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

Pamela S. Burt (P47857)
Weiner & Burt, P.C.
Attorney for Plaintiff-Appellant
635 N. U.S. 23
P.O. Box 186
Harrisville, MI 48740
(989) 724-7400
_____/

Scott C. Strattard (P33167)
Braun, Kendrick, Finkbeiner
Attorneys for Defendants-Appellees
4301 Fashion Square Blvd.
Saginaw, MI 48603
(989) 498-2100

BRIEF OF AMICI CURIAE MICHIGAN CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, MICHIGAN BANKERS ASSOCIATION, AND MICHIGAN HOTEL, MOTEL & RESORT ASSOCIATION

Submitted by:
Fredric N. Goldberg (P29057)
William A. Horn (P33855)
Ronald M. Redick (P6112)
Mika Meyers Beckett & Jones PLC
900 Monroe Ave., N.W.
Grand Rapids, MI 49503
(616) 632-8000

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes and Court Rules

Other Authorities

STATEMENT OF QUESTION PRESENTED

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

Trial Court's Answer:	No
Plaintiff-Appellant's Answer:	No
Defendants-Appellees' Answer:	Yes
Amici's Answer:	Yes

INTEREST OF AMICI CURIAE

The Michigan Chamber of Commerce is a non-profit membership corporation that represents the interests and views of over 6,500 private corporations and businesses which are engaged in commercial, industrial, agricultural, civic and professional activities in Michigan.

The National Federation of Independent Business Legal Foundation is the legal arm of the National Federation of Independent Business, the nation's oldest and largest organization dedicated to representing the interests of small business owners throughout all 50 states. Of the NFIB's approximately 600,000 members, over 200,000 own retail and service establishments, including small resorts, hotels, restaurants and marinas, with many located in Michigan.

The Michigan Bankers Association is a professional association of over 200 Michigan financial institutions with more than 2,300 branches located throughout the state. Its member institutions provide a financial foundation for economic activity in the state so as to promote strong communities and economic development in Michigan.

The Michigan Hotel, Motel & Resort Association is a professional association whose members represent over 500 hotels, motels, resorts and bed and breakfasts located throughout the state. The association is engaged in the promotion of travel and tourism in Michigan.

Amici Curiae represent the interests and views of (1) owners of property along Great Lakes shorelines who use the property for private residential purposes, and commercial businesses such as motels, hotels and recreational resorts, (2) lenders who finance homes and businesses located along Great Lakes shorelines, and (3) businesses engaged in industrial, agricultural, civic, financial and professional activities in Michigan.

Amici Curiae are interested in the stability of longstanding rules of private property law, protecting existing private property rights and values, and minimizing the potential for further litigation between owners of riparian lands along the Great Lakes shorelines and non-owners who

seek to use or claim an interest in the area of the Great Lakes shorelines landward of the water's edge.

ORDER APPEALED FROM AND RELIEF REQUESTED

Plaintiff-Appellant ("Plaintiff") has filed an application for leave to appeal the May 13, 2004 published opinion of the Court of Appeals (*see* Appendix A, *Glass* v *Goeckel*, No. 242641 (Mich Ct App, May 13, 2004)), which reversed the trial court's grant of summary disposition to Plaintiff and remanded for entry of an order granting Defendants-Appellees' ("Defendants") motion for summary disposition.

The Court of Appeals' opinion included two principal holdings: (1) pursuant to *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930) and subsequent cases, riparian property owners on the Great Lakes have the right to exclusive use and enjoyment of their land to the water's edge and, therefore, the public has no right of passage over dry land between the low and high water mark; and (2) Part 325, Section 2 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.32502,[1] does not modify, but rather affirms, the rule set forth in *Hilt* and subsequent cases.

In lieu of granting leave to appeal, Amici Curiae urge the Court to vacate the opinions of the courts below and peremptorily affirm the Court of Appeals' decision, albeit on slightly different grounds. Specifically, the Court should affirm solely on the basis that *Hilt* and subsequent cases establish that Great Lakes riparian property owners not only have the right to exclusive use of their property to the water's edge, but in fact have *title* to their property to the water's edge, free of any public trust interest of the state in the submerged lands of the Great Lakes.

Alternatively, Amici Curiae urge the Court to grant leave to appeal under MCR 7.302(B)(3). By doing so, this Court can correct the erroneous statements by the Court of Appeals that are

[1] Part 325 of NREPA was formerly known as the Great Lakes Submerged Land Act (the "GLSLA"), MCL 322.701, *et seq*., which was repealed by 1995 PA 59.

inconsistent with the principle from *Hilt* that Great Lakes riparian owners have title to their property to the water's edge, free of any public trust interest in submerged lands.

ARGUMENTS

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

A. The Michigan Supreme Court's *Hilt* v *Weber* Decision Controls This Case

In the landmark decision of *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930), this Court clearly and unambiguously held that shoreline property owners on the Great Lakes have title to the water's edge, at whatever stage:

> "The most ordinary effect of a large body of water is to change the shore line by deposits or erosion gradually and imperceptibly. In such cases it is the general, possibly universal, rule, except for the [now overruled] Kavanaugh Cases, and except in a few States where riparian rights have been extinguished by Constitution or statute, that the **title of the riparian owner follows the shore line under what has been graphically called 'a movable freehold.'**" *Hilt* at 219 (quoting 28 Halsbury, Laws of England, 361) [emphasis added].

As elaborated upon later in this brief, the *Hilt* decision also held that the public trust does not extend landward beyond the water's edge and applies only to submerged bottomlands of the Great Lakes. *Id*. at 224. The *Hilt* decision has been neither overturned nor criticized by any Michigan case since it was decided in 1930. In fact, this Court most recently affirmed the principle of riparian ownership to the water's edge, at whatever stage, in *Peterman* v *DNR*, 446 Mich 177; 521 NW2d 499 (1994). In *Peterman*, the court held that the riparian owner, and not the public, owned the beach between the water's edge and the so-called "ordinary high water mark:"[2] "**title of the riparian**

[2] The term "ordinary high water mark" seems to have no fixed definition. Even Plaintiff, who wishes to use it as the demarcation line between private and public ownership on the shoreline, is unable to consistently define it. At some points in her brief, Plaintiff describes the ordinary high water mark as a fluctuating line that changes imperceptibly as the "tumultuous waters of the Great Lakes exert their influence." (Pl's Application for Leave at pp 28-29) At other points, Plaintiff wishes to adopt a fixed measurement above sea level as the "ordinary high water mark," as provided

owner follows the shore line under what has been graphically called a 'movable freehold.'" *Peterman* at 192 [emphasis added]. Based on *Hilt* and *Peterman*, Plaintiff's argument that the public has any ownership interest in Great Lakes' riparian property between the water's edge and the so-called "ordinary high water mark" is untenable and must be rejected. The specific facts of *Hilt* further bear out this conclusion.

In *Hilt*, a land contract purchaser of shoreline property, in defending against foreclosure, asserted that the seller had misrepresented the property line as being located at a stake driven approximately 100 feet inland from the water's edge. Based on the court's holdings in *Kavanaugh* v *Rabior*, 222 Mich 68; 192 NW 623 (1923) and *Kavanaugh* v *Baird*, 241 Mich 240; 217 NW2d (1928) (hereinafter the "*Kavanaugh Cases*"), the land contract purchaser argued that the "meander line"[3] was the actual boundary, which was located approximately 277 feet inland from the water's edge. In resolving this dispute, the *Hilt* court overruled the *Kavanaugh Cases*, holding that the boundary line of the riparian property extended to the water's edge – not the meander line – and so no damage had occurred.

The significance of the *Hilt* decision and its overruling of the *Kavanaugh Cases* cannot be overstated. Before the *Kavanaugh Cases*, it was understood that property owners along Michigan shorelines owned to the water's edge. The *Kavanaugh Cases* changed that by converting to public property Michigan's hundreds and hundreds of miles of shore.

Understandably, this dislodging of the bedrock foundation of Michigan's Great Lakes riparian jurisprudence caused a flurry of controversy and dispute, and both legislative and executive

---

by statute. *Id*. at pp 39-46. Because even Plaintiff is incapable of consistently defining the very term upon which her legal arguments hinge, Amici Curiae use it with a good deal of caution.

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

action. To resolve this rising conflict and to place the law back on its foundations, the Michigan Supreme Court promptly accepted the *Hilt* case for review:

> "Because of the conflict of authority, and also because the executive and legislative branches of the state government have felt the need of more precise statement of the legal situation as a basis of legislation, we finally determined upon a frank re-examination of the Kavanaugh cases. . . ." *Hilt* at 202.

Recognizing that the *Hilt* case presented an issue of momentous importance to the state and its jurisprudence, the court accepted numerous briefs beyond those submitted by the parties, including briefs filed by the attorney general and others representing public and private interests as amici curiae. The court then carefully and methodically addressed all of the arguments that might be brought to bear on the issue, including an historical analysis of relevant federal and state decisions and consideration of the public trust doctrine, and set about to bring final resolution to the issue of Great Lakes' shoreline ownership in Michigan. As is discussed at length below, the court decided that, in the absence of condemnation and payment of just compensation by the state, the title of a riparian owner extends to the water's edge, and that the public trust covers only lands actually submerged by waters of the Great Lakes.

1. State And Federal Decisions Establish Title To The Water's Edge

From the outset, the *Hilt* court noted that even in the earlier, contrary case of *Kavanaugh* v *Baird, supra,* the court had acknowledged that "the decision was against the weight of authority, supported by the fact that the contrary authority is substantially unanimous, in state and federal courts, in this country and England." *Hilt* at 203. With specific regard to federal law, the court cited *St Paul & P Railroad Co* v *Schurmeier,* 7 Wall 272, 286; 19 L Ed 74 (1868) ("the water course, and not the meander-line, as actually run on the land, is the true boundary") and *Hardin* v *Jordan,* 140 US 371, 380; 11 S Ct 808, 811; 35 L Ed 428 (1890) ("the waters themselves constitute the real boundary"). Ultimately, after reviewing the decisions made by courts in other Great Lakes states,

the court concluded that under federal law, "the purchaser from the government of public land on the Great Lakes took **title to the water's edge**." *Hilt* at 206 [emphasis added].

2. Michigan Law Defines Michigan Property Rights

The *Hilt* court next held that once Great Lakes' waterfront property was acquired by a private person, state law, and not federal law, controlled the extent of that person's rights: "The state law became paramount on after it vested in a private person." *Id*. (citing *Hardin* v *Jordan, supra*). This same conclusion holds true and remains the law today. *See Oregon* v *Corvallis Sand & Gravel Co*, 429 US 363, 372; 97 S Ct 582; 50 L Ed 2d 550 (1977) ("that land had long been in private ownership and, hence, under the great weight of precedent from this court, subject to the general body of state property law").

3. Prior To The *Kavanaugh Cases*, Michigan Law Held That Shoreline Owners Held Title To The Water's Edge

After concluding that Michigan law controlled the disposition of the case, the *Hilt* court concluded that, prior to the *Kavanaugh* decisions, "this court, in common with public opinion and in harmony with the weight of authority, assumed, without question, that the upland proprietor **owns to the water's edge**." *Id*. at 212 [emphasis added]. In so holding, the *Hilt* court cited with approval *People* v *Warner*, 116 Mich 228; 74 NW 705, 711 (1898)[4] and *People* v *Silberwood*, 110 Mich 103; 67 NW 1087 (1896), as well as the concurring opinion in *State* v *Fishing & Shooting Club*, 127 Mich 580; 87 NW 117 (1901), all of which held that private ownership extends to the water. *Hilt* at 208-209.

[4] After noting that the high and low water marks may well be synonymous because there are no tides on the Great Lakes, the *Warner* court stated that "[t]he adjoining proprietor's fee stops there, and there that of the State begins, whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation." *Id*. at 239.

4. The *Hilt* Court Clearly Held That The Public Trust Terminates At The Water's Edge

The *Hilt* court acknowledged that the so-called "public trust" doctrine (termed the "trust doctrine" by the court) had been recognized by Michigan courts as early as 1843 in *La Plaisance Bay Harbor Co* v *City of Monroe*, Walker's Ch 155 (1843). In that case, the court had explained that "the proprietor of the adjacent shore has no property whatever in the land **covered by the water of the lake**." *Hilt* at 208 (emphasis added). The court also noted the reference to the doctrine in several other cases. *Id*. The court then dealt head on with the heated and vigorous arguments, presumably made by the state Conservation Department and others by way of amicus briefs, that the trust doctrine should not end at the water's edge, but should extend upward across the dry shore. *Hilt* at 224. Despite the state's apparent strong desire for "public control of the lakeshore," the *Hilt* court clearly and unequivocally rejected this extension of the public trust doctrine:

> "With much vigor and some temperature, the loss to the State of financial and recreational benefit has been urged as a reason for sustaining the *Kavanaugh* doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The State should provide proper parks and playgrounds and camping sites to enjoy the benefits of nature. But to do this, the State has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The State must be honest." *Hilt* at 224.

The court further explained that, even under the *Kavanaugh Cases*, the state's alleged title to the meander line was merely that of trustee, holding the land "only for the preservation of the public rights of navigation, fishing, and hunting." *Id*. at 224. Thus, when it overruled the *Kavanaugh Cases* and instead held that the state's title ended at the water's edge, the *Hilt* court was referring to the terminus of the public trust. Any doubt regarding this point disappears in the face of the following statement from the dissent:

> "My brother's opinion is far reaching, for it constitutes the Michigan shoreline of 1624 miles private property, and thus destroys for all time the trust vested in the State of Michigan for the use and benefit of its citizens." *Id*. at 231.[5]

5. In This Case, The Court Of Appeals Mistakenly Suggested That The So-Called "Public Trust" Extends Landward Of The Submerged Lands Of The Great Lakes

In its opinion in this case, the Court of Appeals reached the correct result in holding that, pursuant to *Hilt* and subsequent cases, Great Lakes' riparian property owners have the right to exclusive use and enjoyment of their land to the water's edge. Unfortunately, some portions of the Court of Appeals' opinion imply that the state holds title in trust to a part of the riparian owners' exposed property landward of the water's edge, even though other portions of the opinion correctly note that the state's trust interest is limited to submerged lands.

For example, at one point, the Court of Appeals emphasized that the public trust applies only to submerged lands:

> "That the state of Michigan holds in trust the *submerged lands* beneath the Great Lakes within its borders for the free and uninterrupted navigation of the public is without doubt." *Glass* v *Goeckel*, No 242641 (Mich Ct App, May 13, 2004), slip op at p 8 [emphasis in original] (citing *Peterman* at 194; *Nedtweg* v *Wallace*, 237 Mich 14, 16-17; 208 NW 51 (1926); *People* v *Massey*, 137 Mich App 480, 485; 358 NW2d 615 (1984)).

However, intertwined with this same discussion is the implication that the public trust extends to exposed lands lying above the water's edge:

> "The *Hilt* conclusion that a riparian owner has the right to the exclusive use of relicted land is entirely consistent with the title held by the State under the public trust doctrine.
>
> * * *

[5] Of course, the majority's decision did not destroy the public trust in any property, because no public trust ever extended beyond the water's edge and onto the lakeshore. The same holds true today.

> Although the state holds title to land previously submerged, the state's title is subject to the riparian owner's exclusive use, except as it pertains to navigational issues. [internal citations omitted]. However, if and when the Great Lakes rise, the riparian owner no longer has exclusive use to that submerged land, for the state's title in public trust for navigational purposes becomes paramount." *Id*., slip op at pp 8-9.

The implication that the state has public trust title to exposed, dry lands is, of course, irreconcilably inconsistent with the holdings of *Hilt* and *Peterman* that Great Lakes riparian property owners themselves have title that extends to the water's edge. It is simply not possible for the state and private property owners to hold mutually exclusive titles to the same land at the same time.[6]

There are numerous cases that describe the "public trust" as attaching only to the "submerged lands" of the Great Lakes, including *Hilt*. *See*, e.g., *Illinois Central R Co* v *Illinois*, 146 US 387, 452; 13 S Ct 110; 36 L Ed 1018 (1892) ("the state holds title to the lands **under the navigable water** of Lake Michigan") [emphasis added]; *Hilt* at 202 ("State has title in fee in trust for the public to **the submerged beds** of the Great Lakes within its boundaries") [emphasis added]; and *People ex rel Director of Conservation* v *Broedell*, 365 Mich 201, 205; 112 NW2d 517 (1961) (title of the State to "submerged lands" in the Great Lakes is impressed with public trust). The inescapable fact is that, subsequent to *Hilt*, and setting aside the Court of Appeals' decision in this case, there has never been a Michigan case holding that the public trust applies to dry land above the water's edge.

[6] The Court of Appeals' confusion on this point may stem from the court's failure to differentiate between two separate legal theories that have important distinguishing characteristics: (1) the public trust doctrine, through which the state holds title to Great Lakes' *submerged* lands in trust for the people of the state so that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein, without obstruction or interference from private parties (*see Peterman* at 194; *Nedtweg* v *Wallace*, 237 Mich 14, 16-17; 208 NW 51 (1926); and *People* v *Massey*, 137 Mich App 480, 485; 358 NW2d 615 (1984)); and (2) the "navigational servitude," which allows the state, or the federal government, under proper circumstances of public necessity, to incidentally burden privately held Great Lakes riparian property if such burdens are the result of making navigational improvements on or in the waters of the Great Lakes. *Peterman* at 193-195.

The limitation of the public trust to lands that are actually submerged is compelled not only by the relevant case law cited above, but also by common sense, since the purpose of the trust is to protect the public's right to enjoy navigation on the waters, to carry on commerce over them, and to have the liberty of fishing therein (*see Peterman* at 194; *Nedtweg* at 16-17; and *Massey* at 485) – all activities which are performed on the surface of the water, not on dry land. Indeed, conspicuously absent from the list of activities protected by the public trust is walking on the beach – the dry land activity which Plaintiff has improperly tried to shoe-horn into the public trust without a scintilla of legal support for doing so. The relevant Michigan authorities thus compel the conclusion that the public trust applies only to submerged lands when they are actually submerged.

6. Plaintiff's Arguments Are Nothing But An Attempt To Rewrite *Hilt* v *Weber*

In an attempt to escape the clear holding of *Hilt*, Plaintiff argues in her application for leave to appeal that the *Hilt* court didn't really mean to use the term "water's edge" or "shore line" when it referred to the extent of a riparian owner's fee title. It appears to be Plaintiff's unsupported opinion that the *Hilt* court "loosely" and mistakenly used this "unfortunate terminology," when the court really meant to refer to the "foreshore" – a term which does not appear in a single Michigan case that is germane to the case at bar. *See* Pl's Application for Leave at pp 26, n10; 28-31.

Of course, as Plaintiff points out, the term "foreshore" was already used in 1930 to mean "the part of the shore that lies between high and low water marks." *Id*. at p 10, n2. Therefore, in order to accept Plaintiff's arguments, one must accept the proposition that the *Hilt* court – knowingly embarking on one of the most important riparian rights decisions in Michigan's jurisprudential history – sloppily and accidentally replaced the existing term "foreshore" with the phrase "water's edge" or "shore line," when it really meant the former.

To continue to stay on course with Plaintiff's arguments, one must then accept the proposition that both this Court and the Court of Appeals repeated the same sloppy use of the English language in not less than six opinions covering the same subject over a course of approximately 64 years. *See Peterman* at 192 (quoting *Hilt*) ("the 'title of the riparian owner follows the **shore line**'"); *Bott* v *Comm of Natural Resources*, 415 Mich 45, 82-84; 327 NW2d 838 (1982) ("In *Hilt*, a recent holding in the *Kavanaugh Cases* that owners adjacent to the Great Lakes hold title to land running along the meander line but not to the **water's edge** was re-examined and overruled."); *Klais* v *Danowski*, 373 Mich 262, 279; 129 NW2d 414 (1964) (recognizing under *Hilt* that a riparian owner has use of the land to the **water's edge**, including any new land occurring through accretions or reliction); *Donohue* v *Russell*, 264 Mich 217, 218; 249 NW 830 (1933) (recognizing that *Hilt* "held that the riparian owner owns the land beyond the meander line to the **edge of the water**"); *Boekeloo* v *Kuschinski*, 117 Mich App 619, 626-627; 324 NW2d 104 (1982) (recognizing that *Hilt* held that "**the waters themselves** constitute the real boundary"); *Turner Subdivision Prop Owners Assn* v *Schneider*, 4 Mich App 388, 391; 144 NW2d 848 (1966) ("*Hilt* established that a riparian owner owns land between the meander line and **the water**").

Plaintiff's position that this Court and the Court of Appeals have been using the wrong terminology for 64 years is untenable, and finds no support under Michigan law. The "movable freehold" referred to by the *Hilt* court and by several subsequent courts unambiguously finds its boundary at the water's edge. Plaintiff's attempt to redefine the "movable freehold" as "the gradual and imperceptible shifting of the line where the riparian's dry upland meets the high water mark" (*see* Pl's Application for Leave at p 28) finds no support other than in Plaintiff's individual desire to overturn established Michigan property law. Furthermore, to the extent that Plaintiff attempts to alternatively argue that the ordinary high water mark is a fixed line established by Part 325 of

NREPA (*see* Pl's Application for Leave at pp 39-46), this is totally inconsistent with the *Hilt* court's concept of a "movable freehold." Does Plaintiff actually expect the Court to believe that the *Hilt* court meant to refer to a "movable freehold" that never moves?

The fallacy of Plaintiff's position is further highlighted by her own admission regarding the implicit errors in the *Kavanaugh Cases*. In that regard, Plaintiff admits that the *Kavanaugh Cases* were patently erroneous because, by allowing the state's trust interest to extend to the meander line, the *Kavanaugh* court had cut off Great Lakes riparian properties from physical contact with the waters defining them as riparian in the first instance. *See* Pl's Application for Leave at pp 24-25. At the same time, however, Plaintiff wants this Court to draw a new but equally divisive line in the sand –the ordinary high water mark. This new line would likewise cut off Great Lakes riparian properties from physical contact with the waters defining them as riparian, and would therefore suffer from the same problem as the meander line used in the *Kavanaugh Cases*.

Stated another way, Plaintiff appears to be comfortable with the concept of creating a "public trust" corridor along the beach that cuts off riparian properties from physical contact with the water which defines them as riparian, so long as the corridor is narrower than that created by the meander line, but just wide enough to accommodate Plaintiff's interest in walking the beach. This is, of course, preposterous. Plaintiff cannot have it both ways. As the *Hilt* court correctly recognized and Plaintiff is forced to admit, "[t]he basis of the riparian doctrine, and an indispensable requisite to it, is actual contact of the land with the water." *Hilt* at 218. Therefore, if the Court were to insert a "public trust" corridor – no matter how infinitesimally small – between riparian property and the waters which define it as riparian, it would making the same error that infected and led to the Court's expeditious overruling of the *Kavanaugh Cases*.

The Court of Appeals correctly held in this case that riparian property owners have exclusive control of their properties to the water's edge. Unfortunately, the Court of Appeals erred by failing to note that the public trust interest held by the state in submerged lands ends at the water's edge where the riparian owner's title begins. This error is relatively harmless to Defendants in the limited factual context of this particular case (Plaintiff is effectively prevented from trespassing on Defendants' beachfront anyway). However, it does represent a fundamental error in the interpretation of Michigan riparian property law, which could cause great mischief by confusing settled law that has existed for at least 75 years. Needless litigation is likely to be the result. Thus, in lieu of granting leave to appeal, Amici Curiae urge the Court to peremptorily affirm the Court of Appeals' decision on the basis that Great Lakes riparian property owners have title to the water's edge free from the public trust imposed on submerged lands of the Great Lakes.

B. *Hilt* v *Weber* Continues To Be Controlling Law In Michigan

There is no doubt that the *Hilt* decision continues to represent the law in Michigan, as evidenced by the number of subsequent Michigan opinions that have reaffirmed its holding of riparian title to the water's edge. *Peterman, supra*; *Bott, supra*; *Klais, supra*; *Donohue, supra*; *Boekeloo, supra*; and *Turner Subdivision Prop Owners Assn, supra*. The most significant of these is the *Peterman* opinion, decided in 1994 – 64 years after *Hilt*.

As noted previously, in *Peterman*, Great Lakes riparian property owners sued the Department of Natural Resources ("DNR") for just compensation due to the destruction of their beachfront – both above and below the ordinary high water mark – caused by the DNR's negligent installation of an adjacent boat launch and jetties. In framing its analysis, the *Peterman* court first set forth the fundamental holding of *Hilt* that established riparian ownership to the water's edge: "**title of the riparian owner follows the shoreline** under what has been graphically called 'a movable freehold.'" *Peterman* at 192 (quoting Hilt at 219) [emphasis added]. The court also specifically

referenced with approval the *Hilt* court's conclusion that "the riparian owner has the exclusive use of the bank and shore." *Id*. at 192 (citing *Hilt* at 226).

Based on these fundamental precepts established by *Hilt*, the *Peterman* court ultimately held that the state must compensate the riparian owner for the state's negligent destruction and the resulting "loss of the beach below the ordinary high water mark." *Id*. at 200-202. In so holding, the *Peterman* court – like the *Hilt* court 64 years later – recognized the potential benefits of "public control of the lakeshores." Importantly, however, the *Peterman* court, like the *Hilt* court, eschewed the notion being advocated by Plaintiff in this case, that public control of the lakeshore could be taken by the state without payment of just compensation therefor: "There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation." *Id*. at 193 (citing *Hilt* at 224).

Thus, the argument that the public trust doctrine extends beyond the actual water's edge was rejected by this Court in 1930, and that rejection was reaffirmed by this Court in 1994. Both *Hilt* and *Peterman* remain the law in Michigan today, and support the result reached – if not the wording used – by the Court of Appeals in this case.

C. As A Rule Of Property Law, *Hilt* Should Not Be Overturned

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

> "The rules of property law which it is proposed to change have been fully established for over 60 years, and the underlying concepts for over 125 years. Riparian and littoral land has been purchased in reliance on these rules of law, and expenditures

> have been made to improve such land in the expectation, based on decisions of this Court, that the public has no right to use waters not accessible by ship or wide or deep enough for log flotation, and that, even if there is navigable access to a small inland dead end lake, the public may not enter over the objection of the owner of the surrounding land, and that the only recreational use recognized by this Court as an incident of the navigational servitude is fishing. The Legislature can, if it is thought to be sound public policy to enlarge public access to and the use of inland waters, pass laws providing for the enlargement of the rights of the public in those parts of the state where the Legislature finds that there is a shortage of public access to inland rivers and lakes and for the compensation of landowners affected by the enlarged servitude." (Emphasis added)

The Court further stated:

> "The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. The judiciary must accept responsibility for its actions. Judicial 'rules of property' create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital . . . . It cannot be denied that some landowners have invested their savings or wealth in reliance on a long-established definition of navigability. It also cannot be denied that the heretofore private character of the waters adjacent to their property significantly adds to its market value. Vacationers are not manufacturers who can pass on their losses to a large class of consumers. Techniques to safeguard past reliance on prior law such as prospective overruling are unavailable where property rights are extinguished. Prevention of this hardship could be avoided through compensation, but this Court has no thought of providing compensation to riparian or littoral owners for the enlarged servitude and the resulting reduction in amenities and economic loss." *Id*. at 77.

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

D. Allowing Public Access To And Use Of The Dry Beach Areas Will Diminish The Enjoyment And Value Of The Riparian Lands

In *Bott*, *supra*, this Court recognized that merely by allowing public use of previously non-navigable waters, the enjoyment of the surrounding properties would be diminished. This Court noted that many of those who owned such property were vacationers who acquired the property for a peaceful retreat and the opening of the adjacent waters to the public could render the property unfit as a refuge or as a retreat. 415 Mich at 78-79. The impact predicted in the *Bott* opinion would be

even greater if this Court were to open up beaches landward of the water's edge for public use as the Plaintiff demands in this case.

Opening up the beaches to public use would adversely affect not just the intangible values flowing from the peaceful refuge or retreat offered by private beach areas along riparian lands, but also the financial investment made by owners of the riparian land. These owners and their mortgage lenders – many of whom are members of one or more of the Amici Curiae submitting this brief – have invested substantial monies in reliance on the rule laid down in *Hilt*. In *Bott*, it was noted, "It also cannot be denied that the heretofore private character of the waters adjacent to their property significantly adds to its market value." 415 Mich at 79. The same is true of the private character of the beach lands adjacent to riparian property along the Great Lakes shorelines. Opening this area to public use will reduce the amenities and cause economic loss to the riparian property owners.

E. Departure From The Principle Set Forth In *Hilt* v *Weber* Will Result In A "Taking" Of Private Property Rights

Negation of the riparian property owner's right to exclude the public from dry land beyond the water's edge destroys a fundamental element of property and will result in an unconstitutional taking of property. As noted in *Bott*, "Compensation has been awarded where there has been a significant reduction in the use and enjoyment of property stemming from governmental action. The recreational-boating test would deny riparian and littoral owners the right to exclude others, a right inherent in the concept of private property." 415 Mich at 81. The same effect upon a right inherent in the concept of private property would occur by departing from the principles set forth in *Hilt* and expanding the public's rights and interest in exposed land beyond the water's edge. In *Bott*, in footnote 44, the court quotes from an early Michigan Supreme Court decision which emphasizes the value of the right to exclude:

> "'And among the incidents of property in land, *or anything else*, is not the right to enjoy its beneficial use, *and so far to control it as to exclude others from that use*, the

most beneficial, the one most real and practicable idea of property, of which it is a much greater wrong to deprive a man, than the mere abstract idea of property without incidents? The use, or the right to control it with reference to its use, constitutes, in fact, all that is beneficial in ownership, except the right to dispose of it; and this latter right or incident would be rendered barren and worthless, stripped of the right to use.' (Emphasis supplied.) *Grand Rapids Booming Co v Jarvis*, 30 Mich 308, 320-321 (1874)." *Bott*, 415 Mich at 81-82, n44.

F. To Deviate From Or Weaken The *Hilt* Decision Would Repeat The Mistake Of The *Kavanaugh Cases*

The imposition of public rights landward of the water's edge is precisely what was attempted by the *Kavanaugh Cases*. That this was the wrong thing to do is evident from the fact that *Hilt* overruled the *Kavanaugh Cases* only a few years later. This was discussed at length in the following passage from the *Bott* opinion:

> "In *Hilt*, a recent holding in the *Kavanaugh Cases* that owners adjacent to the Great Lakes hold title to land running along the meander line but not to the waters' edge was re-examined and overruled. The *Hilt* opinion demonstrated at some length that the *Kavanaugh Cases*, decided just two years and seven years earlier, had misanalyzed prior precedent. Especially pertinent is the Court's response to the policy arguments made by those who favored retention of the disputed land for the public:
>
> > 'The doctrine of *stare decisis* has been invoked. The point has much force. Titles should be secure and property rights stable. Because a judicial decision may apply to past as well as to future titles and conveyances, a change in a rule of property is to be avoided where fairly possible. But where it clearly appears that a decision, especially a recent one, was wrong and continuing injustice results from it, the duty of the court to correct the error is plain. The *Kavanaugh Cases* were decided in the recent years in 1923 and 1928, respectively. They enumerated principles at variance with settled authority in this State and elsewhere, under which real estate transactions long had been conducted and given legal effect by courts and citizens, and themselves, disregarded the doctrine of *stare decisis* by overruling the *Warner Case [People v Warner*, 116 Mich 228; 74 NW 705], decided in 1898. The rules they stated are not as old as the rules they abrogated. *When to that are added the considerations that they operated to take the title of private persons to land and transfer it to the State, without just compensation, and the rules here announced do no more than return to the private owners the land which is theirs, the doctrine of stare decisis must give way to the duty*

> *to no longer perpetuate error and injustice.*' *Hilt*, p 223. (Emphasis supplied.)" *Bott*, 415 Mich at 82-83.

This Court should carefully heed the *Bott* court's admonition: "This Court's experience following the *Kavanaugh Cases* suggests that we should not casually enlarge the rights of the public at the expense of property owners who have relied on prior decisions of this Court. The *Kavanaugh Cases* were overruled because, among other things, they worked severe injustice and constituted a judicial 'taking' without compensation." 415 Mich at 84.

G. Maintaining The Boundary Between Riparian Title And The State's Public Trust Interest At The Water's Edge Will Minimize The Potential For Litigation Between Riparian Owners And Those Seeking To Use The Dry Beach Areas

Affirming the rule enunciated in *Hilt* and its progeny, to the effect that the boundary between public and private interests along the Great Lakes is the water's edge, will minimize the chances of fomenting needless litigation. The water's edge as it exists is an easily identifiable and clear line which anyone, whether a child or a trained scientist, can readily perceive. Determining its location does not require the skills and expertise of a surveyor as would determining the location of the ordinary high water mark if the elevations set forth in MCL 324.32502 were deemed the boundary. Nor does locating the water's edge require the skills and expertise needed to analyze land forms along the shore to locate the physical ordinary high water mark. One simply looks to see where the water is and one then knows exactly where public and private rights exist. Disputes are unlikely to arise under such circumstances.

Allowing public access to and use of the area landward of the water's edge would inevitably create conflicts and thus litigation over the appropriate scope and extent of the use allowed of such area by the public. No guidance is provided by the public trust doctrine as to what possible uses could be made by the public of dry land beyond the water's edge, because the doctrine was never intended to apply to dry land. Instead, the public trust doctrine is simply an interest the state holds in

submerged lands so that the people of the state may enjoy the navigation of the waters, carry on commerce over them and have the liberty of fishing therein.

This Court and the Court of Appeals have seen the result of situations where the public right to use lands bordering water bodies existed but was not delineated or defined. Prime examples are the so-called "road end" cases where courts have been forced to repeatedly consider the issue of public access to water and usage of road ends (roads that terminate at the water's edge). See, for example, the substantial amount of litigation relating to road end issues for just one lake, Higgins Lake. *Higgins Lake Property Owners Assn* v *Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003).

Expansion of the right of the public to use areas along Great Lakes shorelines landward of the water's edge will likely lead to the same sort of recurring litigation. Maintaining the demarcation between public and private interests at the water's edge allows the public to engage in those activities which are consistent with the public trust interest held by the state in submerged lands while at the same time allowing the riparian property owner to fully exercise the rights inherent in the ownership of property along the Great Lakes shoreline.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals reached a correct result when it reversed the trial court's decision in this case, and held that Great Lakes riparian property owners have the exclusive right to the use of their property all the way to the water's edge.

Unfortunately, the Court of Appeals failed to fully comprehend that the right to exclusive use was but one incident of the "movable freehold" title held by such owners in their property under *Hilt*, and that the public trust held by the State of Michigan in the submerged lands of the Great Lakes stops at the water's edge. For that reason, the Court of Appeals' opinion is seriously flawed. Amici Curiae therefore request, in lieu of granting leave, that the Court vacate the opinions of the

courts below and affirm the decision of the Court of Appeals based solely on the holding in *Hilt* v *Weber* that Great Lakes riparian property owners hold title to the water's edge free of the public trust. Alternatively, this Court should grant leave to appeal to correct the flaws in the Court of Appeals' decision on this principle of major significance to the state's jurisprudence.

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Amici Curiae

Dated: _____

By: _____

Fredric N. Goldberg (P29057)
William A. Horn (P33855)
Ronald M. Redick (P6112)
900 Monroe Ave., N.W.
Grand Rapids, MI 49503
(616) 632-8000

H:\WAH\CLN\SOS\Goeckel.Amici.Brief.doc