STATE OF MICHIGAN
IN THE SUPREME COURT

JOAN M. GLASS,

Plaintiff-Appellant,

v

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants-Appellees.
/

Supreme Court Docket No. 126409

Court of Appeals Docket No. 242641

Alcona Circuit Court No. 01-10713-CK

PLAINTIFF-APPELLANT'S BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

ISSUE: Did the circuit court properly grant summary disposition in plaintiff's favor that as a member of the public she has the right, under Michigan's public trust doctrine as established by long-standing decisions of this Court and as codified in the Great Lakes Submerged Lands Act, to walk the shore of Lake Huron below the ordinary high water mark, free from obstruction or interference from defendants, riparian owners on Lake Huron?

The circuit court answered "yes."

Plaintiff-Appellant answers "yes."

Defendants-Appellees answer "no."

The Court of Appeals answered "no."

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT

The decision of the Court of Appeals which plaintiff-appellant seeks to have reviewed is dated May 13, 2004. This Court has jurisdiction of this appeal of the decision of the Court of Appeals under Const 1963, art 6, § 4 and MCR 7.301(A)(2).

STATEMENT OF FACTS

Plaintiff has owned her residential property on the west side of US-23 in Greenbush Township, Alcona County since 1967. Defendants have owned property on the east side of US-23, across the highway from plaintiff's home and fronting Lake Huron, since 1997. Plaintiff's 1967 deed to her property expressly grants her a 15-foot easement across defendants' property "for ingress and egress to Lake Huron." Exhibits 1, 2 attached to Plaintiff's Brief Opposing Defendants' Motion for Summary Disposition filed March 2, 2002 in the circuit court ("plaintiff's summary disposition brief").

As set out in the original pleadings, the dispute between the parties initially centered on the scope of use of the 15-foot easement itself. In count 1 of her two-count complaint filed May 10, 2001, plaintiff alleged that defendants had interfered with and obstructed her use of the express easement for ingress and egress to Lake Huron. Count 2 alleged prescriptive rights for sunbathing, picnicking and lounging on the 15-foot easement, which plaintiff claimed she, her family, and their guests had been doing for 30 years. In their answer, defendants generally denied the scope of use claimed by plaintiff, and in their counter-complaint sought injunctive relief against plaintiff's use of the easement for anything more than ingress and egress to Lake Huron.

On June 21, 2001 the circuit court entered an Order to Show Cause as to why an order should not enter enjoining plaintiff according to the demand of the counter-complaint. During a show cause hearing on July 9, 2001, the parties reached agreement as to the terms of a preliminary injunctive order (TR 7/9/2001, pp. 12-14).

On July 16, 2001 the circuit court entered a Preliminary Injunctive Order, approved by counsel for both parties, setting out restrictions on uses of the easement, but protecting the status quo with respect to plaintiff's claimed historic use of the easement for sunbathing and lounging.

On September 12, 2001 defendants filed their First Amended Counter-Complaint adding a second counterclaim seeking injunctive relief against alleged trespass by plaintiff on property adjacent to the easement, claiming that:

> [Plaintiff] Joan M. Glass has, without lawful right trespassed upon the property of your Defendants adjacent to the easement which is the subject of the initial complaint and counter complaint interrupting and interfering with your Defendants exclusive right to possession.

In turn, plaintiff filed her First Amended Complaint on September 17, 2001 adding a third count seeking injunctive relief against defendants' interference with her right to walk the shore of Lake Huron below the ordinary high-water mark, claiming that:

> The shoreland and waters of Lake Huron lying below and lakeward of the natural ordinary high-water mark are subject, under federal and state statutory law and common law, to a navigational servitude held by the State of Michigan, and a dominant navigational servitude held by the United States, under which such land and water is held in trust for the benefit of the people of this state and country for navigational and recreational activities.
>
> Under local custom and practice, members of the public have for many years walked along the shore of Lake Huron lying lakeward of the natural ordinary high-water mark in the area of defendants' property, without interference by lakefront property owners.
>
> As a resident and citizen of the State of Michigan and the United States of America, plaintiff 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.
>
> Defendant Mr. Goeckel has interfered with, and/or has threatened to interfere with, plaintiff's 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.

Likewise, plaintiff denied defendants' allegations of trespass in the area adjacent to the easement "to the extent that plaintiff has the right to traverse the shore of Lake Huron below the natural ordinary high-water mark." Answer to First Amended Counter-Complaint (9/17/2001).

On February 5, 2002 defendants filed a motion for summary disposition under MCR 2.116(C)(8) and (9) seeking judgment in their favor against plaintiff's claim that she had the right to walk along the Lake Huron shore below the ordinary high water mark. Defendants also sought summary disposition under MCR 2.116(C)(8) and (10) of plaintiff's claim of prescriptive rights with respect to the easement. Defendants filed no supporting affidavits or documentary evidence with their motion.

On March 2, 2002 plaintiff filed her brief opposing defendants' motion and seeking summary disposition in her favor. Included were plaintiff's own affidavit, declarations of witnesses including family members, and transcripts of depositions of defendant Richard Goeckel and his predecessor in title, Agnes Kushmaul.

As set out in plaintiff's affidavit and the witnesses' declarations, the parties' properties were once part of an overall parcel lying east and west of US-23. In 1967 plaintiff and her husband (now deceased) purchased the non-riparian portion of the overall parcel on the west side of U.S. 23, along with the express easement for access to Lake Huron. Throughout the decades since 1967, plaintiff and her family used the easement seasonally for lounging and sunbathing, and for access to the Lake Huron shore for walking the beach and swimming. In 1993 plaintiff moved her full-time residence to the cabin on her property. Affidavit of J. Glass; Declarations of F. Glass, C. Stearns, C. Ebner, K. Gambicki, R. Stearns, P. Ebner, N. Walters; and letter of D. Raths attached to plaintiff's summary disposition brief.

The portion of the original overall parcel lying on the east side of US-23 across from plaintiff's home included 400 feet of lake frontage located on a part of Lake Huron in northeast Michigan which has sand beaches stretching for miles. In 1974 Donald and Agnes Kushmaul purchased this lake front portion, and the Kushmauls in turn sold the north 135 feet to defendants

in 1997. Plaintiff's easement is located on the far north 15 feet of what is now defendants' property. J. Glass affidavit and Exhibits 1-3 attached to plaintiff's summary disposition brief.

Plaintiff's affidavit and her witnesses' declarations established that soon after defendants purchased their property in August 1997, strife over plaintiff's use of the 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 the deposition of defendant Mr. Goeckel, plaintiff's counsel questioned him about his beach walking habits, and those of the public, along the Lake Huron shore. Mr. Goeckel 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' land, and that it is also the custom of the public to do so. He also admitted that he had no problem with strangers or anyone walking along the beach on the sand near the water's edge, which he understood belonged to the State:

> Q. Do strangers walk along the beach in front of your property on a regular basis?
>
> A. Yes.
>
> Q. Travel over your property and other beach-front properties?
>
> A. They're not traveling over my property. They're traveling next to the water's edge, which is the State of Michigan's property.
>
> . . . .
>
> Q. Do you walk yourself along the beach near the water line traveling across other people's property?
>
> A. Yes, I do.
>
> Q. That is the custom, as you understand it, for people to walk the beach freely along near the water?
>
> A. Yes.

. . . .

Q. Okay. You indicated that you have no problem with strangers or anyone walking along the beach near the water's edge?

A. That's correct.

Q. And would that include walking on dry sand next to the water's edge? And by next to it I mean within a foot of the water's edge or two.

A. I have no problem with anybody doing that.

Q. So when people walk by on the beach in front of your home they don't walk in the water, their feet aren't wet?

A. That's fairly – that's pretty general. Some people walk in the water, some people walk on the sand. Depends if they got shoes on or they're barefoot.

Exhibit 4 attached to plaintiff's summary disposition brief (copy attached as Appendix 3).

Agnes Kushmaul, defendants' predecessor in title, likewise testified in her deposition that it was her custom, and that of the public, to walk along the beach. Plaintiff's summary disposition brief Exhibit 5, pp. 14-15.

In her cross motion for summary disposition, plaintiff supported her right as a member of the public to walk the shore of Lake Huron below the ordinary high-water mark by focusing on case law adopting the public trust doctrine, and the codification of that case law in the Great Lakes Submerged Lands Act, MCL 324.32501 *et seq*, particularly MCL 324.32502. Plaintiff conceded, however, that she was unaware of any Michigan case squarely addressing the issue (see plaintiff's summary disposition brief argument, pp 11-15).

At a March 11, 2002 hearing on defendants' motion for summary disposition, counsel for both parties presented arguments concerning plaintiff's right to walk the Lake Huron shore as a member of the public (TR 3/11/02, pp. 3-27). During ensuing arguments concerning the scope of use of the 15-foot easement itself, general agreement as to its scope and use was reached on the record (TR 3/11/02, pp. 27-51). The hearing concluded with the court leaving it to counsel to

prepare an order implementing the agreed-upon terms with respect to the scope of use of the easement itself (TR 3/11/02, pp. 50-52). As to whether plaintiff has the right to walk along the Lake Huron shore below the high-water mark, the court indicated that it was taking the issue under advisement, stating "I'll just have to do some research. I'll let you know what I come up with, if I can find anything at all." (TR 3/11/02, p. 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.

Appendix 2. An Order consistent with this Opinion was entered April 29, 2002.

Subsequently, on June 26, 2002 the circuit court entered its Order Establishing Easement Rights implementing the agreed-upon terms concerning the scope of use of the easement itself. Because it resolved the last remaining claim, this order was entered as final.

Defendants filed their claim of appeal in the Court of Appeals on July 15, 2002.

The parties completed their briefing in the Court of Appeals by January 22, 2003. In the parties' appeal briefs, the decision in *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930), upon which the Court of Appeals ultimately based its decision, was discussed only nominally (Appellant's Amended Brief on Appeal, p. 4; Appellee's Amended Brief on Appeal, p. 7, footnote 1). Eleven months later, in December 2003, Save Our Shoreline (SOS), an organization of Great Lakes riparian property owners, filed a belated Motion to Extend Time for Filing Amicus Curiae Brief. In its Order dated December 18, 2003, the Court of Appeals granted the motion and accepted SOS' amicus brief, which relies principally upon the *Hilt* case in lengthy arguments (pp. 3, 10, 11). Oral arguments were heard by the Court of Appeals less than a month later, on January 15, 2004. The Court of Appeals entered its published decision on May 13, 2004, reversing the circuit court's ruling (Appendix 1).

ARGUMENT

ISSUE: The circuit court properly granted summary disposition in plaintiff's favor that as a member of the public she has the right, under Michigan's public trust doctrine as established by long-standing decisions of this Court and as codified in the Great Lakes Submerged Lands Act, to walk the shore of Lake Huron below the ordinary high water mark, free from obstruction or interference from defendants, riparian owners on Lake Huron.

1. Introduction

The circuit court properly granted summary disposition in plaintiff's favor on her claim that, as a member of the public, she has the right to walk the shore of Lake Huron below the ordinary high water mark, free from interference or obstruction by the defendants. The Court of Appeals reversed the circuit court's ruling, holding under *Hilt v Weber*, 252 Mich 198 (1930), that the defendants as riparian owners have exclusive rights to the shore right up to the water's

edge, so that plaintiff must walk in the water to avoid trespassing on defendants' riparian rights (Appendix 1).

The decision of the Court of Appeals, released for publishing, misinterprets this Court's decision in *Hilt v Weber* and in doing so ignores a venerable body of decisions by the highest courts of our state and nation applying the public trust doctrine to Michigan's Great Lakes shores. These decisions, handed down in the late 1800's and early 1900's, include two landmark rulings by the United States Supreme Court in the late 1800's, and a trilogy of seminal cases by this Court which followed them closely in time. Under these decisions, the law of our state was unequivocally established a century ago as vesting title in the State of Michigan to all the lands and waters of the Great Lakes to the high water mark, held in trust for the use and welfare of the people.

By ignoring these venerable authorities, and the act of the Michigan Legislature which codifies them, the Court of Appeals decision deprives plaintiff of her valuable right, as a citizen of this state and nation, to walk the foreshore of Lake Huron for enjoyment of its waters and scenic beauty – a right plaintiff has been exercising for decades. Because the rights of millions of other members of the public in and to the lands and waters of thousands of miles of Great Lakes foreshores are likewise impacted, the ruling of the Court of Appeals is of grave moment.

Reversing the Court of Appeals decision would not entail overruling any of this Court's prior decisions. The decision by the Court of Appeals reflects a misinterpretation of *Hilt* arising from ambiguous language and dicta in the decision which has generated confusion for the courts over the years since. This confusion, in so important an area of law involving the rights of literally millions of people, begs for clarification by this Honorable Court.

2. Standard of Review

The Court of Appeals in its decision correctly treated the circuit court's ruling as having granted plaintiff summary disposition under MCR 2.116(C)(10), and set out the proper standard for reviewing a decision granting summary disposition as being de novo. As held by the Court of Appeals, the standard the circuit court is required to use is:

> 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. The nonmoving party has the burden of rebutting the motion by showing, through evidentiary materials, that a genuine issue of disputed fact does exist.

Court of Appeals decision p. 3 (citations omitted). Further, summary disposition is properly granted to the nonmoving party under MCR 2.116(I)(2) if the court determines that the nonmoving party is entitled to judgment as a matter of law. *Id*.

3. Analysis

Plaintiff, a 73-year old woman, claimed in her amended complaint that she has the right as "a resident and citizen of the State of Michigan and the United States of America . . . 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." She based her claim on "federal and state statutory law and common law" holding that such land and water is "in trust for the benefit of the people of this state and country for navigational and recreational activities." Amended complaint ¶¶ 22, 24. In her cross motion for summary disposition plaintiff argued that her claim of such right is based on the public trust doctrine as developed by federal and state case law, and as codified in the Great Lakes Submerged Lands Act, MCL 324.32501 *et seq*, particularly MCL 324.32502.[1]

[1] The Act is now codified in Michigan's Natural Resources and Environmental Protection Act ("NREPA"), Article III, Chapter 1, Part 325 by virtue of P.A. 1994, No. 451, added by P.A. 1995, No. 59, § 1, MCL 324.32501 *et*

In an Opinion dated April 3, 2002, the circuit court granted summary disposition in plaintiff's favor on the issue, ruling as follows:

> 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 circuit court went on to hold that the Great Lakes Submerged Land Act supports plaintiff's argument that she has "the right to use the shore of Lake Huron lying below and lakewards of the natural ordinary high water mark for pedestrian travel." 4/3/2002 Opinion, p. 2. Equally important, the circuit court's ruling that plaintiff has the right to travel by foot along the Lake Huron foreshore below the high water mark is supported by one of the most longstanding and widely applied legal doctrines in the jurisprudence of our nation and its states, the public trust doctrine.[2]

A. The evolution of the public trust doctrine from the common law, as applied to the foreshores of the Great Lakes under decisions by the United States Supreme Court and this Court, establishes that the public's rights of navigation and recreation extend to the ordinary high water mark.

A proper consideration of the central question presented to this Court requires a careful review of the common law roots of the public trust doctrine, as well as its evolution in the jurisprudence of the United States Supreme Court and this Court, and in federal and state legislation. Such a review is equally essential to an understanding of the nature and magnitude of the errors made by the Court of Appeals in its decision in this case.

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seq. A complete copy of the text of the Great Lakes Submerged Lands Act is attached as Appendix 4.

[2] The term "foreshore" as used here and subsequently in referring to the area of the Lake Huron shore at issue, lying between the high and low water marks, has as its dictionary definition: "The part of a shore that lies between high and low water marks." *The American Heritage College Dictionary*, 3rd ed, 2000.

The essence of the public trust doctrine is that certain natural resources, particularly the beds and waters of the seacoast and navigable lakes and streams, are so important to the public that they should never be the subject of purely private ownership and control. Slade, David C., *Putting the Public Trust Doctrine to Work*, p 5 (2d ed 1997). A recent description of the doctrine and its evolution is found in Kenneth Manaster & Daniel Selmi, 1 State Environmental Law at §4.9 (2003):

> The public trust doctrine is an important component of disputes over water-related resources. The doctrine's origins are ancient. Roman law held that '[b]y the law of nature' certain resources are considered 'common to all': air, running water, sea, and shores of the sea. As the common law evolved in England, the King owned the beds of navigable waters, but the public had the right to use these waters. From this background evolved the principle of early American law that the various states own the tidelands and their associated resources, but hold them in 'trust' for the people. Consequently, the states cannot dispose of these public trust resources at will to private individuals.
>
> Although the courts recognized and enforced public trust constraints in the nineteenth century, the doctrine lay quiescent through much of the present century. Then, beginning in the late 1960's, it was revived and expanded to cover additional natural resources and to place new constraints on state management of those resources . . . .

(Citations omitted). This expansion of the public trust doctrine in recent decades was described in *Gillen v City of Neenah*, 219 Wis2d 806, 580 NW2d 628, 633 (1998):

> Although the public trust doctrine was originally designed to protect commercial navigation, the doctrine has been expanded to safeguard the public's use of navigable waters for enjoyment of scenic beauty, as well as for recreational and nonpecuniary purposes.

In similar terms, but ones more precisely relevant to the question presented here, the New Jersey Supreme Court has described the scope of the doctrine as follows:

> The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people. The public's right to use the tidal lands and water encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities.

Borough of Neptune City v Borough of Avon-by-the-Sea, 61 NJ 296, 294 A2d 47 (1972).

Under the old English common law of the tidal seas, as it existed at the time of the American Revolution, the title and dominion of the sea where the tide ebbs and flows, *and of all lands below high water mark*, were in the king. *Shively v Bowlby*, 152 US 1, 11 (1894). These waters and lands were incapable of ordinary and private occupation, cultivation, or improvement. *Id.* Their natural and primary uses were public in nature – as highways of navigation and commerce, domestic and foreign. The title of such lands belonged to the king as the sovereign, while dominion over them was vested in him as the representative of the nation, for the welfare of the public. *Id.*

As to the "shore" of the sea (the "foreshore" here), the leading common-law authority on the subject was Lord Hale, who in his treatise *De Jure Maris*, stated:

> The shore is that ground that is between the ordinary high-water and low-water mark. This doth prima facie and of common right belong to the king both in the shore of the sea and the shore of the arms of the sea. Harg. Law Tracts, pp. 11, 12.

Shively, 152 US at 14.[3]

Some of the important public policies underlying the general rule that the foreshore of the sea belonged to the king in trust for the people for their use as natural highways can be found in the observations of Justice Best in *Blundell v Catterall*, 5 *B & Ald* 268, 106 *Eng Rep* 1190 (KB 1821), quoted with approval in *Illinois Central RR Co v Illinois*, 146 US 387, 455-56 (1892)

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[3] The public trust doctrine in its support of public use of the foreshore is even more ancient. Professor Douglas Grant in a major article on the doctrine's evolution noted, "Historically under English law and before that under Roman law, the air – like running water, the sea, and the seashore – was common property usable by all. *Arnold v. Mundy*, 6 NJL. 1, 49 (1821); Justinian Institutes 2.1.1 (J.B. Moyle transl. 4th ed. 1889); Samuel C. Wiel, Natural Communism: Air, Water, Oil, Sea, and Seashore, 47 Harv L Rev 425-26 (1934); Underpinnings of the Public Trust doctrine: Lessons from Illinois Central Railroad, 2001 Arizona State L Rev 849, 878, n. 167.

and *Matthews v Bay Head Improvement Assoc*, 95 NJ 306, 316-317; 471 A2d 355 (NJ 1984).[4] Justice Best observed that most of the seashore was barren and "useful only as a boundary and an approach to the sea; and therefore, ever has been, and ever should continue common to all who have occasion to resort to the sea." 5 *B & Ald* at 283-84; 106 *Eng Rep* at 1196. He went on to say that:

> The interruption of free access to the sea is a public nuisance . . . . The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. *If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours.*

5 *B & Ald* at 287, 106 *Eng Rep* at 1197 (emphasis added); *Matthews, supra*, 95 NJ at 316-317.

. The first American court to apply the public trust doctrine was the New Jersey Supreme Court, in the seminal case of *Arnold v Mundy*, 6 NJL 1 (Sup Ct 1821), holding that the public's paramount rights under the public trust doctrine rendered a private grant for dredging of an oyster bed on Raritan Bay invalid. Relying heavily on the *Arnold* decision, the United State Supreme Court applied the public trust doctrine as the law governing the navigable waters of our nation in *Martin v Waddell's Lessee*, 41 US 367 (1842), holding that lands under navigable waters are within the public trust given to the new states upon their entry into the Union.

Some 50 years later, in 1892 the United States Supreme Court rendered its decision in the landmark case of *Illinois Central RR Co v Illinois*, 146 US 387 (1892). The case, which unequivocally extended the public trust doctrine to our Great Lakes, is cited in literally hundreds of state court cases nationwide and has been lauded as the "lodestar in American public trust

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[4] *Blundell v Catterall* was not decided until 1821, many decades after the American Revolution, so that it is not part of the old English common law of tidal seas upon which the public trust doctrine is based, as discussed below. It is not cited here as common-law precedent, but rather for its articulation of relevant policy concerns.

law." [5] At issue in *Illinois Central* was ownership of over a mile of shoreline along Chicago's lakefront, occupied by the railroad company's tracks, depots, warehouses, and piers, including adjacent submerged lands in Lake Michigan. The Illinois Legislature had in 1869 granted to the railroad all of the state's right and title to the property in exchange for a percentage of the railroad's profits. Four years later, in 1873, the Illinois Legislature repealed the original act.

In upholding the legislature's repeal of the sale of the Chicago waterfront, the Court in *Illinois Central* elevated the public trust doctrine to a status of quasi-constitutional dimension. The Court ruled that not only could the legislature repeal the act of the prior legislature, but that the Court itself could independently invalidate the sale if it found that the state's trustee obligations under the public trust doctrine had been abdicated. In thus ruling the sale invalid, the Court stated:

> The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.

146 US at 453.

In rendering its decision in *Illinois Central*, the Court first re-affirmed the basic principle, applying to all the states, that Illinois was admitted "to the Union in 1818 on an equal footing with the original states, in all respects." 146 US at 434. The boundaries of Illinois were set by Congress and accepted by the state in its first constitution, and include within their eastern line all that portion of Lake Michigan lying east of the mainland of the state and the middle of the lake. 146 US at 434.

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[5] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 473, 489 (1970).

Of critical and fundamental significance to the jurisprudence of the Great Lakes states is the Court's ruling in *Illinois Central* that the law of the seas under the English common law, encompassing all waters subject to the ebb and flow of the tide, applies not only to land covered by tide waters in the United States but also to the Great Lakes. 146 US at 435-436. After tracing the origin of the law of tidal seas in the English common law, the Court held that although the Great Lakes are not in any appreciable respect affected by the tide, on their waters "a large commerce is carried on, exceeding in many instances the entire commerce of states on the borders of the sea." 146 US at 436. Finding no reason to apply any different rule to the Great Lakes than that which applies to the tidal seas, the Court ruled:

> The same [public trust] doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects *they are inland seas*, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes.
>
> . . . .
>
> The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment . . . . We hold, therefore, 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 434-436 (emphasis added).

Two years after *Illinois Central*, the United States Supreme Court rendered its decision in *Shively v Bowlby*, 152 US 1 (1894), a case which the Court later agreed was "the seminal case in American public trust jurisprudence." *Phillips Petroleum Co v Mississippi*, 484 US 469, 473 (1988). In *Shively* , the disputed land was below the high-water mark in the Columbia river in

Oregon. The plaintiffs claimed title to the land on the basis of deeds received from Oregon under a state statute permitting riparian owners to purchase portions of the state's tidal and overflowed lands abutting their property so that they could improve them with public wharves and the like (152 US at 52-53). If a riparian owner failed to purchase the abutting lands within a prescribed time, any resident of Oregon could do so. Although the defendant in *Shively* owned the uplands abutting the land in dispute, he never applied to the state to purchase it. Instead, the plaintiffs purchased the land from the state and built a wharf which serviced ocean and river freight crafts. *Id.*

The Court in *Shively* affirmed the Oregon Supreme Court's ruling that the plaintiffs had title to the land under Oregon law, under which the upland owner has no title in adjoining lands below high-water mark. Instead, the title is in the state to convey to anyone free of any right in the upland owner, but subject always to the public's paramount right of navigation. In reaching this conclusion, the Court held that the common law of England at the time of emigration of our ancestors is the law of this country except as modified by state and federal law. 152 US at 10-18. The Court then surveyed the laws of the early colonies as to rights of riparian owners, noting that some states had granted riparians greater rights in the shore than they had in England, while others remained faithful to the English common law of the tidal seas which holds that title in land under tide waters is in the state and the riparian owner has no title below high-water mark. 152 US at 18-26.[6]

The Court in *Shively* held that the public trust doctrine as established in the English common law of the tidal seas applied to each new state upon its admission into the Union, such

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[6] Although technically the owner of land on the shores of a lake is a littoral owner while a riparian owner is one owning land abutting a river, the term "riparian owner" is used herein to refer to private property owners on any lake, river or stream, consistent with its ubiquitous use in the cases.

that title and control of all lands below the high water mark is vested in the state as sovereign. State law governs the title and rights of riparian proprietors in the soil below high-water mark, subject to the paramount rights of the public under the public trust doctrine, and rights granted to the United States by the Constitution. 152 US at 26-50. The Court in *Shively* summarized its ruling as follows:

> *Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and the control of them are vested in the sovereign, for the benefit of the whole people.*
>
> . . . .
>
> . . . .
>
> The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.

152 US at 57-58 (emphasis added).

Under the combined rulings of the United States Supreme Court's landmark decisions in *Illinois Central* and *Shively*, the Great Lakes states are solemnly obligated to protect the paramount rights of the public in the foreshores, bottomlands, and waters of our great inland seas, under a doctrine of quasi-constitutional dimension. Upon their admission to the Union, each state held title to all the foreshores, bottomlands and waters of the Great Lakes within its borders, in trust for the people, just as the king did under the English common law of tidal seas. Subject to the paramount rights of the people and the laws and Constitution of the United States, each state is free to govern the title and rights of Great Lakes riparian owners in the land below the high water mark as it sees fit – in a manner best suited to each state's own unique circumstances.

In *Illinois Central* and *Shively*, the United States Supreme Court laid the foundation for what would become a long tradition in this Court of vigorously guarding Michigan's duty as trustee of the Great Lakes under the public trust doctrine. In a trilogy of cases spanning the years 1896 to 1910, this Court adopted, as the law of this State governing the lands and waters of the Great Lakes within its borders, the common law of the tidal seas. Under that law, the State of Michigan holds title to the lands and waters of the Great Lakes within its borders up to the high water mark, in trust for the use and enjoyment of the people, whose rights are paramount to those of riparian owners with certain common-law exceptions.

In the first case of this trilogy, *People v Silberwood*, 110 Mich 103, 108; 67 NW 1087 (1896), the Court addressed the validity of a state statute setting aside submerged lands in Lake Erie and the Detroit River for public shooting grounds, and penalizing the cutting of vegetation on the submerged lands. In concluding that the statute was a valid exercise of legislative authority under the public trust doctrine, the Court quoted at length from the passage in *Illinois Central* first quoted above, to the effect that the English common law of tidal waters, and the crown's dominion over and ownership of lands within the realms under tide waters, applies with equal force to the Great Lakes as great "inland seas." *Illinois Central*, 146 US at 435-436. After quoting this passage from *Illinois Central*, the Court in *Silberwood* ruled:

> The reasoning of this case [*Illinois Central*] is without flaw, and ...the law enunciated therein ought to stand as *the law of this state*. It commends itself to one's reason and judgment, and avoids many difficulties incident to a different construction of the law. It is in harmony with the doctrine laid down in the early case of *La Plaisance*... [and] with the decisions in all of the states bordering on these great seas.

Silberwood, 110 Mich at 108 (emphasis added).

The Court's seminal decision in *Silberwood* thus established that the common law of the tidal seas governs Michigan's dominion over and ownership of lands and waters of the Great

Lakes up to the high water mark. As noted in *Shively*, while some of the early coastal states had dealt with lands under tide waters within their borders by granting riparian owners greater rights and privileges in the shore below the high water mark than they had in England, other states remained faithful to the common law of the tidal seas, under which a riparian owner holds title only to the land above the high water mark, along with rights of access to and contact with the waters. *Shively*, 152 US 18-26. By this Court's ruling in *Silberwood*, Michigan was added to this latter group of states.

The second in the trilogy of cases by this Court which laid the foundation of the public trust doctrine as applied to Michigan's lands and waters of the Great Lakes is *State v Lake St. Clair Fishing & Shooting Club*, 127 Mich 580, 585; 87 NW 117 (1901). The dispute involved a strip of land along the south end of Harsen's Island at the mouth of the St. Clair River, in the St. Clair Flats. Over time, cottages, hotels and club houses had been built on the strip. The State filed suit to quiet title to the disputed land, while the defendants in turn claimed title by adverse possession.

At the outset of its analysis, the Court in *St. Clair Fishing & Shooting Club* reaffirmed that the public rights in Great Lakes waters extend 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.*

127 Mich at 585-586 (emphasis added). The Court went on to hold that the State had title to the disputed strip because it was a small sand bar forming part of the lake bed when the State was admitted to the Union in 1837. In considering the defendants' claim of adverse possession, the Court held that when Michigan was carved from the Northwest Territory it took title to the

submerged lands of the Great Lakes under the Ordinance of 1787 "in trust for a public use for the people of the states, and subject to the rights of navigation by people of the entire country" (127 Mich at 593).[7]

The Court in *St. Clair Fishing & Shooting Club* concluded that the State's statute of limitations for establishing adverse possession applies only to dry land, and not to submerged lands of the Great Lakes held in trust by the State to be preserved for public uses. 127 Mich at 597-98. In summarizing its ruling, the Court held:

> *On the admission of Michigan, all of said submerged land covered by this lake, to high-water mark, passed to the state in its sovereign right, – not as private proprietor, and subject to sale, but in trust for the public....* The statute of limitations has no application to the submerged lands belonging to the state, whose duty it is to hold them for the benefit of the public in the enjoyment of the ancient rights of navigation, fowling, and fishing.

127 Mich at 600-601 (emphasis added).

The last in the trilogy of this Court's decisions laying the foundation of the public trust doctrine as applied to the Great Lakes is *State v Venice of America Land Co*, 160 Mich 680, 125 NW 770 (1910), in which the State sought to quiet title against the defendant to a southern part of Harsen's Island. The defendant in turn claimed fee ownership to over 800 acres through a chain of title dating back to the British. The circuit court, following this Court's ruling in *St. Clair Fishing and Shooting Club*, concluded that the State acquired title to the land in dispute upon its admission into the Union because it was then lake bottom. This Court, in affirming the

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[7] The full text of the relevant portion of the Northwest Ordinance, which the Court in *St. Clair Fishing & Shooting Club* quoted only in part (127 Mich at 593), reads as follows:

> The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

See *An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio,* Art 4, July 13, 1787.

circuit court's decision, quoted extensively from the circuit court's factual findings and legal conclusions.

On the basis of a wealth of testimony and documentary evidence, the circuit court held that the condition of the land when the State was admitted to the Union in 1837 controls title (160 Mich at 689). In determining the character of the disputed land at the time the State was admitted to the Union, the circuit court first noted the characteristic water level fluctuations of the Great Lakes:

> *While in the Great Lakes there are no appreciable tides, yet the water level varies materially from time to time.* During a period of years, the waters in Lake St. Clair gradually rise, followed thereafter by a gradual fall. This is a matter of such frequent occurrence that many sailors have it that the water rises and falls every 14 years. The water level is also subject to variations during the different seasons of the year . . . . High southerly winds also raise the water on the lower part of the island from a few inches to a foot . . . .

160 Mich at 690 (emphasis added). The circuit court found that the highest water on Harsen's Island was during 1837-38, with 1838 being the culmination of a rise described as the "epoch of high water" which destroyed tillable lands and a distillery on the island. In contrast, some three decades later in 1871, the waters of Lake St. Clair were many feet lower. 160 Mich at 690-91. During times of low water, parts of the disputed land were sufficiently habitable to support the pasturing of cattle, while in times of high water such as existed when Michigan was admitted to the Union in 1837, the land was covered with water. The circuit court concluded that the disputed land was covered by the waters of Lake St. Clair when the State was admitted into the Union, so that title was vested in the State in trust for the people (160 Mich at 691). This Court affirmed the circuit court's ruling in all respects (160 Mich at 701).

The Court thus established, in the trilogy of cases including *Silberman*, *St. Clair Fishing and Shooting Club*, and *Venice of America Land Co*, that the common law of the tidal seas applies in full measure to Michigan's Great Lakes waters and lands, to the high water mark. In

since deciding cases where the rights of the public to use and enjoy the Great Lakes are pitted against those of riparian owners, always a fertile ground for litigation, the Court has applied common law riparian doctrine as it existed under the law of the seas. One example of relevance here is the decision in *People v Warner*, 116 Mich 228, 74 NW 705 (1898), which focused on the common law riparian rule of accretion.

In *Warner*, the State claimed title to partially submerged land bordering an island in Saginaw Bay. The defendant, who owned the island, claimed title to the disputed land under the common-law riparian rule of accretion. This Court held that the defendant's title depended upon whether the disputed land was washed up against defendant's island and gradually extended outward, or whether the land arose from the water and gradually approached the island. 116 Mich at 238-240. This remained a question for the jury to be determined at a new trial on remand. In so ruling, the Court stated the law on the riparian rule of accretion as follows:

> Additions to the land of a littoral proprietor by the action of the water, which are so gradual as to be imperceptible, become a part of the land, and belong to the owner of the land, but, when not so, they belong to the state. So, if, by the imperceptible accumulation of soil upon the shore of an island belonging to a grantee of the government, or by reliction, it should be enlarged, such person, and not the state, would be the owner; but if an island should first arise out of the water, and afterwards become connected to that of the private proprietor, it would not thereby become the property of such person, but would belong to the state.

116 Mich at 239.

Accretion and reliction came to the fore again some three decades after *Warner*, in *Nedtweg v Wallace*, 237 Mich 14, 208 NW 51 (1926), upholding the validity of a 1913 statute, 1913 PA 326, allowing the State to lease dry, relicted land in Lake St. Clair. The opening sentence of the decision states: "Reliction has rendered several thousand acres of the bed of Lake St. Clair suitable for cottages and summer homes." 237 Mich at 15. In subsequently tracing the

common law roots of the public trust doctrine, the Court spoke of its evolution in sweeping terms:

> *There has arisen, out of centuries of effort, limitation of crown prerogative, parliamentary action, numerous adjudications, common necessity, and public forethought, a rule beyond question, impressing rights of the public upon all navigable waters.*
>
> The trust is a common-law one; it prevailed in England long before the American Revolution . . . it continued during the period the United States held the Northwest Territory and passed as the same trust to the state of Michigan at her admission to the Union; it has not changed in character or purpose and is an inalienable obligation of sovereignty . . . . 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.

237 Mich at 17 (emphasis added). The Court went on to conclude that:

> The rights of the public, of which the state, in its sovereign governmental capacity, acts as trustee, have been sedulously protected; not in prohibiting grants by the state of private rights to relicted lake beds or the rule of riparian ownership, for such would restrict the proprietary sovereignty, but in *denying the power, by grant or otherwise, to abdicate the trust by placing use and control in private hands to the curtailment or exclusion of public use.*

237 Mich at 21 (emphasis added). The Court's ruling was consistent with Section 12 of the 1913 Act being considered, 1913 PA 316, providing that "The rights of lessees under this act shall be subject to the paramount right of navigation, hunting and fishing, which rights are to remain in the general public and in the government as now existing and recognized by law."[8]

The meaning of the term "reliction" in *Nedtweg* is critical to a proper understanding of the Court's later decision in *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930), and the Court of Appeals' misreading of the *Hilt* decision in this case, as discussed below. Fortunately, and almost presciently in terms of this case, the Court carefully defined the meaning of reliction on rehearing of the case (237 Mich 14, 15; 211 NW 647 (1927)) (emphasis added):

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[8] A full copy of 1913 PA 326 is attached to SOS' amicus brief in the Court of Appeals proceedings as Exhibit B.

> In the former opinion we stated: 'Reliction has rendered several thousand acres of the bed of Lake St. Clair suitable for cottages and summer homes.' *We did not employ the term reliction in the restricted sense of land uncovered by a recession of water, but in the broader sense of former lake bed unfitted by recession of water and accretion for purposes of navigation, hunting, and fishing, and thereby rendered suitable for human occupation . . . .*
>
> Beds of the Great Lakes, involving no riparian or littoral rights, unfitted for navigation, hunting, or fishing by *permanent* recession of waters, reliction, accretion, or alluvion, and useful for residence purposes with or without shoring or dredging, may be leased by the state in its proprietary capacity under legislative authorization.

The Court's 1926 decision in *Nedtweg* is sandwiched in time between a pair of by now infamous cases, known as the *Kavanaugh* cases, which would later be reversed in their entirety by this Court in *Hilt v Weber*, 252 Mich 198, 223 NW 159 (1930). The first of the pair is *Kavanaugh v Rabior*, 222 Mich 68, 192 NW 623 (1923) (*"Rabior")* decided three years prior to *Nedtweg*. The second is *Kavanaugh v Baird*, 241 Mich 240, 217 NW 2 (1928) (*"Baird"*), decided two years after *Nedtweg*.

The land at issue in the *Kavanaugh* cases was dry upland formed by reliction and accession, extending 280 feet from the shore of Saginaw Bay upland to the meander line. While the water line of Saginaw Bay had materially receded in the past 30 years, the height of the disputed land had been raised by artificial fill. *Rabior*, 222 Mich at 70. The plaintiff in both cases, who owned property extending upland from the meander line, claimed title to this 280-foot wide strip of dry land by accretion. In *Rabior*, the defendant had built a summer cottage on a portion of the disputed land. In *Baird*, where the plaintiff sought to quiet title to the relicted land against the State, the Court noted that the strip, formed by both accretion and reliction, had been platted into lots and leased to various parties who erected cottages and paid rent to plaintiff.

The Court in the *Kavanaugh* cases, relying on its decisions in *Lake St. Clair Fishing and Shooting Club* and *Venice of America Land Co.*, held that title to the riparian owner's land ended

at the meander line, while title to all dry land formed by accretion and reliction, extending from the meander line to the water, was held by the State in trust for the beneficial use of the public. The State's title in trust was subject to riparian rights of the upland owner to cross the accreted dry land to reach navigable waters. *Baird*, 241 Mich at 253-254. The Court based its decision on the premise that the meander line fixed the boundary between the riparian owner and the State when the State was admitted into the Union and that "the conditions then existing were controlling for all time." 241 Mich at 244.

By this ruling in the *Kavanaugh* cases, the Court opened a pandora's box– unsettling vested rights and titles of Great Lakes riparian owners who were cut off from contact with the waters defining their property as riparian in the first instance. The ruling violated the basic common law riparian doctrine which ensures contact with and access to the adjacent waters, and in so doing granted to the State the ownership of relicted lands lying between riparian property and the shores of the Great Lakes.[9]

Just two years after the 1928 decision in *Baird*, the Court in *Hilt v Weber*, 253 Mich 198, 233 NW 159 (1930), revisited its ruling in the *Kavanaugh* cases because it had found a "conflict of authority" and because the "executive and legislative branches of the state government have felt need of more precise statement of the legal situation as a basis of legislation." 252 Mich at 202.

The task before the Court in *Hilt* was to determine whether the State or a riparian owner had title to a disputed strip of dry land extending inland from the shore of Lake Michigan. Like the land at issue in the *Kavanaugh* cases, the land in dispute in *Hilt* was dry upland formed by

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[9] A consequence of the *Kavanaugh* ruling was that renters on Saginaw Bay and at other places around the State withheld their rent from riparian-owner landlords. See Steinberg, *God's Terminus: Boundaries, Nature, and Property on the Michigan Shore*," *American Journal of Legal History*, Vol XXXVII, 65-90 at 77 (reviewing the history of the ruling in the *Kavanaugh* cases), attached as Exhibit A to SOS' amicus brief in the Court of Appeals.

reliction and accession. The disputed land extended from a stake driven in the Lake Michigan shore 100 feet from the water, upland to a surveyed meander line located 277 feet from the water's edge. The meander line extended along a ledge elevated 44 feet above the level of Lake Michigan. Some of the disputed strip had always been upland since before admission of the State into the Union, while the rest had been made dry by the "gradual, imperceptible, and natural" processes of reliction and accession. 252 Mich at 201-02.

The plaintiffs in *Hilt* sought to foreclose on a land contract against the defendants, while the defendants claimed fraud for failure of title to the disputed strip. Under the authority of the *Kavanaugh* cases, the trial court in *Hilt* had decreed damages for the defendants, for failure of title to the disputed strip between the meander line and the stake.

The basis of the ruling in the *Kavanaugh* cases was separated by the Court in *Hilt* into two main issues: (1) Whether the meander line fixed the status of the disputed strip as lake bottom; and (2) whether the legal status of the land as lake bottom would not change even though a portion of it had become dry land. *Hilt*, 252 Mich at 203-204.

Addressing the first issue, the Court overruled the *Kavanaugh* cases as a radical departure from prior decisions following the rule that meander lines do not define the boundary of the shore line on the Great Lakes. Rather, meander lines are inaccurate representations of the shore, originally run by surveyors to plat the land and ascertain the quantity of upland to be granted, and never intended to be the boundary between fee ownership of the riparian and that of the State. Instead, that boundary is at the "water's edge." *Hilt*, 252 Mich at 202-213.[10]

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[10] Throughout the *Hilt* decision, the Court loosely uses the terms "water's edge", "shore" and "shoreline" interchangeably in referring to the boundary between State and private title. 252 Mich at 206-208, 219. As discussed below, this unfortunate terminology paved the way for misinterpretation of the decision.

The Court then turned to the second issue, whether the legal status of the land as lake bottom would not change even though part of it later became dry land. 252 Mich at 213. The Court held that its pre-*Kavanaugh* decisions, as well as other federal and state decisions, established that the common law of the sea applies as to the sovereignty and ownership of lands under waters of the Great Lakes. Under the law of the sea, title to dry land formed by accretion or reliction belongs to the riparian owner, following the shore line as altered by gradual and imperceptible deposits over time, under what has been called "a movable freehold." 252 Mich at 219.

The Court held that the common law rule of reliction was properly stated by the United States Supreme Court in *Shively*, quoting the following passage from that case:

> '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 the soil covered by the water.'

Hilt, 252 Mich at 219, quoting *Shively*, 152 US at 35 (emphasis in original). The rule preserves the riparian owner's right of access to the water, and the indispensable requirement of the common law riparian doctrine of actual contact of the land with the water. *Hilt*, 252 Mich at 218-220. The decision in the *Kavanaugh* cases ran afoul of this common law rule, and in doing so overruled the Court's prior ruling in *People v Warner*, 116 Mich 228, 74 NW 705 (1898), that title to relicted land belongs to the riparian owner. 252 Mich at 220-222.

In *Hilt*, the Court used the term "reliction" to refer to dry land formed "partly by accession and partly by reliction" under "gradual, imperceptible" processes (252 Mich at 201) which "has continuously remained dry" (252 Mich at 206). This was precisely the same way the Court used the term in *Nedtweg* four years earlier, a case which the *Hilt* court repeatedly cites with approval. As held on rehearing in *Nedtweg*, the term reliction means former lake bed which

has been rendered *dry land*, suitable for human occupation but unfit for navigation and recreation, by *permanent* recession of waters, reliction, accretion, or alluvion. *Nedtweg v Wallace, on rehearing*, 237 Mich 14, 15; 211 NW 647 (1927).

Addressing the only issue before it, whether the State or the riparian owner has title to permanently dry relicted land, the Court in *Hilt* never addressed the issue of whether the State or the riparian has title to the foreshore, nor did it explore the strong imperatives of the State's dominion over the foreshore as trustee of the public's rights, as it had in prior cases. The Court clarified the extent of its ruling at the outset:

> Lest we be misled, we must keep it clear that the issue is not as to the ownership of submerged land or of an island arising out of the lake or of lands beyond lines established as definite boundaries by the government or of other distinguishable premises. *It covers only dry land, extending meandered upland by gradual and imperceptible accession or recession of the water, on the lake side of the meander line.*

252 Mich at 203 (emphasis added). The Court did, however, make reference to long-standing Michigan law governing the foreshore. It did so in emphatic terms, albeit implicit ones:

> Until the *Kavanaugh* cases . . . this court was in accord with other American courts in applying the common law of waters and had not established a rule of property as to land upon the Great Lakes contrary to the law of the sea.

252 Mich at 213. To like effect, after quoting from *Illinois Central* and *Silberwood*, the Court in *Hilt* held that "this court [is] squarely planted upon the common law. . .of the sea" under which a permanent change of condition during private ownership works a change of title (252 Mich at 216).

The *Hilt* Court's reference to the common law of the seas, without articulating its fundamental tenet that the high water mark defines the line where riparian ownership ends and the State's ownership in trust for the people begins, is entirely understandable inasmuch as the case involved title only to permanently-dry relicted or accreted land. In the present context,

however, this silence belies the magnitude of this Court's historic commitment to apply the full reach of the common law of the tidal seas to the shores of the Great Lakes.

The "movable freehold" referred to in *Hilt*, by which "the title of the riparian owner follows the shore line" under the common law, can only properly be understood as the gradual and imperceptible shifting of the line where the riparian's dry upland meets the high water mark. Under the common law of the tidal seas, the land below the high water mark was the barren area not suitable for human occupation because consistently exposed to the vagaries of the tidal sea. *Shively, supra*, 152 US at 11. On the other hand, under this Court's rulings in *Nedtweg* and *Hilt*, relicted land formed by the waters of the Great Lakes is land which has become dry by permanent recession and/or accretion, and which is suitable for human occupation.

The "line in the sand" drawn on the Michigan shores of the Great Lakes by long-standing decisions of this Honorable Court in following *Illinois Central* and *Shively*, the line which separates the public's rights and interests under the public trust doctrine from the unqualified interests of the private land owner, is the ordinary high water mark. The Court in *Hilt* did not upset this well-settled rule, nor even address it. In any event, even if the *Hilt* decision were to be mistakenly read as extending the riparian owner's title to the "water's edge", the title of the riparian owner below the high water mark would be a qualified one – subject to the paramount rights of the public.

B. The Court of Appeals decision misinterprets this Court's ruling in *Hilt* and in so doing ignores centuries of public trust law, from the common law of England through seminal decisions of this Court, under which the rights of the public to use and enjoy the Great Lakes foreshores cannot be abdicated.

In its decision in the present case, the Court of Appeals acknowledged the fundamental rule that title between the high and low water marks "remains with the state pursuant to the public trust doctrine." 5/13/2004 Decision p 7. On some level, the Court of Appeals also

seemed to recognize that the Court in *Hilt* focused entirely on title to dry, relicted upland. The Court of Appeals defined accretion and reliction early in its decision (p 3, FN 2), and quoted the common law accretion rule from *Shively* which the *Hilt* court had quoted (p 7). At a critical point, however, the Court of Appeals lost sight of the difference between the dry relicted upland at issue in *Hilt*, and the barren reaches of the foreshore where the tumultuous waters of the Great Lakes exert their influence. In doing so, the Court of Appeals wrested *Hilt* from its legal setting and misapplied it to a factual situation having nothing to do with accretion and reliction – resulting in a new rule of law which abdicates the rights of the public in literally thousands of miles of Great Lakes shoreline surrounding the two peninsulas of Michigan.

The new rule enunciated by the Court of Appeals, that members of the public exercising their fundamental rights of navigation and recreation in and on the waters and foreshores of our Great Lakes must keep their feet in the water at all times or run the risk of trespassing on private property rights, finds no support in *Hilt*. Nor can any semblance of the rule be found in this Court's cases applying the public trust doctrine to the Great Lakes which are cited with approval in *Hilt*, nor in cases subsequent to *Hilt*.

The critical point at which the Court of Appeals went astray starts with its quote of the following passage from *Hilt* (quoted here in its entirety):

> 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*, 180 Wis 225, 193 NW 393, 31 ALR 969." *Hilt*, 252 Mich at 226.

In footnote 7 (p 7) of its decision, the Court of Appeals acknowledged that this passage is dicta, but nonetheless elevated it to a binding rule of law:

> 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*, 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).[11]

Having thus expanded the accretion and reliction ruling in *Hilt* beyond all arguably legitimate bounds, to encompass the foreshores of the Great Lakes which the *Hilt* Court never addressed, the Court of Appeals went on to hold at page 7 of its decision that:

> Although the riparian owner has the exclusive right to utilize such land [between high and low water mark] 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.*

For the first time in any reported Michigan decision including *Hilt* itself, the Court of Appeals thus granted the Great Lakes riparian owner a new stick in his bundle of property rights – that of exclusive possession of the foreshores of the Great Lakes. Except for the several years when the ruling of the *Kavanaugh* cases was in effect, the Great Lakes riparian has always enjoyed title to and exclusive possession of permanently-dry relicted land, under the common law riparian doctrine of accretion as consistently applied by this Court since *People v Warner, supra* and as reviewed in *Hilt*. The common law likewise assures the riparian owner of contact with and access to the waters of the Great Lakes as discussed in *Hilt*. But the grant of *exclusive possession of the foreshores of the Great Lakes to riparians* not only finds no basis in *Hilt* or any other decision of this Court, it is repugnant to the common law of tidal seas which this Court has consistently applied to the Great Lakes since it was adopted as the law of the State in *Silberwood*.

Because the dicta in *Hilt* making reference to exclusive rights of riparians between low and high water marks led the Court of Appeals down the wrong path in making a decision which

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[11] The *Schaub* case holds that, under limited circumstances not applicable here, there is an exception to the rule that dicta is not to be used as precedent.

has no precedent in our state's law, it is worthy of careful examination. In this dicta, the *Hilt* Court cited the early Wisconsin case of *Doemel v Jantz*, 180 Wis 225, 193 NW 393 (1923) as holding 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" (252 Mich at 226). The dicta appears in the Court's analysis of the common law right to accretions, in which it surveys, but never proclaims to adopt, rulings from numerous federal and state courts (252 Mich at 225-226). The Court in *Hilt* makes earlier mention of the Wisconsin *Doemel* case as follows:

> In cases directly involving the Great Lakes, the rule of reliction was applied in . . . . It was applied to an inland lake, but which is governed by the Great Lakes rule of state ownership in *Doemel* . . . .

252 Mich at 220 (citations omitted).

The inland lake at issue before the Wisconsin Supreme Court in *Doemel* was Lake Winnebago, one of thousands of meandered inland lakes in Wisconsin. The *Hilt* Court's reference to the lake as being governed by the Great Lakes rule of state ownership most likely refers to the general rule in Wisconsin that the state holds title to the beds of *all* navigable waters, including inland lakes. *Doemel*, 180 Wis at 395-398; *State v Trudeau*, 139 Wis2d 91, 101-102; 408 NW2d (1987). In contrast, the general rule in Michigan is that riparian owners hold title to the beds of navigable inland lakes and streams, while the State holds title to the lands and waters of the Great Lakes in trust for the people. *Peterman v Dept of Natural Resources*, 446 Mich 177, 192; 521 NW2d 499 (1994).

The court in *Doemel* based its ruling on its prior decision in *Delaplaine v C & NW RR Co*, 42 Wis 214, also involving an inland lake, in which the court held that the riparian owner on the inland lake had the right of exclusive access to and from the waters of the lake. Following this ruling, the court in *Doemel* held that the riparian owner on Lake Winnebago had exclusive rights of possession in the dry area between the high and low water mark. The Court noted that

its ruling was in harmony with nature inasmuch as inland lakes swell with incoming waters on a periodic basis each year – unlike the levels of tidal water seas where the tides are "intermittent" (180 Wis at 398). During annual high water periods, the area between the high and low water marks of the inland lake is covered with water and subject to the rights of the public for navigation, but when the waters make their annual recession, the riparian has exclusive possession of the exposed dry land. *Id.*[12]

The periodic seasonal water fluctuations of inland lakes as described in *Doemel* cannot be equated to the sudden severe rises and cyclic fluctuations which characterize Great Lakes waters. As held by this Court in *Venice of America Land Co, supra*, the foreshores of our great inland seas are exposed to the vagaries of sudden rises of water levels during high winds, and cycles of high and low water conditions which span more than a decade. Indeed, several years after *Doemel*, the Wisconsin Supreme Court in *City of Milwaukee v State*, 193 Wis 423, 214 NW 820, 828-829 (1927), distinguished the Great Lakes from inland lakes like Lake Winnebago considered in *Doemel*.

Consistent with the state of affairs in Wisconsin under *Doemel*, the Michigan Legislature has enacted legislation applying the *Doemel* rule that the riparian owner has exclusive possession to the area between the high and low water marks of inland lakes and streams. In Article III, Chapter 1, Part 301 of NREPA, entitled "Inland Lakes and Streams" (MCL 324.30101 *et seq)*, Section 30111 (MCL 324.30111) provides:

> This part does not deprive a riparian owner of rights associated with his or her ownership of water frontage. A riparian owner among other rights controls any temporarily or periodically exposed bottomland to the water's edge, wherever it

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[12] A pivotal issue for the court in *Doemel* was that early in Wisconsin history, when the lands surrounding inland lakes were property of the state, the court had ruled that the title of a riparian owner on an inland meandered lake extends to the low water mark, and that vested rights of riparians had attached. The court noted that if this had not been the case, a different situation would be presented. 193 NW at 398.

> may be at any time, and holds the land secure against trespass in the same manner as his or her upland subject to the public trust to the ordinary high-water mark.

This rule of exclusive riparian possession applies only to our state's inland lakes and streams. It is conspicuously absent from the companion statute in NREPA applying to the Great Lakes, the Great Lakes Submerged Lands Act (Appendix 4).

Thus, on careful examination, the *Hilt* Court's citation of the riparian exclusive possession rule in *Doemel* is not only mere dicta, it has no application whatever to the foreshores of the Great Lakes in our state, which are governed by the common law of the tidal seas under longstanding Michigan law. Under that law, the State, not the riparian owner, holds title to the lands and waters between high and low water marks, and it holds such title in trust for the use and welfare of the people. Plaintiff is unaware of any Michigan case applying the *Doemel* rule of exclusive riparian possession to the foreshores of our Great Lakes. Notwithstanding this, the Court of Appeals, at p. 8 of its decision, states that:

> 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 'as long been held' that 'the right to acquisitions to land, through accession or reliction, is itself one of the riparian rights' . . . .

The first problem with this analysis is that the dry land in *Hilt* was permanently relicted and accreted upland, above the high water mark, while the rule of exclusive possession from the *Doemel* case cited in dicta in *Hilt* applies to the area between high and low water marks on an inland lake. The second problem is that the only authority cited by the Court of Appeals for the proposition that courts have recognized under *Hilt* that "a riparian owner has exclusive use of the dry land to the waters' edge" is a passage from *Peterman v Dept of Natural Resources* which

instead recognizes the actual ruling of *Hilt,* that a riparian owner enjoys exclusive use of dry, permanently relicted land.

Although the Court of Appeals, at p. 8 of its decision, cites a string of Michigan cases following or referring to the holding in *Hilt* that the riparian owner's title does not end at the meander line but rather extends to the water's edge, none of the cited cases came close to ruling that the riparian owner possesses the foreshores of the Great Lakes to the exclusion of the public. Nor, to plaintiff's knowledge, has any other reported case.

A careful reading of *Hilt* in light of this Court's earlier decisions applying the common law of the tidal seas to the Great Lakes leads inescapably to the conclusion that the *Hilt* Court used the term "water's edge" very loosely. What the *Hilt* Court meant by "water's edge", used interchangeably with "shore" and "shoreline" in the decision, was the edge of the water *at its high water mark.* As the *Hilt* Court emphasized, its decision left Michigan law exactly where it existed before the *Kavanaugh* cases – squarely planted on the common law of tidal seas. It is unfathomable that the *Hilt* Court, which exhaustively reviewed legal authorities and policy concerns in ruling on the meander line and reliction issues before it, would have enunciated a new rule of law eliminating public use of the foreshores of the Great Lakes without a thorough exploration of the law and the important policy issues involved.

C. Although the case law after *Hilt* shows that the decision has been a source of confusion, this Court has consistently ruled that the rights of the public under the public trust doctrine extend to the high water mark of the Great Lakes.

A review of Michigan cases after *Hilt* demonstrates that the ambiguity generated by the *Hilt* Court in loosely using the words "water's edge", and worse still by its reference in dicta to the Wisconsin court's ruling in *Doemel* which only applies to inland lakes, set the stage for some confusion in the Michigan courts. As the ruling by the Court of Appeals in this case so tragically demonstrates, a casual reading of *Hilt*, without a solid grasp of the common law of the tidal seas

as developed over the decades before it, all too easily leads to the misguided notion that riparian owners somehow have ownership and exclusive possession rights extending to the very edge of Great Lakes waters at the low water mark. Although *Hilt* left Michigan law respecting the Great Lakes foreshores "squarely planted" on the common law of the tidal seas (252 Mich at 216), its failure to specifically reaffirm the reach of that law as extending to the high water mark paved the way for a misreading of *Hilt* by the Court of Appeals in its decision here.

Three decades after *Hilt*, in *Obrecht v National Gypsum Co*, 361 Mich 399 (1960), the Court ruled that National Gypsum's construction of a permanent loading dock extending over 1,000 feet into Tawas Bay on Lake Huron constituted an unlawful entry upon State property under the public trust doctrine, inasmuch as the public title and right to the lands and waters of Lake Huron was supreme against National Gypsum's riparian right to wharf out. In so ruling, this Court once again affirmed in forceful terms its commitment to faithfully guard Michigan's duties under the public trust doctrine:

> This Court, equally with the legislative and executive departments, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of five Great Lakes. Long ago we committed ourselves (see *State v Lake St. Clair Fishing & Shooting Club...; State v Venice of America Land Co...; Nedtweg v Wallace...*) to the universally accepted rules of such trusteeship as announced by the Supreme Court in *Illinois Central*....

361 Mich at 412. The Court in *Obrecht* recognized the threat posed to the public's use and enjoyment of our Great Lakes if riparian interests were permitted to prevail over those of the public:

> In the case before us Michigan's great natural resource, providing as it does general public enjoyment of the pure blue waters of these incomparable inland seas, is subtly threatened by a projected rule of the common law – the riparian right to wharf out. We recognize the rule and the right, yet hold them subject to reasonable regulation by the State. In effect and in sum, this Court is asked . . . to grant such rule an untrammeled legal beachhead on this limited part of Tawas Bay. *Convinced that any such grant would open our shoal waters and*

> *renowned miles of sandy beaches to ruthless and uncontrolled exploitation, we are not so inclined*.

361 Mich at 416-417 (emphasis added).

The year following *Obrecht*, the Court in *People v Broedell*, 365 Mich 201, 112 NW2d 517 (1961), faced the question of whether the rights of a riparian owner on the shore of Lake St. Clair extended to the high or low water mark, the same question facing the Eastern District of Michigan the following year in the related case of *McKnight v Broedell*, 212 F Supp 45 (ED MI 1962).

In *People v Broedell*, the State sought to enjoin the defendants from filling or improving lots they claimed to own on the shore of Lake St. Clair. The State alleged that the lots were part of the lake bottom which it held in trust for the use and benefit of the people. The Court noted that the evidence showed "a high degree of fluctuation in the water levels of the lake throughout the years and the seasons and months within those years." 365 Mich at 204. The Court then expressed confusion over the question of how far the State's trust extended, as follows:

> Questions [have arisen] as to whether the trust ownership of the State should be held to extend to the all-time high water mark on record, the mean high water mark, the mean level, the mean low level or the lowest water mark. In holding to the theory that the State holds certain submerged lands in trust for public navigation, fishing, hunting, etc., this Court has referred to the low water mark as the boundary thereof. See *Lincoln v Davis*, 53 Mich 375, 19 N 103. See, also, *LaPorte v Menacon*, 220 Mich 684, 190 NW 655, for the low water mark theory. For language seemingly favorable to the high water mark theory, however, see *State v Venice of America Land Co*, 160 Mich 680, 125 NW 770; *Collins v Gerhardt*, 237 Mich 38, 211 NW 115. Plaintiff [the state] says that in administering the submerged land acts, above mentioned, it follows the 'philosophy' which it says is found in *Hilt v Weber* . . . of 'a moveable freehold', that is to say, that the dividing line between the State's and the riparian owner's land follows the water's edge or shore line at whatever level it may happen to be from time to time.

365 Mich at 205-206. The cases cited by the Court in *Broedell* reflect only a cursory review of relevant law. Of the cited cases, only *Lincoln v Davis* and *State v Venice of America Land Co*

applied the public trust doctrine to the Great Lakes. *Lincoln v Davis*, a case from1884 holding that riparian rights on the Great Lakes are the same as on inland streams, was effectively overruled a decade later by *Illinois Central*. Notably, the only reference in *People v Broedell* to the ruling in *Hilt* is the State's claim that it followed the moveable freehold "philosophy" of *Hilt* – an assertion which is itself ambiguous at best.

The Court in *Broedell* did not resolve the confusion it expressed. Instead, it held that decision in the case was controlled by another issue – whether the defendant's chain of title dating back to a grant from the United States before Michigan was admitted into the Union embraced the defendant's lots. On this basis, the Court remanded the case to the trial court.

One year after *People v Broedell*, in *McKnight v Broedell*, 212 F Supp 45 (ED MI 1962), the U. S. District Court for the Eastern District of Michigan ruled that the title to the same lots at issue in *People v Broedell* was unmarketable by virtue of the State's claim that the land was filled-in bottomland lying lakeward of the ordinary high water mark. In so holding, the court followed the rule from *Shively* and its progeny that a state, when admitted into the Union, acquires title from the United States to all land under navigable water lying below the high water mark, noting that the validity of these principles was recognized by the Michigan Submerged Land Acts, 1913 PA 326, CL 1948, § 322.401 (212 F Supp 49). The Court also followed the well-settled common law rule set out in *Shively* that *a grant from the sovereign of land bounded by the sea does not pass title below the high water mark unless the language of the grant or long usage under it clearly indicates such intention*. 212 F Supp at 49-50.

Lastly, the court in *McKnight* held that a riparian owner's rights are determined by state law, but that as noted by the Court in *People v Broedell*, it was unclear whether Michigan follows the common law principle that a riparian owner takes title to the high water mark depending on its location from time to time. Nonetheless, the court ruled that "there is little

question that plaintiffs do not have marketable title to the land involved since the State has a very substantial claim to such land." 212 F Supp at 51.

Most recently, in *Peterman v Dept of Natural Resources*, 446 Mich 177, 521 NW2d 499 (1994), the Court applied some of the basic tenets of the public trust doctrine in a reverse condemnation claim involving destruction of the plaintiff's riparian land on Grand Traverse Bay in Lake Michigan. The Court held that, under the general rule, damages caused to riparian property by governmental actions in improving navigation for the people are compensable as a taking only with respect to fastland, i.e., land extending above high water mark (446 Mich at 181, n 4). However, an exception to the general rule applies, allowing recovery of damages to the beach area below high water mark, where the taking results from the government's unscientific construction of jetties which could have been constructed to further navigation without entirely destroying the plaintiff's property. 446 Mich at 201-202. In so ruling, the Court in *Peterman*, 446 Mich at 194-196, emphasized the paramount rights of the public over those of riparian owners under the public trust doctrine:

> 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 . . . .'
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> . . . .
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> 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 [riparian] rights must give way to any use of the tide lands and water flowing over them that serves the public right of navigation.

In the course of its analysis, the Court in *Peterman* provided an overview of riparian rights in which it cites the above-discussed dicta from *Hilt,* i.e, that "the riparian owner has the exclusive use of the bank and shore" (*Peterman*, 446 Mich at 192). This citation to the *Hilt* dicta is itself mere dicta, appearing as it does in the *Peterman* Court's generalized overview of riparian rights. As part of that overview, the Court also cites *Bott v Michigan Dept of Natural Resources*, 415 Mich 45, 80; 327 NW2d 838 (1982), and *Koopman v. Blodgett*, 70 Mich. 610, 616; 38; 38 NW 649 (1888), both of which determined riparian rights in inland streams. The Court goes on to draw the distinction under Michigan law that title to lands underlying the Great Lakes is in the State in trust for the people, while title to inland lakes and rivers is in the riparian owners – with the common law rule of accretions and relictions as set out in *Hilt* applying to all riparian owners (446 Mich at 192). The Court's ruling in *Peterman* reaffirms that while the riparian owner has rights to the foreshores of the Great Lakes, the public's rights are superior – up to the high water mark.

D. The Great Lakes Submerged Lands Act codifies the common law of the tidal seas as applied to the foreshores of the Great Lakes under long-standing decisions of this Court.

Consistent with the longstanding rule that the State's title under the public trust doctrine extends to the high water mark of the Great Lakes is the Great Lakes Submerged Land Act, MCL 324.32501 *et seq*. Under the Act, the interests of the public in the Lake Huron bottomlands below the high water mark are 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).

The statutory protection found in MCL 324.32502 echoes this Court's decisions from a century ago in which it applied the law of the seas and its associated riparian rules to the shores of our Great Lakes. The statute protects the public's right to use the State's sovereign waters and lands of the Great Lakes lying below the natural ordinary high-water mark for "hunting, fishing, swimming, pleasure boating, or navigation." As discussed below, this Court should take judicial notice that these public uses entail, as an indispensable incident, walking on the foreshores below the high-water mark.[13]

The Great Lakes Submerged Lands Act ("GLSLA"), as originally enacted in 1955 and amended since, underscores the public trust policy of this State as expressed in Michigan's Constitution of 1963, art 4, § 52:

> The conservation and development of the natural resources of the State are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The Legislature shall provide for the protection of

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[13] It should also be noted that as a basic principle of public trust law, a state legislature cannot narrow the extent of title and public rights protected by the public trust in Great Lakes waters and lands by subordinating these to private interests. *Illinois Central, supra.* In *Illinois Central* the United States Supreme Court struck down a legislative grant which subordinated the public trust and rights to an exclusively private interest. Thus, the definition of "ordinary high water mark" under the Great Lakes Submerged Lands Act cannot be read more narrowly than the operative rulings of the United Supreme Court and this Court on the extent and nature of this title and the public trust.

> the air, water and other resources of the State from pollution, impairment and destruction.

The Court in *Obrecht, supra*, 361 Mich at 407, traced the history of the GLSLA from the federal Submerged Lands Act of 1953, 43 USC 1301-1315, "by which the United States relinquished to the coastal States its remaining rights, if any, in all lands lying beneath navigable waters within state boundaries." The original GLSLA was enacted by the Michigan Legislature in 1955 PA 247, just two years after the federal act. *Id.* at 407-408. The section of the 1955 Act which corresponds to MCL 324.32502 was in 1955 compiled as MCL 322.702, which read:

> The lands covered and affected by this act are all of the unpatented submerged lake bottom lands 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 which have heretofore been artificially filled in and developed with valuable improvements. It shall be construed so as to preserve and protect the interests of the general public in the aforesaid lands and to provide for the sale, lease or other disposition of such lands whenever it is determined by the department of conservation that such lands have no substantial public value for *hunting, fishing or navigation* and that the general public interest will not be impaired by such sales, lease or other disposition. . . .

A copy of 1955 PA 247 is attached in Appendix 5.

In *McKnight, supra*, 212 F Supp at 49, the U. S. District Court for the Eastern District of Michigan held that the 1955 Act recognized the principle that "a state, when admitted into the Union, becomes entitled to land under navigable water below the high-water mark, and within its limits which has not been previously granted."

In 1958, MCL 322.702 was amended to expand the protected public uses, adding to the original list of "hunting, fishing or navigation" those of "swimming" and "pleasure boating" (1958 PA 94, Appendix 5). In 1968 the statute was amended to clarify that:

> The word "land" or "lands" whenever used in this act shall refer to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors thereof lying below and lakeward of the natural ordinary high-water mark, but the act shall not be construed as affecting property rights . . . as may be acquired by accretions

> occurring through natural means or reliction. For purposes of this act the ordinary high-water mark shall be deemed to 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.

(1968 PA 57, Appendix 5). The 1968 amendment thus codified this Court's decisions spanning a full century, in which the Court repeatedly applied the common law of the seas to the Great Lakes, as limited by the riparian rule of accretions and relictions, and under which the State's title in trust for the people extends to the high water mark. The 1968 version of MCL 322.702 is virtually identical to the present version of the statute, re-codified in NREPA as MCL 324.32502.

In *Superior Public Rights Inc v Dept of Natural Resources*, 80 Mich App 72, 85; 263 NW2d 290 (1978), the Court of Appeals quoted the full text of MCL 322.702 (now MCL 324.32502) and held that "The tests set forth in *Illinois Central R. Co.*, supra, and the Great Lakes Submerged Lands Act, supra, are nearly identical, and go about protecting public trusts in a similar manner."[14]

The expansion of MCL 322.702 in 1958 to include the recreational uses of swimming and pleasure boating as protected public uses is consistent with the evolution of the public trust doctrine in federal and state cases and statutes to encompass the ever-changing needs and uses of the public it was created to benefit. While examples abound, one of relevance here is the New Jersey Supreme Court's expansion of the doctrine to include bathing, swimming and related shore activities, as well as public access over certain privately-held dry sand areas where necessary to protect the public policy favoring access by the public to the shoreline. *Matthews v*

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[14] More recently, in *Nowakowski v Hughes*, an unpublished opinion per curiam of the Court of Appeals, decided May 26, 2000 (Docket No 211406), ruled that a boundary line acquiesced in between riparian owners ran lakeward only to the high water mark because, under MCL 324.32502, the State owns all property below the high water mark (Appendix 6).

Bay Head Improvement Assoc, 95 NJ 306 (1984). A legislative example is the Wisconsin Legislature's declaration in a 1929 statute that "the enjoyment of natural scenic beauty is . . . a public right." See *Muench v Public Serv Comm'n*, 55 NW2d 40, 43 (Wis 1952), quoting 1929 Wis Laws 523.

The various sections of Michigan's GLSLA together establish a scheme of regulatory control of the waters, bottomlands and foreshores of the Great Lakes by the Michigan Department of Environmental Quality ("MDEQ") under which: (1) submerged lands may be filled-in and bottom lands leased or deeded by the State under prescribed conditions, while drilling operations beneath bottom lands for oil or gas is prohibited (MCL 324.32503); (2) a person who "excavates or fills or in any manner alters or modifies any of the land or waters subject to this part without the approval of" MDEQ is guilty of a misdemeanor punishable by fine or imprisonment (MCL 324.32510); (3) a riparian owner can obtain from MDEQ a certificate suitable for recording which indicates the location of the riparian owner's lakeward boundary, or land accreted to his or her property (MCL 324.32511); (4) certain prescribed beach maintenance activities are allowed, for a limited time, without a permit (MCL 324.32512); and (5) MDEQ is required to designate two areas of Great Lakes shorelines where removal of vegetation from the foreshore is to be allowed without a permit (MCL 324.32516).

The GLSLA as a whole thus empowers MDEQ with regulatory authority to protect the invaluable natural resources of the Great Lakes ecosystem, which in turn protects the health and welfare of the public. Protection of the public's interests in the overall health of the lakes and the biologically diverse vegetation and wildlife they support requires that the foreshore area be protected because, as stated by the U. S. Army Corps of Engineers and the Great Lakes Commission in a recent joint publication, "the place where land and water meet is by far the most diverse and productive part of the Great Lakes - St. Lawrence River ecosystems." *Living*

with the Lakes, US Army Corps of Engineers and Great Lakes Commission, p 31 (2000), attached as Appendix 7.

The limited beach maintenance activities on the foreshore as now permitted under the GLSLA were added by amendment in 2003 (2003 PA 14, 2003 PA 163) at the urging of Great Lakes riparian owners headed by Save Our Shoreline (SOS). A representative of SOS testified before the Michigan Legislature to the same effect as SOS' amicus brief in the Court of Appeals – that neither the GLSLA nor this Court has ever defined the public's rights in the lands and waters of the Great Lakes as extending to the high water mark. See print-outs from SOS's web site (www.saveourshoreline.org) attached as Appendix 8, including Testimony of F. N. Goldberg on Behalf of SOS. In a May 14, 2004 press release, SOS proudly announced affirmation of its misguided version of Michigan law by the Court of Appeals in this case (Appendix 8). In a press release dated June 1, 2004, SOS announced that an organization of riparian owners in Ohio has filed suit in that state "to clarify that shoreline ownership extends to the water's edge." Appendix 8.

For their part, members of the general public have expressed their dim views of the legal rule set out in the Court of Appeals decision in a "Cyber Survey" conducted by the *Detroit News* beginning on May 28, 2004, following an article of that date entitled "Beach Walkers Lose Ground to Homeowners." Of all survey responders, 21.46% indicated they intend to obey the law, while 78.54% said that they did not.[15]

The vital nature of the public's rights which the Court of Appeals decision abdicated can be understood by considering pleasure boating and swimming, two of the public uses specifically protected by the GLSLA . This Court can and should take judicial notice that in the

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[15] The results of the ongoing survey can be found at the *Detroit News* web site, www.detnews.com.

21st Century the Great Lakes are navigated by ocean-bound freighters of immense proportions plying their deeper waters, and at the same time, by small and vulnerable watercraft which hug the shores. Commonly found on the Great Lakes today are small watercraft like canoes, kayaks, and windsurfers, to name a few. For watercraft this small, and even more so for swimmers, a sudden riptide or off-shore wind can lead to life-threatening conditions in almost an instant. Under the Court of Appeals decision, those seeking the safe harbor offered by the nearest stretch of foreshore would be trespassers.

The Court of Appeals decision also abdicated the rights of many less venturesome members of the public, like the 73-year-old plaintiff in this case, who has for decades walked the foreshore of northern Lake Huron for recreation and enjoyment of its scenic beauty.

To deny these navigational and recreational public uses of the Great Lakes foreshores – to place these vast, beautiful stretches of natural highways in the exclusive possession of the few, at the expense of the safety and welfare of the many – is to abdicate the rights of the public under a doctrine of quasi-constitutional dimension.

If this Court reverses the Court of Appeals decision and affirms the public's recreational and navigational rights in the lands and waters of the Great Lakes to the ordinary high water mark as encompassing, by necessary implication, the right to travel by foot, then riparian owners themselves will have much to gain and little to lose. Under the Court of Appeals decision, riparian owners must confine their beach walking to the limited lakefront footage they own, or run the risk of trespassing. If the decision is reversed, riparian owners could walk the foreshores as a member of the public, just as the record here shows has long been the case on the shores of Lake Huron in northeast Michigan.

E. In any event, either the statutory high water mark under the GLSLA or the ordinary high water mark under the common law is appropriate for defining the foreshore area here.

In the GLSLA, the Michigan Legislature has defined the State's title in trust for the people as extending to the high water mark of Great Lakes lands and waters under International Great Lakes Datum of 1955, setting out the elevation of the high water mark for each lake. The IGLD of 1955 set out in MCL 324.32502 is an official measurement of mean Great Lakes water levels to which the governments of the United States and Canada subscribe, based on data collected from water level gages throughout the Great Lakes. *Living with the Lakes, supra,* at p 27. Due to numerous factors, the IGLD is updated every 25 to 30 years. *Id*, at pp 17, 27.[16]

Although the Court of Appeals in its decision notes that MCL 324.32502 is silent as to the public's use of the foreshores for walking, the statute can only reasonably be read as encompassing this most basic means of travel as a necessary incident of the navigational and recreational public uses the statute protects. Reading the GLSLA *in pari materia* with its companion statute in NREPA, the Inland Lakes and Streams Act ("ISLA"), MCL 324.30101 *et seq*, reinforces such a reading. As discussed above, MCL 324.30111 of the ISLA grants riparian owners exclusive possession of any temporarily or periodically exposed bottomland below the high water mark to the water's edge of inland lakes, but no such provision is found in the GLSLA. The GLSLA is thus conspicuously silent as to any exclusive possession of the foreshore by the riparian owner.

Although the GLSLA protects the ecology of the entire foreshore area up to high water mark based on IGLD 1955, its silence as to what extent travel by foot is permitted leaves the issue open to interpretation by this Court under the common law rule of our state governing the foreshores of the Great Lakes, the common law of the tidal seas.

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[16] The IGLD of 1955 was updated 30 years later to IGLD 1985, although MCL 324.32502 has not been so updated.

In *Borax v City of Los Angeles*, 296 US 10, 22- 25 (1935), the United States Supreme Court explored the common law basis for determining the ordinary high water mark, noting that according to Lord Hale in *De Jure Maris* and to an old English case considering the question of "the extent of the right of the Crown to the seashore", the tidelands below ordinary high water mark were those regularly subjected to the forces of the tides of the sea, "which is for the most part not dry or maniorable." 296 US at 23. As held by the Court in *Borax*, this does not mean a physical mark which the waters make on the ground, but rather the line of high water as determined by the course of the tides.

The U. S. District Court for the Eastern District of Michigan, in *McKnight, supra*, held that the common law "ordinary high water mark" as set out in *Borax* applies to the foreshores of the Great Lakes, although the court did not elaborate beyond the *Borax* holding (212 F Supp at 50-51). Later, in *Miller v United States*, 480 F Supp 612, 619 (ED MI 1979), the Eastern District court held that the ordinary high water mark on the shore of Lake Huron is as follows:

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

To like effect is the definition found in 78 Am Jur 2d Waters § 293 (2004):

> The line of ordinary high water is defined as the line to which the water rises in the seasons of ordinary high water, or the line at which the presence of water is continued for such length of time as to mark upon the soil and vegetation a distinct character.

As described by the Army Corps of Engineers and the Great Lakes Commission in 2000, dramatic short-term water level fluctuations caused by storm surges on the Great Lakes can last from several hours to several days. Pendulum-like water movements called seiches, which occur when wind and barometric conditions change rapidly, cause water levels to rise on one side of

the lake and drop at the opposite side in oscillating, pendulum-like movements which can continue for days. In the meantime, water levels of the Great Lakes exhibit long-term fluctuations due primarily to differences in the amount of precipitation and ice-melt the lakes receive from year to year. *Living with the Lakes, supra,* pp 14-18 (Appendix 7).

Entirely consistent with the common law definition of the ordinary high water mark, Great Lakes water fluctuations establish a natural line below which the land is barren – not dry, but wet or damp, and too wet for either human occupation or the growth of vegetation. See *Living with the Lakes, supra,* pp. 30-31 (Appendix 7). The diverse foreshores of the Great Lakes, from the wetlands along Saginaw Bay to the high bluffs along the shoreline of Lake Michigan to the rocky cliffs on the shores of Lake Superior, are all encompassed within the common law rule of ordinary high water mark. From place to place, and from time to time, the foreshore may encompass little or no land suitable for the public to walk upon, but where such land exists below the ordinary high water mark it is subject to the paramount navigational and recreational interests of the public.

By adopting the common-law ordinary high water mark, this Court would remain faithful to its historic tradition of applying the common law of the seas to the Great Lakes. It would also provide a line in the sand which is easily discernible by the public and riparian owners alike. Last but not least, this common law ordinary high water mark would permit plaintiff and other members of the public to do what they have been doing all along – walking on the barren stretch

of wet sand close to the water's edge, without being constrained to walk in the oft-times cold waters below it.[17]

F. Plaintiff is also entitled to walk the foreshore of Lake Huron below the ordinary high water mark, as are members of the public, under basic equitable doctrines.

Plaintiff's long use of the Lake Huron foreshore in for walking, consistent with that of the public, raises important equitable issues. As held by the Supreme Court of Wisconsin in applying the public trust doctrine to submerged lands in Lake Michigan, *City of Milwaukee v State*, 193 Wis 423, 214 NW 820, 829 (1927):

> The supreme Court of the United States and our own court have ever been ready and inclined to so construe this trust title as to promote justice between all the parties interested therein, and particularly to preserve the interests of the state in the trust.

Plaintiff likewise appeals to the good conscience of this Honorable Court to construe the public trust doctrine in this case in a manner which promotes justice. Plaintiff symbolizes one of the members of the public who stands to lose the most if the Court of Appeals decision is not reversed. She is a 73-year old woman who, by virtue of the express easement she was deeded in the 1960's, enjoys the riparian right of access to Lake Huron. For some 40 years, plaintiff and her family have used their 15-foot wide easement to access the lake, and to walk the foreshore while enjoying its scenic beauty. By confining plaintiff to walking in the often bitterly-cold waters of the northern reaches of Lake Huron, the Court of Appeals decision deprives plaintiff, in the autumn of her life, of her principle means for enjoying the lake. Such a result is unjust.

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[17] For Great Lakes riparian owners subjected to the clamor of near-shore navigation by small motorized watercraft such as jet skis and speed boats, a beach walker passing by near the water's edge poses, comparatively speaking, no problem at all.

Under the equitable doctrine of prescriptive rights, plaintiff's long use of the foreshores exceeds the 15-year statutory period, and thus would be protected.[18]

As to the long custom of the public in walking the foreshores of Lake Huron, the Oregon Supreme Court has recognized public rights in state beaches through the ancient doctrine of custom. *State ex rel Thornton v Hay*, 254 OR 584, 462 P2d 671 (1969) (relying in part on Native Americans' ancient use to establish customary public rights).

The equitable doctrine of estoppel also applies here. Defendant Mr. Goeckel testified in his deposition that he has no objection to anyone walking the foreshore above the water's edge, which in his words "is the State of Michigan's property" (Appendix 3). Defendants are thus estopped from arguing that plaintiff must confine her beach walking below the water's edge. The Court of Appeals decision reaches beyond the bounds of estoppel by holding that plaintiff cannot walk above the water's edge without trespassing on defendant's land.

Conclusion

The circuit court ruled correctly in granting summary disposition in plaintiff's favor on her claim that, as a member of the public, she has the right to walk the shore of Lake Huron below the ordinary high water mark, free from interference or obstruction by defendants. The Court of Appeals, in reversing the circuit court's decision, handed down a new rule of law of far-reaching impact which cannot be reconciled with the public trust doctrine as applied to the foreshores of the Great Lakes under long-standing rulings of this Court. Under those rulings, the public has an *inalienable* right to navigational and recreational enjoyment of our Great Lakes and their foreshores. Because of its far-reaching effect and the ambiguity in this state's law

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[18] Plaintiff's counsel raised the issue of plaintiff's prescriptive rights in the circuit court during arguments on the parties' cross motions for summary disposition. See 3/11/2002 transcript, pp 18-19.

which it reflects, the Court of Appeals decision confining plaintiff to walking below the waters' edge to avoid trespassing on defendant's land should be reversed.

RELIEF REQUESTED

Plaintiff-Appellant Joan M. Glass respectfully asks this Court for the following relief:

1. That the decision of the Court of Appeals be peremptorily reversed, and the ruling of the circuit court be reinstated, pursuant to MCR 7.302(G);

2. Alternatively, that the decision of the Court of Appeals be summarily vacated and the case remanded to circuit court with instructions to conduct any further fact-finding the Court deems necessary, pursuant to MCR 7.316(A)(5);

3. Alternatively, that the decision of the Court of Appeals be summarily vacated and the case remanded to the circuit court with instructions to enjoin defendants, on the basis of estoppel, from interfering with or obstructing plaintiff as she walks the foreshore in front of defendants' property, pursuant to MCR 7.316(A)(5); and

4. That this Court grant application for leave to appeal pursuant to MCR 7.302(G), and grant the above requested relief or such other relief as is proper and just.

Respectfully submitted,

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