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

COA Docket No.: 242641

Lower Court Case No.:
01-10713-CK(K)
Hon. John F. Kowalski

WEINER & BURT, P.C.
By: Pamela S. Burt (P47857)
Attorneys for Plaintiff-Appellant
116 First Street, P.O. Box 186
Harrisville, MI 49740
(989) 724-7400

BRAUN KENDRICK FINKBEINER P.L.C.
By: Scott C. Strattard (P33167)
Attorneys for Defendants-Appellees
4301 Fashion Square Boulevard
Saginaw, MI 48603
(989) 498-2100

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DEFENDANTS-APPELLEES' BRIEF IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

Prepared By:

BRAUN KENDRICK FINKBEINER P.L.C.
By: SCOTT C. STRATTARD (P33167)
Attorneys for Defendants-Appellees
4301 Fashion Square Blvd.
Saginaw, Michigan 48603
(989) 498-2100

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MISCELLANEOUS

BASIS OF APPELLATE JURISDICTION

Plaintiff-Appellant's jurisdictional statement is correct.

STATEMENT OF QUESTION INVOLVED

UNDER THE MOVEABLE FREEHOLD DOCTRINE, DOES A PRIVATE BEACHFRONT PROPERTY OWNER ON THE SHORES OF LAKE HURON ENJOY EXCLUSIVE RIGHT TO THE USE OF THE BEACHFRONT TO THE WATER'S EDGE, WHEREVER THAT EDGE MAY BE FROM TIME TO TIME?

Plaintiff-Appellant answers "No".

Defendants-Appellees answer "Yes".

The Court of Appeals answered "Yes".

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case involves riparian rights to beachfront property that is created when the waters of the Great Lakes, in this case Lake Huron, recede. It is the Plaintiff's theory that when additional beachfront property is created by receding waters, that beach is public property extending from the "new" water's edge to the ordinary high watermark of the private beachfront property. The Court of Appeals held, however, consistent with over 70 years of Michigan precedent, that the private beachfront property owner, as the riparian owner, enjoys exclusive right to the use of the beachfront property to the water's edge, wherever that edge may be from time to time. This concept is known as the moveable freehold doctrine, a rule adopted in virtually every state in this country. Indeed, it is revealing that, in a calculated attempt at obfuscation, the only reference to this doctrine in Plaintiff's 50 page application is not found until page 36. The moveable freehold doctrine became the law of the State of Michigan, bringing it in line with other states, in 1930 in the case of Hilt v Weber, 252 Mich 198 (1930). In Hilt the Michigan Supreme Court overruled two aberrant cases known as the "Kavanaugh Cases", and declared that a riparian owner's exclusive rights extend to the water's edge, wherever that may be from time to time:

> The most ordinary effect of a large body of water is to change the shoreline by deposits or erosion gradually and imperceptibly. **In such cases it is the general, possibly universal, rule,** except for the Kavanaugh Cases, and except in a few states where riparian rights have been extinguished by constitution or statute, **that the title of the riparian owner follows the shoreline under what has been graphically called "moveable freehold."**

Hilt v Weber, supra, 219, emphasis supplied.

This has been the law in the State of Michigan since Hilt, and contrary to Plaintiff's panicked outcry, the sky has neither fallen, nor as the Court of Appeals announced a new rule of law in this case. The well-settled nature of Michigan law on this issue is perhaps best evidenced by the plethora

of cases cited by the Court of Appeals that, the Appellee might add, is certainly by no means exclusive:

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

Opinion of the Court of Appeals below, Exhibit "D", 7, 8.[1]

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[1]This overwhelming number of cases cited by the Court of Appeals below renders utterly erroneous Plaintiff's claim on page 8 of her application that reversing the Court of Appeals in this case would not entail overruling any of this Court's decisions. It also directly refutes Plaintiff's claim on page 8 of her application that, since Hilt, there has been "confusion for the courts".

In misplacing its reliance on cases discussing the public trust doctrine, the Plaintiff distorts unmercifully the holdings in those cases, which make it clear that the public trust doctrine is concerned with submerged land, and the state's interest in maintaining title to navigable waters for the benefit of the public in general.

Plaintiff's reliance on the Great Lakes **Submerged** Land Act (emphasis supplied) is equally misplaced, as the Act on its face deals with submerged land, and specifically states that it is not intended to affect "rights acquired by accretions occurring through natural means or reliction." MCL 324.32502.

The folly of Plaintiff's theory is best exemplified by the undeniable and illogical effect it would have on private beachfront property owners. Every time the water recedes and a new strip of beach is created, the riparian private beachfront property owner loses exclusive enjoyment to the water's edge, a new **public** beach having now been created between the high water mark and the water's edge. Imagine the riparian owner's consternation when, upon the creation of this "public" beach, up fly the jetskis, up go the volleyball nets, up go the tents, in goes a firepit, and throw in a boombox for good measure. The **private** character of the beachfront property for which people like the Appellees pay top dollar will have been utterly destroyed. That makes no sense, yet it is the undeniable effect of what the Plaintiff urges in her application.

STATEMENT OF FACTS

The Plaintiff-Appellant, Joan M. Glass ("Plaintiff"), owns non-riparian property in Alcona County. The Defendants-Appellees, Richard A. Goeckel and Kathleen D. Goeckel ("the Goeckels"), own lakefront property on Lake Huron, across highway U.S. 23 from Plaintiff's property. Plaintiff's 1967 deed includes an express "easement for ingress and egress to Lake Huron over the North fifteen (15) feet" of the Goeckels' property. (R-42, Exh. 1).[2]

On May 10, 2001, Plaintiff filed a Complaint in the Circuit Court for Alcona County against the Goeckels alleging that the Goeckels were interfering with and obstructing Plaintiff's access to the easement and that Plaintiff had a prescriptive easement which allowed her to use the beach portion of the easement for beach activities such as sunbathing and lounging. (R-2). The Goeckels denied any such prescriptive easement rights in their Answer and Counter-Claim for trespass. (R-8, 9). Thereafter, Plaintiff filed a First Amended Complaint claiming that the Goeckels were also interfering with Plaintiff's alleged right to walk along the shore of Lake Huron lying below and lakeward of the ordinary high-water mark. (R-26).

The Goeckels filed a Motion for Summary Disposition which was heard by the Court on March 11, 2002. (R-37; R-44). In response, Plaintiff argued that she was entitled to summary disposition pursuant to MCR 2.116(I)(2). (R-42). In addition to issues related to the scope of the easement, the March 11, 2002 hearing addressed Plaintiff's alleged right to use Defendants' private property below and lakeward of the ordinary high-water mark as set forth in Count 3 of her First Amended Complaint. (3/11/02 T-3-18). At the conclusion of the hearing, the Trial Court took the matter under advisement.

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[2]All references to the lower court record are by docket number (i.e., R-1) or transcript date and page (i.e., 3/11/02 T-1).

On April 3, 2002, the Court issued an Opinion finding that the Plaintiff has a right to use the Goeckels' private property lying below and lakeward of the natural ordinary high-water mark for pedestrian travel. (R-45). The Court purported to observe that there was "no clear precedent" regarding this issue, and based its ruling on the Great Lakes Submerged Land Act:

> 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 Plaintiffs have the right to use the shore of Lake Huron lying below and lakewards of the natural ordinary high water mark for pedestrian travel.

Exhibit "A", 2. Thereafter, the Court entered an Order conforming to its April 3, 2002 Opinion. (R-48). Exhibit "B".

An Order Establishing Easement Rights was entered on June 25, 2002. (R-65). A copy of the Order is attached hereto as Exhibit "C". The June 25, 2002 Order was a final order and, thereafter, the Goeckels perfected an appeal as of right to the Court of Appeals.

The Court of Appeals reversed the circuit court, finding that the moveable freehold doctrine gave the Goeckels exclusive right to the use of their beachfront property to the water's edge, wherever the water's edge might be from time to time. Exhibit "D", 3-9. The court rejected Plaintiff's claim that the Great Lakes Submerged Land Act infringed on the Goeckel's riparian rights under the moveable freehold doctrine, noting that the Act specifically indicated that it does not affect rights acquired by accretions occurring through natural means or reliction. Exhibit "D", 9, 10.

The Plaintiff has now applied for leave with this Court, and the Goeckels offer this brief in opposition.[3]

[3]Two Amici Curiae briefs were submitted to this Court in support of the finding in favor of the Goeckels, but requesting modification declaring that the fee title to the water's edge lies with the Goeckels and not with the State of Michigan, subject to reversion to the State upon an increase in water level. The Amici agree with the Court of Appeals that the Goeckels are entitled to exclusive use of the land in question.

STANDARD OF REVIEW

This Court reviews a trial court's decision on a summary disposition motion de novo as a question of law. See LaRose Market, Inc v Sylvan Center, Inc, 209 Mich App 201, 204; 530 NW2d 505 (1995).

ARGUMENT

THE DEFENDANTS-APPELLEES, PRIVATE BEACHFRONT PROPERTY OWNERS ON THE SHORE OF LAKE HURON, ENJOY EXCLUSIVE RIGHT TO THE USE OF THE BEACHFRONT TO THE WATER'S EDGE, WHEREVER THAT EDGE MAY BE FROM TIME TO TIME.

A. Under the Moveable Freehold Doctrine, it has been Settled Law in Michigan for Over 70 Years that a Riparian Owner of Land on the Shores of the Great Lakes Enjoys Exclusive Use of Private Beachfront Property to the Water's Edge.

In Hilt v Weber, supra, the Supreme Court adopted the "movable freehold" doctrine by holding that a riparian owner has exclusive use of the beachfront to the water's edge as it exists from time to time. In so doing, the Court overruled the Kavanaugh Cases[4], which just a few years earlier had held that the fee in all land between the meander line and the water is in the State in trust, subject to riparian rights of the upland owner. See Hilt, 252 Mich at 201 (describing the holdings of the Kavanaugh Cases). The Hilt Court explained that in adopting the "movable freehold", it was returning to the law prior to the Kavanaugh Cases:

> Prior to the Kavanaugh Cases there appears to have been little or no conflict of law upon the effect of reliction on title. The law of the sea applies to the Great Lakes. All maritime nations, recognizing the vagaries of the sea, beyond human control and anticipation, have evolved systems of law, founded upon rational conceptions of common justice, to adjust and compensate its effects. The most ordinary effect of a large body of water is to change the shore line by deposits or erosion gradually and imperceptibly. In such cases **it is the general, possibly universal, rule**, except for the Kavanaugh Cases, and except in a few States where riparian rights have been extinguished by Constitution or statute, **that the title of the riparian owner follows the shore line under what has been graphically called "a movable freehold."**

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

Hilt, 252 Mich at 219 (citations omitted).

The holding of Hilt was cited with approval by the Michigan Supreme Court in 1994 where in Peterman v Department of Natural Resources, 446 Mich 177, 192; 521 NW2d 499 (1994), the court stated the "title of the riparian owner follows the shore line under what has been graphically called 'a movable freehold.'" (quoting Hilt, 252 Mich at 219). See also, Klais v Danowski, 373 Mich 262, 275-76; 129 NW2d 414 (1964) (recognizing the general rule under Hilt that the title of the riparian owner follows the shoreline under the movable freehold).

Both Amici Curiae briefs submitted to this court, and the Opinion of the Court of Appeals extremely and adequately outline the history of riparian rights and the public trust doctrine and the Appellee could hardly improve upon the discussion therein without engaging in an exercise of redundancy. But the court is respectfully referred to pages 3-9 of the Opinion of the Court of Appeals and the Amici briefs for a historical perspective. Worthy of emphasis, however, is the Hilt court's reliance upon the extremely extensive opinion of the Wisconsin Supreme Court in Doemel v Jantz, 180 Wis 225; 193 NW 393 (1923). The very issue presented in this case was presented in Doemel, supra:

> The only question involved in this appeal is whether a member of the public can legally enter upon and use for the purposes of public travel that strip of land adjacent to plaintiff's upland, and lying between the ordinary high and low water marks, and constituting what is ordinarily known as the shore, without committing trespass.

Id., 394. In finding that an action for trespass could lie, Doemel clearly held that the riparian land-owner owns to the water's edge wherever that might be from time to time. Several observations made in Doemel, that led to its conclusion, which it viewed as an "established rule of American law," have cogent application here :

> Riparian rights are the result of that full dominion which every one has over his own land, by which he is authorized to keep all others

> from coming upon it except on his own terms. **They are defined as the rights of the owner of lands upon water to maintain his adjacency to it**, and to profit by this advantage, and otherwise as a right to preserve and improve the ***396** connection of his property with the water. Those rights are not common to the citizens at large, but exist as incidents to the right of soil itself contiguous to and attingent on the water. [Quoting the United States Supreme Court in Illinois Central R. Co. v Illinois, 146 U.S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018 (1892)]
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> * * *
>
> It has also been held that **a riparian owner is entitled to the land formed by gradual accretions and as a result of relictions**. He also has the right to use the waters for domestic and agricultural purposes, and he can make improvements necessary to protect his soil from the process of erosion. These are but few of the many rights of a riparian owner which are necessary incidents to his title to the upland, and **such rights are not only generally conceded by the decisions in this state, but by the decisions in practically all the other states where the question has come up for adjudication**.
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> * * *
>
> The doctrine also seems to be in perfect harmony with the natural order of things. During certain periods of the year when precipitation is large, and when the waters of the lakes are swelled by the increasing in-flowing volumes coming from springs, rivers, creeks, and the flowage of surface water and the precipitation in the form of rain, the lake exercises its dominion over the land to the high-water mark. This dominion, however, is not permanent. Upon the seashore, where the waters are affected by the tide, it is intermittent. As to inland lakes and rivers, such assertion of dominion on the part of nature is periodical. So that it would appear but logical to hold that, when nature in pursuance to natural laws holds in its power portions of the land which at periods of the year are free from flowage, then during such periods the strip referred to is subject to all the rights of the public for navigation purposes. **On the other hand, when the waters recede, these rights are succeeded by the exclusive rights of the riparian owner**.

Doemel, supra, 395, 396, 398. (Emphasis supplied.)

In sum, the moveable freehold doctrine is a sensible, workable principle of law that is virtually universally accepted throughout the nation. It has been the law in the State of Michigan

since 1930, and the Court of Appeals in this case merely acknowledged it to be the law, and properly applied it when it held that land between the ordinary high water mark on the Goeckel property and the water's edge is not subject to public access and use.[5]

B. The Public Trust Doctrine Does Not Deprive a Private Beachfront Property Owner of Exclusive Use of Beachfront Property to the Water's Edge, and the Cases Upon Which Plaintiff Relies, Contrary to Plaintiff's Claim, Do Not Hold Otherwise.

The Michigan Supreme Court has "consistently held that the State has title in fee in trust for the public to the **submerged beds of the Great Lakes** within its boundaries." Hilt v Weber, 252 Mich 198, 202; 233 NW 159 (1930). (Emphasis supplied). See also, People v Broedell, 365 Mich 201, 205; 112 NW2d 517 (1961) ("[t]he title of the State to submerged lands in the Great Lakes is impressed with a trust for the benefit of the public"); OAG, 1975, No 4871, p 81 (May 22, 1975) ("Michigan is in its sovereign capacity vested with fee title to all unpatented **submerged** and

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[5]The Amici Curiae, although supportive of the decision of the Court of Appeals to the extent it provides the Appellees with exclusive right to the use of the beachfront property to the water's edge, take exception to the portion of the Opinion of the Court of Appeals purporting to find that notwithstanding this exclusive use, title in the unsubmerged beachfront property still belongs to the State pursuant to the public trust doctrine. Exhibit "D", 7. The Amici concerns in this regard are *well-founded. The Court of Appeals relied upon Hilt for this proposition, and Hilt relied upon* Doemel for that proposition. Hilt, supra, 226. Doemel says otherwise:

> So that during periods of high water the riparian ownership represents a qualified title, subject to an easement, **while during periods of low water it ripens into an absolute ownership as against all the world**, with the exception of the public rights of navigation and with those rights no interference will be tolerated where the acts affect or have a tendency to affect the public rights for navigation purposes.

Doemel, supra, 398. (Emphasis supplied.)

overflowed lands **lying beneath the waters of the Great Lakes** within its political boundaries impressed, however, with the public trust".) (Emphasis added.)

In Obrecht v National Gypsum Company, 361 Mich 399; 105 NW2d 143 (1960), the Supreme Court explained:

> 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 to the universally accepted rules announced by the United States Supreme Court in Illinois Central Railroad Co. v. State of Illinois, 146 U.S. 387,13 S. Ct. 110, 119, 36 L.Ed. 1018.

Obrecht, 361 Mich at 412. (Emphasis added.)[6]

The United States Supreme Court recognized the applicability of the public trust doctrine to the Great Lakes in Illinois Central as follows:

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

Illinois Central R Co v State of Illinois, 146 US 387, 452; 13 S Ct 110, 118 (1892). (Emphasis added.) Plaintiff's application refers to Illinois Central as a "landmark" case. Indeed it is, but not for the proposition espoused by Plaintiff here. Illinois Central went to great lengths in distinguishing

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[6]In misplacing reliance upon Obrecht, Plaintiff impliedly misstates what was at issue in that case. Obrecht merely held that the riparian right to wharf out with a dock is subject to stat regulation. It should also be noted that Obrecht also involved the proposed sale of **submerged** land. Obrecht, supra, 405.

between the riparian rights to wharf out the railroad company did have because of its status as a lakeshore property owner, and the inability of the state to convey **submerged** lands in Chicago Harbor. The court went so far as to declare that the railroad could wharf out to the point of practicable navigability because of its riparian rights, but that the public trust doctrine prevented the state from conveying submerged lands. 13 S Ct 117.

As applied in Michigan, the public trust doctrine applies only to the **submerged lands of the Great Lakes** and, therefore, by definition, does not apply to the dry land between the ordinary high-water mark and the water's edge. See Illinois Central R Co, 146 US at 452 ("the state holds the title to the lands under the navigable waters of Lake Michigan"); Hilt, 252 Mich at 202 ("State has title in fee in trust for the public to the submerged beds of the Great Lakes within its boundaries"); Broedell, 365 Mich at 205 (title of State to "submerged lands" in the Great Lakes is impressed with public trust); OAG, 1975, No 4871, p 81 (May 22, 1975) ("Michigan is in its sovereign capacity vested with fee title to all unpatented submerged and overflowed lands lying beneath the waters of the Great Lakes within its political boundaries impressed, however, with the public trust").

Prior to 1930 when Hilt v Weber was decided, there admittedly were Michigan cases which held differently, but after Hilt there are no Michigan cases holding that the public trust doctrine applies to dry land beyond the water's edge.

While acknowledging that other courts had reached a different result, the Supreme Court in 1961 stated that "[i]n 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." Broedell, 365 Mich at 205-06. Importantly, the Court also noted that the Plaintiff in Broedell, the State of Michigan:

> says that in administering the submerged lands act, . . . , it follows the 'philosophy' which it says is found in Hilt v. Weber, 252 Mich 198, 233 NW 159, 71 A.L.R. 1238, of 'a movable freehold', that is to say, that the dividing line between the State's and the riparian owners' land follows the water's edge or shore line at whatever level it may happen to be from time to time.

Broedell, 365 Mich at 206.

Decisions by other states on this issue are inapposite, as the title and rights of riparian property owners in the soil below the high-water mark of navigable waters are governed by state law. Shively v Bowlby, 152 US 1, 40; 14 S Ct 548, 563 (1894).[7]

C. The Great Lakes Submerged Lands Act Does Not Deprive the Defendants-Appellees from the Exclusive Right to Use Their Private Beachfront Property to the Water's Edge.

The Trial Court ruled and the Plaintiff argues that the Great Lakes Submerged Lands Act, MCL 324.32501 et seq, dictates the scope of the public trust doctrine in Michigan. They rely in particular on Section 2 of the Act which states:

> 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,

[7]Other cases upon which Plaintiff misplaces her reliance have been adequately addressed by the briefs of the Amici Curiae, or are cases predating the dispositive decision in Hilt.

> swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the great lakes lying below and lakeward of the natural ordinary high-water mark, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

MCL 324.32502.

The purpose of the Act is not to declare ownership interests or change rights determined at common law. There are three (3) purposes clearly stated in Section 2 of the Act:

> This part shall be construed so as [1] to preserve and protect the interests of the general public in the lands and waters described in this section, [2] 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 [3] 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.

MCL 324.32502.

More importantly, Section 2 is clear that the Act only applies to lands "belonging to the state or held in trust by it". Thus, rather than defining the scope of land subject to the public trust, the Act does not apply unless lands are owned by the State or held in trust by the State. See also, Obrecht v National Gypsum Co, 361 Mich 399, 407-08; 105 NW2d 143 (1960) (noting that the Great Lakes Submerged Lands Act of 1955 authorized the State to convey or lease the unpatented lake bottom

lands and unpatented made lands in the great lakes "belonging to the state of Michigan or held in trust by it"); Oliphant v Frazho, 5 Mich App 319, 322; 146 NW2d 685 (1966), rev'd other grounds, 381 Mich 630; 167 NW2d 280 (1969) (explaining that the Great Lakes Submerged Lands Act "applies only to unpatented submerged lake bottom lands and unpatented made lands in the Great Lakes belonging to the State or held in trust by it"). As discussed above, the State does not own the land lakeward of the ordinary high-water mark and does not hold said property in trust. Therefore, the Act, by its own terms, does not apply.

The Act, by its terms, is also not to be construed as affecting rights "as may be acquired by accretions occurring through natural means or reliction." MCL 324.32502. An "accretion" can occur in two ways: (1) by the washing up of sand or soil, so as to form firm ground; or (2) by dereliction, as when the sea shrinks below the usual water-mark. See Black's Law Dictionary 20 (6th ed) (West 1990). Reliction is similarly defined as an increase in the land by permanent withdrawal or retrocession of the sea. See Black's Law Dictionary 1291 (6th ed) (West 1990). As discussed above, riparian rights include the right to accretions. Hilt, 252 Mich at 225. Therefore, to the extent the Goeckels' dry land below the ordinary high-water mark was created by accretions through natural means or reliction, the GLSLA does not apply.

The public trust doctrine as set forth in Illinois Central and the Great Lakes Submerged Lands Act are "nearly identical" and are not inconsistent. Superior Public Rights, Inc v Department of Natural Resources, 80 Mich App 72, 85-86; 263 NW2d 290 (1977). The Great Lakes Submerged Lands Act defines the rights of the public to include use for "hunting, fishing, swimming, pleasure boating, or navigation". See MCL 324.32502. Neither the public trust doctrine, nor the GLSLA secure the right to activity on the shore.

Nowhere does the Act, the case law interpreting the Act or the public trust doctrine as recognized by Michigan courts grant the public the additional right to walk along the shore on private property. To the contrary, as discussed above, the cases and the Act limit the public's rights under the public trust doctrine to uses associated with activities on or in the water itself.

In rejecting Plaintiff's GLSLA argument the Court of Appeals not only relied upon the argument set forth immediately above, indicating that the Act provides no substantive rights, but also observed that the statute addresses six particular matters, none of which involve shoreline activity. Exhibit "D", 10. Nevertheless, Plaintiff boldly proclaims that this Court should take "judicial notice" to the contrary. Plaintiff, predictably, can site no authority for the proposition that the judicial notice doctrine may be used to expand a statute's applicability beyond what it expressly covers, and in direct contravention of the Appellee's riparian rights as established by Michigan law. Exhibit "D", 9, 10.[8]

CONCLUSION

Plaintiff's declaration that the decision of the Court of Appeals in this matter is a "grave moment" rings hollow. The opinion merely announced what the law in the State of Michigan has been since 1930, with no hue nor cry from the general public regarding the occasional stroll along the beaches of the Great Lakes. Relying upon Hilt, the Court of Appeals properly rejected Plaintiff's

[8]In Section III F of Plaintiff's application three additional theories are alleged: (1) equity; (2) estoppel; and (3) prescriptive rights. None of these theories were pled relating to the land in dispute on this appeal, nor does any case hold the State has the power to divest the Appellees of their property under such theories, and to do so would violate the just compensation provision of Article X, Section 2 of the Constitution of 1963. See also, Peterman, supra, 193, and Hilt, supra, 206.

claim that merely upholding the Appellees' riparian property rights will somehow preclude residents or visitors from enjoying the Great Lakes and its vast beaches:

> Finally, we reject plaintiff's argument that upholding defendants' riparian property rights will preclude residents or visitors to our Great Lakes and connecting waterways from enjoying the vast beaches bordering our state. Our Supreme Court has repeatedly noted that the state has several means available to it in order to preserve Great Lakes beaches for public use without interfering with a riparian owner's property rights:
>
> > It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The State should provide proper parks and playgrounds and camping sites and other instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the State has authority to acquire land by gift, negotiation, or, if necessary, condemnation. [*Hilt, supra* at 224.]

RELIEF REQUESTED

It is respectfully requested that Plaintiff's Application for Leave to Appeal be denied.

BRAUN KENDRICK FINKBEINER P.L.C.

Dated: August 9, 2004.

By: _____
SCOTT C. STRAYARD (P33167)
Attorney for Defendants-Appellants
4301 Fashion Square Blvd.
Saginaw, Michigan 48603
(989) 498-2100