STATE OF MICHIGAN
IN THE COURT OF APPEALS

JOAN M. GLASS,

Plaintiff-Appellee,

v

Court of Appeals Docket No. 242641
Alcona Circuit Court No. 0110713-CK

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants-Appellants
_____/

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Submitted by:
Pamela S. Burt (P47857)
Weiner & Burt, P.C.
Attorney for Plaintiff-Appellee
635 N. US-23, P.O. Box 186
Harrisville, MI 48740
(989) 724-7400

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JURISDICTIONAL STATEMENT

Defendants-Appellants' Jurisdictional is correct, but incomplete. In addition to seeking review of the final Order Establishing Easement Rights entered June 25, 2002, in their Issue II Defendants also seek review of the circuit court's post-judgment Order in Re: Contempt of Court and Amending Order Establishing Easement Rights issued October 22, 2002. The post-judgment Order was issued after Defendants filed their claim of appeal on July 25, 2002.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. DID THE CIRCUIT COURT CORRECTLY APPLY THE GREAT LAKES SUBMERGED LANDS ACT AND RELEVANT CASE LAW IN RULING THAT PLAINTIFF HAS THE RIGHT TO WALK THE BOTTOMLANDS OF LAKE HURON LYING BELOW AND LAKEWARDS OF THE NATURAL ORDINARY HIGH WATER MARK AS DEFINED IN MCL § 324.32502?

Defendants-Appellants answer: NO

Plaintiff-Appellee answers: YES

The circuit court answers: YES

II. DID THE CIRCUIT COURT PROPERLY EXERCISE ITS EQUITABLE POWER IN MODIFYING ITS PRIOR ORDER BY ENJOINING ANY VEHICLE PARKING ON THE EASEMENT, AFTER HEARING TESTIMONY ESTABLISHING THAT DEFENDANTS HAD REPEATEDLY PARKED ON THE EASEMENT IN CONTEMPT OF THE PRIOR ORDER?

Defendants-Appellants answer: NO

Plaintiff-Appellee answers: YES

The circuit court answers (post-judgment): YES

COUNTER-STATEMENT OF FACTS

Plaintiff has owned her non-riparian, residential property in Greenbush Township, Alcona County, since 1967. Defendants have owned their lakefront property on Lake Huron, across highway U.S. 23 from Plaintiff's property, since 1997. Plaintiff's 1967 recorded deed includes an express "easement for ingress and egress to Lake Huron over the North fifteen (15) feet" of Defendants' lakefront parcel. See deeds attached as Exhibits 1 and 2 to Plaintiff's Brief Opposing Defendants' Motion for Summary Disposition filed March 2, 2002 ("Plaintiff's summary disposition brief").

The parties' properties were once part of an overall parcel, owned by Henry W. Prince and his wife (both now deceased), which extended on both the east and west sides of highway US-23. The property on the east side of US-23 is lakefront property along the Lake Huron shore, located in a resort area of Greenbush Township which has fine sand beaches stretching for miles. For many years, Mr. Prince rented out a number of small cabins on the lakefront property. See Plaintiff's summary disposition brief with attached Affidavit of Joan Glass.

In 1964, Plaintiff's family began renting one of the Princes' cabins annually for their family vacations, and became friends with Mr. Prince. In 1967, Plaintiff and her husband (now deceased) purchased the non-riparian portion of the Princes' property, on the west side of U.S. 23, with the express easement for access to Lake Huron. At the time, Mr. Prince told them that he had his attorney draft the easement language to make sure that Plaintiff's family would always be able to freely use the beach and lake, and that if they ever decided to sell their property, the easement would make it much more valuable. Joan Glass affidavit.

From 1968 to 1974, while the Princes still owned the lakefront portion of the overall parcel, Plaintiff and her children spent the summers, weekends, and holidays on their property. Weather permitting, they were on the beach and in the water daily. They did not confine their activities to the

15-foot easement, but rather freely used the beach of the entire resort including the easement. Their activities included sunbathing, lounging and playing on the beach, swimming, and walking the beach along the shoreline. See Joan Glass affidavit with photos, and declarations of Fred Glass, Cheri Stearns, Carol Ebner, and Kristin Gambicki, attached to Plaintiff's summary disposition brief.

When Mr. Prince sold the lakefront property to Donald and Agnes Kushmaul in 1974, Plaintiff and her family continued their same activities, but confined them to the 15-foot easement and adjacent beach area. See affidavit and declarations attached to Plaintiff's summary disposition brief.

From 1974 to the present, Plaintiff and her family have continued to use the easement seasonally as they always have – to access the beach for lounging, playing, walking and swimming. Throughout this time, they did so without interference from Mr. or Mrs. Kushmaul, and they did so in the belief that their easement gave them that right. See Joan Glass affidavit (pars. 5 and 10) and declarations of Fred Glass, Cheri Stearns, Carol Ebner, Kristin Gambicki, Roy Stearns, Patrick Ebner, and Nicole Walters attached to Plaintiff's summary disposition brief.

Soon after Defendants purchased their property in August 1997 from Mrs. Kushmaul, strife over Plaintiffs' use of her easement began. Defendant Mr. Goeckel began harassing Plaintiff and her family, confronting them when they were walking on the easement, lying on the beach portion of the easement, or walking along the shoreline in front of his property. See affidavit and declarations attached to Plaintiff's summary disposition brief.

During his deposition, Mr. Goeckel admitted that he had parked his car on the easement. He also admitted that it is his habit to walk the beach along the Lake Huron shore above the water's edge, traveling in front of other owners' beach areas, and that it is also the custom of the public to do so. When asked whether he had any problem with Plaintiff doing so, he responded "Absolutely

not." Mrs. Kushmaul likewise testified that it was her custom, and that of the public, to walk along the beach. Transcripts attached to Plaintiff's summary disposition brief (Exhibits 4, 5).

Plaintiff filed her complaint on May 10, 2001, including claims of interference with and obstruction of express easement, prescriptive easement, and interference with right to walk along the Lake Huron shore (First Amended Complaint filed 9/17/01). Defendants filed a counterclaim alleging Plaintiff's use of the easement as being beyond its intended scope, and trespass on the beach area adjacent the easement (First Amended Counter Complaint and Jury Demand filed 9/12/01).

On July 16, 2001, the circuit court entered a Preliminary Injunctive Order setting out some restrictions on uses of the easement (limited to daylight hours, no bonfires or removal of vegetation), but protecting the status quo with respect to Plaintiff's historic use of the easement, as follows:

> Plaintiff and her guests may exercise plaintiff's right to use the easement for ingress and egress to Lake Huron, and to lounge on the easement as associated with such ingress and egress.

7/16/01 Order, p. 2

On February 5, 2002, Defendants filed a motion for summary disposition seeking judgment in their favor against Plaintiff's claim of prescriptive rights, and her claim of a right to walk along the Lake Huron shore below the ordinary high water mark. Defendants failed to file any supporting affidavits or documentary evidence in support of their motion.

On March 2, 2002, Plaintiff filed her brief opposing Defendants' motion and seeking summary disposition in her favor. With her brief, Plaintiff filed her affidavit with attached photos which show her and her family's use of the easement and beach over the decades, along with declarations of Plaintiff's family members, deposition transcripts, and various exhibits.

At a March 11, 2002 hearing on the cross motions for summary disposition, after both counsel presented arguments on the issue of whether Plaintiff has the right to walk along the Lake

Huron shore below the ordinary high-water mark, the circuit court indicated that it was taking the issue under advisement (TR 3/11/02, pp. 50-52). The remainder of the hearing focused on Plaintiffs' use and maintenance of the easement over the past 35 years, and Defendants' obstruction of her use (TR 3/11/02).

During the course of the hearing, grounds for agreement on disputed issues surfaced. Defendants' counsel agreed that sunbathing and lounging on the easement was understood by Defendants as being within the scope of the easement as granted (TR 3/11/02, pp. 28-39), while Plaintiff's counsel agreed to a prohibition of bonfires and fireworks on the easement (TR 3/11/02, p. 29). Other matters discussed, but not fully resolved, included the extent of Plaintiff's maintenance of the easement, and problems arising from Defendants' obstruction of the easement (TR 3/11/02, pp. 43-52).

The hearing concluded with the circuit court leaving counsel to the task of preparing an order including the various agreements reached on the record as to the scope, use, and maintenance of the easement. TR 3/11/02, pp. 50-52.

Subsequently, on April 3, 2002 the circuit court issued an Opinion in which it ruled on the beach walking issue, as follows:

> There is little dispute over the facts here . . . .
>
> . . . .
>
> . . . .
>
> Plaintiff claims that for a long time, both before and after purchasing the property, she and her family had used access to Lake Huron; had used the area around the beach for various purposes, and had walked up and down the beach without protest from anyone.
>
> The issues that remain are two. The first is the extent to which the fifteen foot easement can be used. This issue was settled by the parties, on the record, and a written judgment containing settlement is being prepared.
>
> The second issue is whether Plaintiff is allowed to use beach area for pedestrian travel lakeward of the high water mark. The Court has reviewed both arguments concerning this matter and is of the Opinion that there is no clear

> precedent here. 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.

An Order consistent with the Opinion was entered April 29, 2002.

In the meantime, Plaintiff's counsel was unsuccessful in her attempts to communicate with Defendants' counsel in order to prepare a consent judgment including the terms agreed upon at the March 11, 2002 hearing (Plaintiff's motion for settlement of order filed 5/31/02). On May 2, 2002 Defendants filed notice of substitution of a new attorney. On May 31, 2002, Plaintiff filed a motion for settlement of a proposed order implementing the agreed-upon terms, together with Plaintiff's supplemental affidavit with photos showing Defendants were obstructing the easement by parking their car on it.

At a hearing held June 10, 2002 on the motion for settlement of the proposed order, the specific language of the order was addressed, using Plaintiff's proposed order as the starting point. Counsel agreed on the record to specific language resolving most of the issues of use of the easement, including Plaintiff's right to sunbathe and lounge on the easement, and her agreement to refrain from driving any vehicles on the easement (TR 6/10/02, pp. 7-26). As to Defendants' parking of their car on the easement, Plaintiff's counsel strongly objected to any need for Defendants to do so, but reluctantly agreed to the circuit court's suggested language that Defendants could not park on the easement except to perform work, for no longer than three hours (TR 6/10/02, p. 29).

The circuit court then entered its June 26, 2002 Order Establishing Easement Rights ("Order") as a final order. Amongst other things, the Order permanently enjoins Defendants from obstructing Plaintiff's use of her easement to Lake Huron, as follows:

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. (Emphasis added).

Defendants then filed their claim of appeal in this Court, on July 15, 2002. Subsequently, post-judgment contempt proceedings and a further Order followed in the circuit court, as described below.

On July 25, 2002, Plaintiff filed a motion for a contempt order with affidavits showing that Defendants had already repeatedly violated the June 26, 2002 Order. Amongst other things, the affidavits attested that Defendants were obstructing the easement with a large "Keep Out" sign and with their car, which Defendants repeatedly parked on the easement virtually all day long. The circuit court entered an Order to Show Cause on August 1, 2002.

At a show cause hearing held October 16, 2002, the court heard testimony from Defendant Mr. Goeckel which conflicted with the testimony of Plaintiff and her witnesses Fred Glass and Carol Ebener. During their testimony, the witnesses referred to a diagram of Defendants' property (entered as hearing exhibit), showing that Defendants had ample room to park their vehicle on their parcel without parking on the easement. The court then ruled that Defendants had repeatedly violated the Order Establishing Easement Rights, and ordered Defendants to remove the sign blocking the easement. The court also ruled that it was amending the Order to prevent parking of any vehicles on the easement.

The circuit court then issued its October 22, 2002 Order In Re: Contempt of Court and Amending Order Establishing Easement Rights, ruling in relevant part that:

The Court has heard the testimony of the parties and it is clear to this Court that there is no reason for the parking of the vehicle on the easement, whether for the performing of work on the property or otherwise. Accordingly, it is hereby

ORDERED that the earlier Order is AMENDED to provide that no vehicle may be parked on the easement. It is

FURTHER ORDERED that since the sign located on the easement, as depicted on the exhibits introduced into evidence, does obstruct the easement, the same must therefore be removed within ten (10) days.

The Court finds that Defendant Richard Goeckel is in contempt of Court for violation of the easement in the respects set forth above, and it is

FURTHER ORDERED that Defendant Richard Goeckel pay six hundred dollars ($600) to Pamela S. Burt, attorney for Plaintiff, within thirty (30) days from the date of this Order.

Although Defendants' Brief on Appeal in this Court addresses as Issue II the circuit court's ruling prohibiting any parking on the easement as set out in the October 22, 2002 post-judgment Order, Plaintiffs' undersigned counsel was advised by the circuit court reporter that to date Defendants have not ordered a transcript of the October 16, 2002 show cause hearing.

ARGUMENT

Plaintiff-Appellee asks this Honorable Court to affirm the circuit court's rulings on both issues presented by Defendants-Appellants for review.

I. THE CIRCUIT COURT CORRECTLY APPLIED THE GREAT LAKES SUBMERGED LANDS ACT AND RELEVANT CASE LAW IN RULING THAT PLAINTIFF HAS THE RIGHT TO WALK THE BOTTOMLANDS OF LAKE HURON LYING BELOW AND LAKEWARDS OF THE NATURAL ORDINARY HIGH WATER MARK AS DEFINED IN MCL § 324.32502.

A. Standard of Review

The standard of review stated in Defendants-Appellants' brief is complete and correct.

B. Argument

The circuit court correctly ruled that Plaintiff has the fundamental right, like other members of the public, to walk along the bottomlands of Lake Huron between the high and low water marks. Although Plaintiff is unaware of any Michigan case squarely addressing this issue, the public's right to walk the bottomlands of the Great Lakes below and lakeward of the ordinary high water mark is protected under Michigan's Great Lakes Submerged Lands Act, MCL § 324.32501 *et seq*, in keeping with a long line of rulings by the highest Courts of our state and nation, as discussed below.

Defendants brief on appeal includes numerous authorities and points of law which have no direct relevance to this issue. Most of the cases cited by Defendants involve inland lakes and rivers, for which Defendants admit a different body of law applies than for the Great Lakes (Brief p. 4).

The single authority cited by Defendants lending support to their position is a Michigan Attorney General opinion, 1977-1978 OAG No. 5327 (1978). However, Attorney General opinions are not binding precedent on this Court. *Frey v Dept of Management & Budget*, 429 Mich 315, 337, 414 NW2d 873 (1987).

Moreover, the Attorney General opinion entirely ignores the public trust doctrine – a venerable doctrine which is codified in Michigan's Great Lakes Submerged Lands Act. The opinion cites a 1955 statute (1955 PA 274, MCL 322.701 *et seq*) which has since been repealed and replaced by MCL 324.32501 *et seq*, (the Great Lakes Submerged Lands Act, P.A. 1994, No. 451, added by P.A. 1995, No. 59, § 1). The provisions of the Great Lakes Submerged Lands Act, discussed below, deprive the 1978 Attorney General opinion of any precedential value whatever.[1]

Under the Great Lakes Submerged Lands Act, the interests of the public in the Lake Huron bottomlands below the high water mark is statutorily protected:

> 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 lakewards 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.

MCL § 324.32502 (emphasis added).

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[1] The 1978 opinion also cites mere dicta from *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930), in which the Court quotes language from a Wisconsin case. The *Hilt* case preceded by some 65 years the Michigan Legislature's current codification of the public trust doctrine in the Great Lakes Submerged Lands Act.

This statutory protection by Michigan of the waters and bottomlands of the Great Lakes "lying below and lakewards of the natural ordinary high-water mark" is consistent with United States and Michigan Supreme Court decisions adopting what is known as the public trust doctrine.

The public trust doctrine dates back hundreds of years to Roman law and English common law. According to the Institutes of Justinian (2.1.1) in Roman Law:

> By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea.

Emphasis added. See Shafer, C.A., *Public Rights in Michigan's Streams: Toward a Modern Definition of Navigability*, 45 Wayne L. Rev. 9 (1999). The rule under the English common law was equally forceful. As noted by the U. S. Supreme Court in *Shively v Bowlby*, 152 US 1, 10 (1894) (emphasis added):

> By the common law, 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 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, as of waste and unoccupied 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.

From these historic roots sprang the public trust doctrine, the legal concept that natural resources, particularly the beds and waters of the seacoast and navigable lakes and streams, are so important to the public that they are incapable of purely private ownership and control.

The United States Supreme Court, in the seminal case of *Illinois Central R Co v State of Illinois*, 146 US 387 (1892), ruled that the public trust doctrine applies with all its force to the Great Lakes. After tracing the common law routes of the public trust doctrine, the Court held:

> The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment – a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefor, that the

> same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

146 US at 436-37. The Court went on to hold that the State of Illinois holds the title to the lands under the navigable waters of Lake Michigan "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." 146 US at 451. This trust, the Court ruled, cannot be abdicated by the state (146 US at 453).

Two years after *Illinois Central*, the U.S. Supreme Court decided *Shively v Bowlby*, 152 US 1 (1894), a case concerning the scope of a federal land grant bounded by the Columbia River in Oregon. After carefully analyzing the history of the public trust doctrine, the Court concluded that it extends to all lands, of all our nation's navigable waters, up to the high-water mark:

> The congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery . . . shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals, as private property . . . .

152 US at 49 (emphasis added).

Within a decade of the U. S. Supreme Court's *Illinois Central* and *Shiveley* decisions, the Michigan Supreme Court likewise held, in *State v Lake St. Clair Fishing & Shooting Club*, 127 Mich 580, 585; 87 NW 117 (1901) that the public trust in the waters of the Great Lakes extends to the high-water mark:

> We must take judicial notice that the Great Lakes are navigable waters, and while, as in all cases of water, there must be a line where the water meets the shore, and consequently shallows, the legal characteristics of navigable water attach to all of it. It is an old and well-settled rule that the privileges of the public are not limited to the channel, or to those parts which are most frequently used, but extend to high-water mark in all tide waters.

More recently, in another Great Lakes case, *Peterman v Dept of Natural Resources*, 446 Mich 177, 521 NW2d 499 (1994), the Michigan Supreme Court emphasized the vitality of the public trust doctrine on both the state and federal levels:

> 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 . . . .'
>
> . . . .
>
> Furthermore, Michigan's power over navigation 'is limited by the superior power of the general Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against any State action. [FN] The United States possesses a navigational servitude that, by virtue of the commerce power, is dominant over both the states and private landowners . . . . In short, the navigable waters 'are the public property of the nation . . . .'
>
> . . . . Littoral rights must give way to any use of the tide lands and water flowing over them that serves the public right of navigation.

446 Mich 194-196.

Consistent with the venerable legal authorities establishing that the public trust extends to the high water mark of the Great Lakes are the findings from a national, federally-funded project on the public trust doctrine focusing on coastal states of the Great Lakes and both sea coasts. *National Public Trust Study, Putting the Public Trust Doctrine to Work, Executive Summary*, Coastal States Organization (1990). Appendix Exhibit 1. The steering committee for the study included the Chief of the Great Lakes Shoreland Section of the Michigan Department of Natural Resources. Research for the study was contributed by state government representatives from the Great Lakes states of

Michigan, Illinois, Ohio, Pennsylvania, and New York

The National Public Trust Study found that:

> In general, the upper boundary of public trust shorelands, whether those lands are privately or publicly held, is the ordinary high water line . . . . For freshwater shore-lands, this term generally means the line to which high water reaches under normal conditions, not the line reached in floods nor by the great annual rises of a river. In all situations, however, the location and description of the upper boundary of trust shorelands is determined by local law, custom and practice.

App. Exhibit 1, p. 4. Further, the study notes current recognized public uses of trust lands as including strolling:

> As society and technology have evolved, however, the public's use of trust lands and waters has necessarily changed. Over the centuries the Public Trust Doctrine has kept pace with the changing times, assuring the public's continued use and enjoyment of these lands and waters. Recognized public uses of trust lands today include fishing, bathing, sun bathing, swimming, strolling, pushing a baby stroller, hunting, fowling, both recreational and commercial navigation, environmental protection, preservation of scenic beauty, and perhaps the most basic use, just being there.

App. Exhibit 1, p. 5 (emphasis added). In its conclusion, the study notes that:

> In all States, the Public Trust Doctrine assures the public some right of lateral access along shorelands between the ordinary high and low water lines. For the most part, the public's lateral access includes recreational use of the shorelands. Maine and Massachusetts, however, do not recognize the public's right to use the tidelands for solely recreational purposes.

App. Exhibit 1, p. 10.

The statutory protection found in MCL § 324.32502 sweeps with the same broad stroke as that of the public trust doctrine. The statute protects the public's right to use the waters and bottomlands of the Great Lakes lying below the natural ordinary high-water mark for "hunting, fishing, swimming, pleasure boating, or navigation." Clearly, all of these uses often involve walking

on the bottomlands below the high-water.[2] Defendants' argument that public use of the bottomlands for walking is somehow not embraced within § 324.32502 thus rings hollow.

Consistent with the authorities which establish that the public trust extends to the high water mark of the Great Lakes, and particularly MCL § 324.32502, is the local custom of the public of walking along the Lake Huron shorelands in Greenbush Township, where Defendants' riparian property is located. In their deposition testimony, Defendant Mr. Goeckel and his predecessor in title Mrs. Kushmaul both confirmed that it has been their own custom, as well as that of the public, to walk the beach above the water's edge – an area between the low and high water marks. In fact, when Mr. Goeckel was asked whether he objected to Plaintiff walking above the water's edge, he responded "Absolutely not" (Plaintiff's summary disposition brief, Exhibit 4). Like other members of the public, Plaintiff and her family have used the shorelands of Lake Huron for beach walking and swimming for more than 30 years. Joan Glass affidavit, pars. 5, 10).

The circuit court correctly ruled in its April 29, 2002 Order that the Great Lakes Submerged Lands Act, particularly MCL § 324,32502, protects the right of Plaintiff (and other members of the public) to walk the bottomlands of Lake Huron lying below and lakeward of the statutorily-defined natural ordinary high water mark.

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[2] Indeed, the definition of "navigate" encompasses the meaning "to walk or find one's way on, in, or across: *It was difficult to navigate the stairs in the dark*" (*Random House Webster's Unabridged Dictionary*, 2 ed (1999).

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS EQUITABLE POWER IN MODIFYING ITS PRIOR ORDER BY PROHIBITING ANY VEHICLE PARKING ON THE EASEMENT, AFTER HEARING TESTIMONY ESTABLISHING THAT DEFENDANTS REPEATEDLY PARKED ON THE EASEMENT IN CONTEMPT OF THE PRIOR ORDER.

A. Standard of Review

The standard of review stated in Defendants-Appellants brief is complete and correct.

B. Argument

Defendants seek reversal of the Court's October 22, 2002 Order modifying the June 26, 2002 final Order Establishing Easement Rights on the sole ground that "no request had been made to change the previously stipulated order of the parties and the Court, on its own sua sponte ruling [sic] that the Defendants could no longer park a vehicle on the easement for any purpose" (Brief p. 14). Defendants cite no legal authorities at all to support their position.

It has long been settled that equity may shape her relief according to the situation present when the time for decree arrives, and that an injunction is always subject to modification if the facts merit it. *Opal Lake Assoc v Michaywe' Ltd Partnership*, 47 Mich App 354, 367; 209 NW2d 478 (1973). As held in *Hagen v Hagen*, 202 Mich App 254, 508 NW2d 196 (1993), it is well within the equitable power of the trial court to modify a judgment as the nature of changed circumstances may demand, particularly where a party's own actions causes the changed circumstances.

Further, MCR 2.614(C) provides:

> **Injunction Pending Appeal.** If an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the [circuit] court may suspend, modify, restore, or grant an injunction during the pendency of the appeal on terms as to bond or otherwise that are proper for the security of the adverse party's rights.

As noted in *Michigan Court Rules Practice*, Dean & Longhofer (1998), § 2614.5 (p. 538), the power of the circuit court to preserve the status quo pending appeal "is broad enough to cover all possible

situations requiring the protection of the parties' rights pending appeal."

Here, Plaintiff's counsel strongly objected at the June 10, 2002 hearing to any need for Defendants to ever park a vehicle on the easement, but reluctantly agreed to the circuit court's suggested provision that Defendants be allowed to park on the easement only to perform necessary work on their property, and for no longer than three hours (TR 6/10/02, p. 29). This language was then incorporated in the June 26, 2002 final Order, which prohibits Defendants from "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." (Order 6/26/02, p. 2, par. 3).

Within a month of the June 26, 2002 final Order, Defendants had repeatedly parked their car on the easement virtually all day long – blocking Plaintiff's use of the easement (affidavits of Joan Glass and Fred Glass attached to Plaintiff's 7/25/02 motion for contempt order). At the October 16, 2002 show cause hearing on Defendants' contempt, the circuit court heard the testimony of numerous witnesses, including that of Plaintiff and Defendant Mr. Goeckel, before ruling that Defendants had repeatedly violated the parking provision of the June 26, 2002 Order. The court also had before it a diagram of Defendants' property, which witnesses referred to in their testimony, showing that Defendants had ample room to park their car on their parcel without parking it on the easement.[3]

By modifying the June 26, 2002 Order to provide that "no vehicle may be parked on the easement", the circuit court properly exercised its equitable power according to the changed circumstances arising from Defendants' own contemptuous acts. Although the court had itself

[3] The transcript of the 10/16/02 hearing is unavailable inasmuch as Defendants never ordered it from the court reporter.

earlier suggested the language in the June 26, 2002 Order to the effect that limited parking would be allowed, Defendants' subsequent and immediate contempt of the Order by repeatedly parking his car on the easement for long periods convinced the court that parking must be prohibited entirely in order to protect Plaintiff's right to use the easement.

In its October 22, 2002 Order In Re: Contempt of Court and Amending Order Establishing Easement Rights, the circuit court properly exercised its equitable power by modifying the June 26, 2002 Order to prohibit parking on the easement.

CONCLUSION

Plaintiff asks this Honorable Court to affirm the circuit court's rulings on both issues presented by Defendants for review. With respect to Defendants' first issue, the circuit court correctly applied the public trust doctrine as protected by the Great Lakes Submerged Lands Act in ruling that Plaintiff has the right to walk the Lake Huron bottomlands below and lakeward of the ordinary high water mark as defined in MCL § 324.32502. As to Defendants' second issue, the circuit court properly exercised its equitable power to protect Plaintiff's easement rights against Defendants' repeated violation of the parking provisions of the June 26, 2002 Order, by prohibiting any parking at all. The Court should affirm the circuit court in both respects.

Oral argument is not believed to be necessary because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the Court's deliberation (MCR 7.214(E)(1)(b)). However, if the Court determines that oral argument is necessary, Plainitiff hereby requests oral argument.

Respectfully submitted,

Dated: December 23, 2002

Pamela S. Burt (P47857)
Attorney for Plaintiff-Appellee