its decision, the Peterman court specifically referenced with approval the Hilt court's conclusion that "the riparian owner has the exclusive use of the bank and shore." Peterman, 446 Mich at 192, citing Hilt, supra, at 226. And like the Hilt decision, the Peterman court, 64 years later, repeated the Hilt court's recognition of the benefits of "public control of the lakeshores," but quoted again its conclusion that the state has no power "which will justify it in taking private property without compensation." Peterman, 446 Mich at 193.[4] Thus, the argument that the public trust doctrine extends beyond the actual water's edge, even when below the OHWM, has been rejected by this state's highest court in 1930 and 1994. Both Hilt and

[4] The Peterman court did state that "riparian owners hold a limited title to their property that is subject to the power of the state to improve navigation," but that discussion was obiter dictum, and in any event offers no consolation to plaintiff in this case. Peterman at 193-198. See also Hilt at 225, 226 ("Riparian 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 paramount trust purpose . . . The only substantial paramount public right is the right to the free and unobstructed use of navigable

Peterman remain the law in Michigan without criticism by any reported decision.

C. As a Rule of Property Law, Hilt Should Not Be Overturned.

Even if modern courts could find fault with the Hilt decision, the decision should nevertheless stand. The Michigan Supreme Court has held that "stare decises is to be strictly observed where past decisions establish 'rules of property' that induce reliance." Bott v Commission of Natural Resources, 415 Mich 45; 77, 327 NW2d 838, 849 (1982), citing Lewis v Sheldon, 103 Mich 102; 61 NW 269 (1894), Hilt v Weber, supra. Urged in 1982 to extend public rights of use to a creek by modifying the definition of navigability, the Michigan Supreme Court in Bott, supra, refused:

> The rules of property law which it is proposed to change have been fully established for over 60 years, and the underlying concepts for over 125 years. Riparian and littoral land has been purchased in reliance on these rules of law, and expenditures have been made to improve such land in the expectation, based on decisions of this Court, that the public has no right to use waters not accessible by ship or wide or deep enough for log flotation, and that, even if there is navigable access to a small inland dead end lake, the public may not enter over the objection of the owner of the surrounding land, and that the only recreational use recognized by this Court as an incident of the navigational servitude is fishing. The Legislature can, if it is thought

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waters for navigation.") Mrs. Glass does not navigate on defendant's beach.

> to be sound public policy to enlarge public access to and the use of inland waters, pass laws providing for the enlargement of the rights of the public in those parts of the state where the Legislature finds that there is a shortage of public access to inland rivers and lakes and for the compensation of landowners affected by the enlarged servitude (emphasis added).

The court further stated:

> The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. The judiciary must accept responsibility for its actions. Judicial "rules of property" create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital . . . It cannot be denied that some landowners have invested their savings or wealth in reliance on a long-established definition of navigability. It also cannot be denied that the heretofore private character of the waters adjacent to their property significantly adds to its market value. Vacationers are not manufacturers who can pass on their losses to a large class of consumers. Techniques to safeguard past reliance on prior law such as prospective overruling are unavailable where property rights are extinguished. Prevention of this hardship could be avoided through compensation, but this Court has no thought of providing compensation to riparian or littoral owners for the enlarged servitude and the resulting reduction in amenities and economic loss.

Id. at 77. Since the Hilt decision in 1930, riparian owners have relied on the rule of property law established by it, and under the foregoing authority, the rule should stand.

II. THE GREAT LAKES SUBMERGED LANDS ACT DOES NOT MODIFY THE RULE OF OWNERSHIP TO THE WATER'S EDGE ESTABLISHED BY HILT v WEBER.

Many commentators have negligently (or overeagerly) referred to the Great Lakes Submerged Lands Act of 1955, recompiled as amended at MCL 324.32501 et seq., as a basis for public ownership of that dry land which lies below the so-called "Ordinary High Water Mark" as defined by that Act in a 1968 amendment. Such a construction not only is impermissible by the statute's language, but would be unconstitutional, as further described below.

Contrary to the understanding of some commentators, the Great Lakes Submerged Lands Act of 1955 was not new. In 1913, the Act's predecessor, 1913 PA 326, CL 1915, §606 et seq., provided in part as follows: "[a]ll of the unpatented overflowed lands, made lands and lake bottom lands belonging to the state of Michigan or held in trust by it, shall be held, leased and controlled by the state board of control" (emphasis added). Nedtweg v Wallace, 237 Mich 14; 208 NW2d 51 (1926) (legislature may authorize lease of trust lands for private use through Act) (See Exhibit B, 1913 PA 326). Like the 1955 Act (See Exhibit C), the 1913 Act provided for leases of public trust lands. Nedtweg at 18. Thus, at the time of the Hilt decision, the court had to be keenly aware of the existence of the existing Submerged Lands Act, and its directive that lands

"belonging to the state of Michigan or held in trust by it" be "held" by the state. Yet the court made no mention of the Act in determining the rule of ownership to the water's edge that prevails to this day, nor did the Peterman court mention the Act in awarding compensation to a riparian owner for the loss of the portion of his beach which Plaintiff in this case says the Act granted to the state 39 years earlier. Since the court found ownership of the lakeshore to be private, there was no reason to look at a statute which applied only to property owned or held in trust by the state.

Twenty-five years after the Hilt court declared that private ownership of riparian land on the Great Lakes extended to the water's edge, the Michigan Legislature passed the Great Lakes Submerged Lands Act of 1955, formerly compiled at MCL 322.701 et seq, and now compiled at MCL 324.32502. The stated purpose of the Act, as amended, prior to recompilation in 1995 by PA 1994, No. 451, was as follows:

> An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors thereof, belonging to the state of Michigan or held in trust by it; to permit the private and public use of waters over submerged patented lands and the making of agreements limiting and regulating the use thereof; to provide for the disposition of revenue derived therefrom; and to provide

> penalties for violation of this act (emphasis added).

See PA 1955, No. 247, PA 1958, No. 94, §1, PA 1965, No. 293. (See Exhibit D). Thus, the title of the act limited the act to lands "belonging to the state of Michigan or held in trust by it." As this court knows, Article 4, §24 of the Michigan Constitution provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

This constitutional provision was "designed to prevent the legislature from passing laws not fully understood . . ." 22 Michigan Civil Jurisprudence, Statutes, §22. From the Act's title, it is clear that it was intended to apply only to lands "belonging to the state of Michigan or held in trust by it." The Michigan Supreme Court having held 25 years earlier in Hilt that the state neither owned nor held in trust lands on the Great Lakes beyond the water's edge, the legislature is presumed to have known that the Act did not apply to any lands above the water's edge. 73 Am Jur, Statutes, §184 ("the legislature has been presumed to have known and considered the state of the common law").

The Act's language in its current amended form repeats the phrase requiring state ownership or trust rights:

> 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 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 (emphasis added).

(See Exhibit E). Again, under this section, the Great Lakes Submerged Lands Act applies only to those "bottomlands and . . .

lands in the Great Lakes . . . belonging to the state or held in trust by it." The Act defines the term "lands" by referring to "the aforesaid described . . . bottomlands and . . . lands . . . in the Great Lakes . . . lying below the natural ordinary high water mark . . ." Accordingly, since the "aforesaid described bottomlands and lands" are limited to those "belonging to the state or held in trust by it," the term "lands" does not include the lands which the Hilt Court previously declared private property: land above the water's edge, wherever it occurred at any given moment. Thus, the Act and its subsequent statutory definition of the ordinary high water mark in this section has no bearing on the issue of the extent of riparian ownership. Simply put, the Act has no application to private riparian land above the water's edge, and that is why neither the Hilt nor Peterman courts referred to the Act in their decisions.[5]

Indeed, the Michigan Supreme Court in Peterman, supra, determined ownership to the water's edge without reference to the Great Lakes Submerged Lands Act, even 39 years after the

[5] This interpretation of the Great Lakes Submerged Lands Act of 1955 was also the interpretation given it by Michigan's Department of Conservation in 1961, as explained by the Michigan Supreme Court in People v Broedell, 365 Mich 201, 206; 112 NW2d 517 (1961):

> Plaintiff says that in administering the submerged lands acts, above mentioned, it follows the "philosophy" which it says is found in Hilt v Weber [citations omitted] of a movable freehold, that is to say, that the dividing line between the state's and

Act's passage. Similarly, not a single reported decision has held that the Act sets the line between public and private ownership.[6] The position espoused by plaintiff in this case may represent the hopes and dreams of the Coastal States Organization[7] (See Plaintiff's Brief, Appendix I) and those

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> the riparian owners' land follows the water's edge, or shoreline at whatever level it may happen to be from time to time.

[6] The Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan has published, as part of its Land Title Standards, 5th Edition, a section discussing the boundary of property adjoining the Great Lakes. Section 24.6 provides as follows:

> The Waterfront Boundary Line of Property Abutting the Great Lakes is . . . the naturally occurring water's edge . . ."

Having rejected the proposition that the Great Lakes Submerged Lands Act of 1955 establishes public ownership of the lakeshore, the Committee mentions the Act in a "Caveat":

> To the extent the Act suggests that the state owns all unpatented land below the Ordinary High Water Mark, the Act conflicts with Hilt v Weber, supra. This conflict has not been considered or resolved by the courts.

Amicus does not consider all parts of Section 24 of the Land Title Standard as authoritative, in part because of our research disclosing that 2 of the 6 members on the Water Rights Subcommittee were MDEQ employees, and one of those was a biologist, and not an attorney. The above-quoted passages, however, do provide some guidance to the court.

[7] Much confusion relating to the interpretation of the Great Lakes Submerged Lands Act has resulted from both the casual misreading of the statute, and from the bias of strong, well-moneyed organizations that seek a meaning of the statute different from its legislative intent. For an example of casual misreading, see Research Memorandum, Ohio Legislative Service Commission, June 22, 2001 (See Exhibit F) ("It appears that the statute indicates that the state owns lakeward of the high water mark"). For an example of biased writings, see "Putting the Public Trust Doctrine to Work," 2d Edition, p 72 (Coastal States Organization 1997) ("Michigan, by statute, has defined the upper boundary of its public trust shorelands as the 'ordinary high water mark . . .'") The first edition of this work is cited extensively by plaintiff. The Coastal States Organization is an organization of governors of coastal states dedicated to "improved [governmental] management of the nation's coasts, oceans, and Great Lakes." Its above-referenced work reflects its bias when it laments that "over 90 percent of the adjacent uplands are privately owned, raising difficulties for the public to access the trust shorelands below the ordinary high water mark." Id. at 2. Further, it advocates

acting in concert with it, but it is not the law in the State of Michigan.

Nearly 50 years after the passage of the Great Lakes Submerged Lands Act, there is simply no authority to support the proposition that the Act redefined the boundary between private and public property along the shore of the Great Lakes.[8] More

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the public trust doctrine as "a useful tool" that can be used to "improve the stewardship of state trustees" over the lands the authors believe come under the doctrine. Id. at xiii. In other words, the focus of the work is to use the public trust doctrine to expand governmental control of property so that such property can be "managed" by the government, to the exclusion of private citizens.

[8] Often cited by public rights advocates is a 1978 Attorney General opinion which is quizzically characterized as "well reasoned" in an otherwise well-respected work. See Cameron, Michigan Real Property Law, 2d Edition, §3.5 (ICLE 1993), citing 1977-1978 OAG No. 5,327 at 518 (July 6, 1978) (See Exhibit G). The plaintiff is right in being critical of the 1978 opinion, but for the wrong reasons. (See Plaintiff's Brief, p.7). A prior published opinion asserted that ownership extended to the water's edge. See 1932-1934, OAG, p.286 (July 13, 1933) (See Exhibit H).

The 1978 opinion gratuitously mentions Hilt v Weber, but not its holding of ownership to the water's edge. That is the first mistake of the opinion. The opinion cites the Great Lakes Submerged Lands Act of 1955, and simply concludes, without analysis, that the Act "indicates the dividing line between the upland and the submerged land is the ordinary high water mark." The failure to provide any analysis for that conclusion, or to explain how the legislation could do so without condemnation, is the second mistake of the opinion. Finally, the opinion cites Hilt out of context and in a misleading fashion in its conclusion that "[t]he riparian owner has exclusive use of the bank and shore . . ., although title is in the state." Unfortunately, it is the missing language that reveals the Hilt court's intent. It is true that the decision held that "the riparian owner has exclusive use of the bank and shore." Hilt at 226. That holding comports with the decision's determination of ownership to the water's edge, at whatever stage. But the court did not hold that "title is in the state." Instead, it merely referred to a Wisconsin decision which so held:

> 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. Dowel v Jantz, supra [180 Wis 225, 193 NW 393 (1923)]"

That the Hilt court considered another state's decision does not mean that it accepted it as dispositive. By its presentation of the Hilt decision, the 1978 opinion was either intellectually dishonest, or it

importantly, because Hilt and its predecessors established a rule of property law,[9] any readjustment of the property line without compensation would be an unconstitutional taking, and such a construction would render the statute void. Thayer v Michigan Dept of Agriculture, 323 Mich 403; 35 NW2d 360 (1949). Indeed, both the Hilt and Peterman decisions warned that to gain "public control of the lake shores . . . the state may do so only by gift, negotiation, or, if necessary, condemnation." Peterman at 193, citing Hilt at 224. A taking by legislative fiat was not listed as a permissible way for the state to acquire the lakeshore. As set forth above, and to its credit, the legislature never so intended.

CONCLUSION

The lakeshore which the Circuit Court wrongfully appropriated from the defendant in this case belongs to the defendant riparian owner, as determined by the Michigan Supreme Court in Hilt (1930) and Peterman (1994). No reported decision has since held to the contrary. The Great Lakes Submerged Lands

represented sloppy research and writing. Neither bodes well for the authority of the opinion. An attorney general opinion is not binding on this court, and this court should disregard the 1978 opinion in its analysis of the issue at bar. Danse Corporation v City of Madison Heights, 466 Mich 175; 644 NW2d 721 (2002).

[9] Also, a long-standing construction given to a statute by the executive of the Department of the State Government, which has been accepted as universal, will not be disturbed without strong reasons, especially where it has become, to some extent, a rule of property, and where many titles depend on it. Malonny v Mahar, 1 Mich 26 (1847), cited in 22 Mich Civ Juris, Statutes, §168.

Act does not, and constitutionally could not, change the ownership of Defendant's riparian property, and again, no case has ever held to the contrary. The trial court's decision is in error, and should be reversed.

Michigan's 3,288 miles of shoreline is perhaps some of the most expensive real estate in the world. Taxes generated by this property serve to fund local governments and schools, and the property supports our nation's number one industry (and our state's number two industry), travel and tourism, of which beaches are the primary factor (See Houston, "The Economic Value of Beaches--A 2002 Update," Exhibit I). Assertions of ownership by state and federal agencies, as well as Plaintiff and those similarly situated, cloud riparian titles, negatively impacting real estate values and the resulting tax base. In addition to reversing the trial court, this court should publish its decision to once again remind the bench and bar, as well as the public, of Michigan's rule of ownership to the water's edge, at whatever stage.

Dated: November 12, 2003

Respectfully submitted,

SMITH, MARTIN, POWERS & KNIER, P.C.

By:_____

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