STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ALCONA

JOAN M. GLASS,

Plaintiff,

v

Case No. 01-10713-CH(K)
Honorable John F. Kowalski

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants.
_____/

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PLAINTIFF'S BRIEF OPPOSING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

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March 3, 2002

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Plaintiff Joan M. Glass opposes Defendants' Motion for Summary Disposition under MCR 2.116(C)(8) and (10) because it fails to satisfy the requirements for summary disposition under either sub-rule, as discussed below.

Instead, the pleadings, affidavits, depositions, and other admissible evidence of record establishes that it is plaintiff who is entitled to summary disposition with respect to her claim for prescriptive easement rights (count 2), and her right to navigate the shore of Lake Huron below and lakeward of the natural high water mark (count 3).

STATEMENT OF FACTS

The focus of this dispute is plaintiff's 15-foot easement over defendant's riparian property, which provides plaintiff with access to the beach and waters of Lake Huron. Plaintiff has owned her non-riparian property, which is across highway U.S. 23 from defendant's property, including the express "easement for ingress and egress to Lake Huron", since 1967. Defendants have owned their property on Lake Huron since 1997. Copies of the parties' recorded deeds are attached as Exhibits 1 and 2.

Both parties' properties were once part of an overall parcel, owned by Henry W. Prince and his wife, which extended on both the east and west sides of highway US-23 in Greenbush Township (Exhibit 3). The property on the east side of US-23 is lakefront property along the Lake Huron shore, which in this resort area of Greenbush Township has fine sand beaches which stretch for miles. Henry Prince developed the parcel by adding four small rental cabins to the four already existing on the lakefront property, which was known as Pine Haven Resort. On the west side of US-23, across from the lake, Mr. Prince constructed a building for his workshop. Affidavit of Joan M. Glass.

In 1964, plaintiff and her husband began renting one of Mr. Prince's Pine Haven Resort cabins annually for their family vacations. Mr. Prince and plaintiff's husband became close friends, and when Mr. Prince learned that plaintiff and her husband intended to build a vacation home in the Greenbush area, he offered to sell them his property on the west side of U.S. 23 which contained his workshop. In 1967-68, Mr. Prince added a family room, bathroom and furnace onto his workshop building for plaintiff's family. Affidavit of Joan Glass.

Plaintiff and her husband purchased their property from Mr. and Mrs. Prince in 1967. At the time, Mr. Prince told them that their family could walk through his resort, and that their children were welcome to use the resort's outdoor play equipment, paddle boards, and the like. Mr. Prince also said he had his attorney draft the language for the easement. He said that he wanted to make sure that plaintiff's family would always be able to freely use the beach and lake, and that if they ever decided to sell their property, the easement would make it much more valuable. Affidavit of Joan Glass.

The easement is expressed in plaintiff's deed as follows: ". . . including an easement for ingress and egress to Lake Huron over the North fifteen (15) feet . . . ." (Exhibit 1). The easement lies between the highway and the shore of Lake Huron, over the northernmost 15 feet of the original Pine Haven Resort. After creating the easement in 1967, Mr. Prince never again mentioned anything to plaintiff or her husband concerning either the easement or their family's use of it. Joan Glass Affidavit.

From 1968 to 1974, plaintiff and her children spent the summers, weekends in the spring and fall, and Thanksgiving on their property. Weather permitting, they were on the beach and in the water daily. During this time, plaintiff's family did not confine their activities to the 15-foot easement, but rather freely used the beach of the entire resort including the easement. Their

activities included sunbathing, lounging and playing on the beach, and walking the beach along the shoreline. See plaintiff's affidavit, the declarations of her children, Fred Glass, Cheri Stearns, Carol Ebner. and Kristin Gambicki, and a letter from Daniel Raths, a childhood friend.

Mr. Prince sold the Pine Haven Resort to Donald and Agnes Kushmaul in 1974. Plaintiff and her family then began confining their activities to the 15-foot easement and the beach area around it, even though Mr. Kushmaul told them they were welcome to walk through the rest of the resort. After Mr. Kushmaul died and Mrs. Kushmaul seemed irritable towards plaintiff, plaintiff and her family confined their beach activities to the beach area on and immediately south of the 15-foot easement. See plaintiff's affidavit with attached photos, and declarations of Fred Glass, Cheri Stearns, and Carol Ebner.

Throughout the ensuing years plaintiff and her family continued to use the easement seasonally as they always had – to access the beach for lounging, playing and walking, and to access the water for swimming. Throughout this time, they did so without interference from Mr. or Mrs. Kushmaul, and they did so in the belief that their easement gave them that right. See plaintiff's affidavit; the declarations of her children, Fred Glass, Cheri Stearns, Carol Ebner. and Kristin Gambicki; the declarations of her son-in-laws Roy Stearns and Patrick Ebner; and the declaration of her granddaughter, Nicole Walters.

Just over four years ago, in August1997, defendants purchased from Mrs. Kushmaul what was formerly the northern 135 feet of the Pine Haven Resort, containing one of the old cabins, and subject to plaintiff's easement over the northernmost 15 feet. A fence extending along the north line of the easement marks the property line between defendants' property and the neighboring property, while defendants' home is located some 90 feet south of the easement and secluded from it by trees. See plaintiff's affidavit.

After purchasing the property, Mr. Goeckel began harassing plaintiff and her family, and confronted family members on more than one occasion when they were either walking on the easement, lying on the beach portion of the easement, or walking along the shore. At the time, plaintiff and her family had been using the easement in the same fashion, including for beach activities, for more than 30 years. See attached affidavit and declarations.

Mr. Goeckel admitted in his deposition that he had placed a barrel on the easement and parked his car on the easement (Exhibit 4, Tr. p. 16), and that he had made an obscene gesture at plaintiff's son while he was on plaintiff's property (Exhibit 4, Tr. p. 21).

During the depositions of Mr. Goeckel and Mrs. Kushmaul, plaintiff's counsel questioned them about their beach walking habits, and that of the public, along the Lake Huron shore. When asked whether it is his habit to walk the beach above the water line, traveling across other people's property, Mr. Goeckel acknowledged that it is – and that it is also the custom of the public to do so (Exhibit 4, Tr. pp. 19, 35). When asked whether he had any problem with plaintiff doing so, he responded "Absolutely not" (Exhibit 4, Tr. p. 27). Mrs. Kushmaul likewise testified that it was her custom, and that of the public, to walk the beach (Exhibit 5, Tr. p. 14).

The Court should deny defendants' motion for summary disposition. Instead, the Court should grant plaintiff summary disposition with respect to her prescriptive easement rights and her right to walk along the shore of Lake Huron between the high and low water marks.

ARGUMENT

The admissible evidence of record establishes that it is not defendants, but plaintiff who is entitled to summary disposition on plaintiffs' claim of prescriptive easement rights, and her rights to navigate and walk along the Lake Huron shore between the high and low water marks.

1. The standards for summary disposition under MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Graham v Ford*, 237 Mich App 670, 672; 604 NW2d 713 (2000). When deciding a motion for summary disposition, the court is to consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. *Id.* The party moving for summary disposition has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Id.* Only then does the burden shift to the opposing party to establish that a genuine issue of disputed fact exists. *Id.*

Giving the nonmoving party the benefit of any reasonable doubt, a motion for summary disposition should be granted only if the pleadings, affidavits, admissions, and other admissible evidence show that there is no genuine issue of disputed material fact and the moving party is entitled to judgment as a matter of law. *Ottaco, Inc v Gauze*, 226 MichApp 646, 574 NW2d 393 (1998).

Further, under MCR 2.116(I)(2), in considering a motion for summary disposition "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

2. *Plaintiff possesses a prescriptive easement for beach activities.*

Here, the pleadings, affidavits, depositions, and other admissible evidence of record establishes that plaintiff is entitled to judgment in her favor with respect to her prescriptive easement rights.

The discussion of the law of prescriptive easements in defendants' brief is flawed because it relies on adverse possession law, rather than prescriptive easement law. While it is true, as

defendants allege, that a prescriptive easement requires elements similar to adverse possession, a prescriptive easement does not require the adverse possession element of exclusivity. As held in *Plymouth Canton Comm Crier Inc v Prose*, 242 Mich App 676, 612 NW2d 725 (2000):

> It appears well established, however, that exclusive use, in the sense of use by only one individual or entity, of another's land is not required to establish a prescriptive easement.

242 Mich App at 679. Defendant's argument based on a lack of exclusivity, i.e., that "Possession of property of a character that is concurrent or mutual with that of the titleholder is never exclusive so as to support a claim of adverse possession", thus has no relevance to plaintiff's prescriptive easement claim.

In the recent *Plymouth Canton* case, the court articulated the proper requirements for a prescriptive easement as follows:

> An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of 15 years."

242 Mich App 679. The burden rests on the plaintiff "to show by satisfactory proof that the use ...was of such character and continued for such length of time as to ripen into an easement by prescription." *Id* (quoting *Banach v Lawera*, 330 Mich 436, 439, 47 NW2d 679 (1961)).

Defendants cite *Doctor v Turner*, 251 Mich 175, 231 NW 115 (1930), for the proposition that the "continuous" element of a prescriptive easement requires more than occasional trespasses or acts of ownership, and must be such "as [would] furnish a cause of action for every day during the whole period . . . ." However, the *Doctor* case involved a claim of adverse possession, not a prescriptive easement, and the claimant's only acts of ownership were occasional cuttings of hay in some years.

The Michigan Supreme Court laid out the proper rule for the "continuous" element of a prescriptive easement of the type involved here in *Von Meding v Strahl*, 319 Mich 598, 30 NW2d 363 (1948). In that case, the easement claimant had used the strip in question to access Lake

Michigan only on a seasonal basis, during the summer months. In finding that a prescriptive easement was established, the Court quoted the following passage from *St. Cecelia Soc v Universal Car & Service Co*, 213 Mich 569, 577, 182 NW 161 (1921) as stating the correct rule as to continuity:

> The correct rule as to continuity of user, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. An omission to use when not needed does not disprove a continuity of use, shown by using it when needed, for it is not required that a person shall use the easement every day for the prescriptive period. It simply means that he shall exercise the right more or less frequently, according to the nature of the use to which its enjoyment may be applied.

Here, the affidavit and declarations of record establish that plaintiff and her family members have continuously used the easement during the summers, and weekends in the fall and spring, weather permitting, for more than 30 years. They have used the easement for beach activities and lounging, and for swimming, according to the nature of the conditions prevailing on the shore of Lake Huron, which generally limit enjoyment of such uses to warm weather months. As such, plaintiff's use of the easement satisfies the "continuous" element of a prescriptive easement. *Von Meding, supra.*

Plaintiff's use of the easement for more than 30 years also satisfies the other three elements of a prescriptive easement, which require that the use be open, notorious, and adverse. As attested to in plaintiff's affidavit and the declarations of her various family members, they have openly and notoriously used the easement for beach activities including lounging, playing, and sunbathing for over 30 years.

Plaintiff also satisfies the adversity or hostility element of a prescriptive easement. As held in *Plymouth Canton Comm Crier Inc v Prose*, 242 Mich App 676, 612 NW2d 725 (2000), the term adverse or hostile as used in the law of adverse possession is a term of art which does not imply ill

will. Nor is it required for the claimant to make any express declaration of adverse intent during the prescriptive period. Use is adverse when made under a claim of right when no right exists. 242 Mich App at 681.

Here, the language of the easement provides plaintiff with rights of "ingress and egress to Lake Huron." To whatever extent a strict interpretation of this language might be deemed to deprive plaintiff of the rights to use the beach portion of the easement for beach activities and lounging, plaintiff has acquired such rights by prescription. Plaintiff and her family have used the easement for beach activities and lounging, without the permission of defendants' predecessors in interest, for more than 30 years. To the extent such use was inconsistent with the rights of the owners, it was adverse.

Thus, plaintiff's historic use of the easement as established by the admissible evidence of record satisfies all the elements of a prescriptive easement including the rights to engage in beach activities and lounging on the beach.

This conclusion is consistent with the recent holding in *Little v Kin*, __ Mich App __, (Feb. 1, 2002) (copy attached), in which the court examined the scope of riparian rights associated with an easement to a lake. As noted by the court of appeals in *Little v Kin*, the Michigan Supreme Court in *Thompson v Enz*, 379 Mich 667, 154 NW2d 473 (1967), "established the critical principle that rights normally afforded exclusively to riparian landowners may be conferred by easement", and that the scope of such rights must be examined in light of the grantor's intent as determined from the language used and the surrounding circumstances (__ Mich App __).

Not only does plaintiff satisfy the classic elements of a prescriptive easement as discussed above, she also has prescriptive rights under an alternative theory recognized by the court in *Plymouth Canton Community Crier Inc v Prose*, 242 Mich App 676, 612 NW2d 725 (2000). In that

case, the express easement granted to the plaintiffs was for "use for pedestrian or vehicle travel... excluding use by either owner for parking or other use...." (242 Mich App at 678, emphasis added). Although this express easement did not give the plaintiffs the right to load or unload vehicles, they had done so for longer than the prescriptive period of 15 years in the mistaken belief they had the right to do so. There was also evidence that the easement agreement was intended to allow loading and unloading of vehicles. The court of appeals affirmed the circuit court's ruling that the plaintiffs established prescriptive use and thus possessed a prescriptive easement for purposes of loading and unloading vehicles.

In arriving at its ruling in the *Plymouth Canton* case, the court of appeals relied upon the Restatement of Property, Servitudes, 3d, § 2.16, which provides in relevant part:

> A prescriptive use is either (1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or (2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.

242 Mich App at 684 (Restatement § 2.16 at 221-222), emphasis in original. As noted by the court in adopting the second of these rules, Restatement "comment a" describes the rationale underlying the rule:

> In the second situation, people try to create a servitude but fail, initially because they do not fully articulate their intent or reduce their agreement to writing, or because they fail to comply with some other formal requirement imposed in the jurisdiction. If they proceed to act as though they have been successful in creating the servitude, and continue to do so for the prescriptive period, the servitude is created by prescription if the other requirements of § 2.17 are met. In this second situation, prescription performs a title-curing function. Observance of the terms of the servitude for the prescriptive period . . . provides satisfactory proof of the existence and terms of the servitude and resolves any doubts as to the parties' intent that may have been created by their failure to comply with the formality.

242 Mich App at 684-85 (Restatement § 2.16 at 222-223).

The facts of the present case fit almost squarely within this recent holding. Here, the available evidence shows that in 1967 Henry Prince intended to execute an easement authorizing use of the beach portion of the easement for beach activities including sunbathing and lounging, but that the imperfectly executed easement "for ingress and egress to Lake Huron" did not fully articulate his intent. For their part, plaintiff and her family engaged in such beach activities in the mistaken belief that the express easement permitted such activity. They did so without interruption by either Mr. Prince or his successors in interests, the Kushmauls. See plaintiff's affidavit and declarations of family members.[1] Under the ruling in the *Plymouth Canton* case, plaintiff's use, made pursuant to a mistaken interpretation of the easement's scope, constitutes prescriptive use entitling plaintiffs to a prescriptive easement for beach activities and lounging.

Whether analyzed under the classic elements of a prescriptive easement, or the alternative prescriptive easement rule which applies where there is a mistaken interpretation of the easement's scope, the admissible evidence of record establishes that plaintiff possesses a prescriptive easement for uses including sunbathing, playing, and lounging on the beach. The evidence also establishes that defendant Mr. Goeckel has interfered with plaintiff's beneficial enjoyment of her prescriptive rights, entitling plaintiff to an injunction against any further interference.

The pleadings, affidavits, and depositions of record show that there is no genuine issue of disputed material fact, and that plaintiff is entitled to judgment in her favor as a matter of law with respect to her easement rights for beach activities and lounging. Under MCR 2.116(I)(2), the Court should thus render judgment in plaintiff's favor.

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[1] In their brief, defendants allege that Mrs. Kushmaul on one occasion complained to Mr. Prince about plaintiff's use of the easement, and that Mr. Prince allegedly told Mrs. Kushmaul and plaintiff that the easement was strictly for access to Lake Huron. Defendants offer no affidavit or testimony to support this bald allegation, which runs counter to Mrs. Kushmaul's deposition testimony that nothing was said to her by Mr. or Mrs. Prince about the easement, that she recalled no conversations with Mrs. Glass about the easement, and that her understanding of the scope of the easement came from her attorney. Exhibit 5, Tr. pp. 7, 18.

3. *Plaintiff, as a member of the public, has the right to navigate along the Lake Huron shore below the high water mark.*

As alleged in count 3 of the amended complaint, plaintiff has the fundamental navigational right, like other members of the public, to walk along the shore of Lake Huron in the sand area between the high and low water marks. As admitted by defendant in his deposition, both he and the public have customarily exercised this right along the Lake Huron shore where defendant's riparian property is located. Nonetheless, defendants, relying on outdated legal citations lacking any precedential value, attempt to argue that this public right of navigability is limited to actually walking in the water.

Although plaintiff is unaware of any Michigan case squarely addressing the issue of whether the public has the right to navigate the shore of Lake Huron below the high water mark, that right is protected under Michigan's Great Lakes Submerged Lands Act, MCL § 324.32501 *et seq*, in keeping with a long line of rulings by the highest Courts of our state and nation, as discussed below.

Defendants cite only two authorities to support their proposition that the public's right of navigability in the Great Lakes is limited to land covered by water. Both are outdated, and both run counter to current law. The first is a quoted passage from a treatise by Cameron, for which defendants cite no date. The problem with the Cameron passage is that it entirely ignores the public trust doctrine – a venerable doctrine which is codified in Michigan's Great Lakes Submerged Lands Act, as discussed below.

The second authority defendants cite is a Michigan Attorney General opinion, 1977-1978 OAG No. 5327 (1978). However, Attorney General opinions are not binding precedent on this Court. *Frey v Dept of Management & Budget*, 429 Mich 315, 337, 414 NW2d 873 (1987). Moreover, the opinion dates back more than 20 years and is as deficient as the Cameron passage because it ignores Michigan's public trust law. The 1955 statute cited in the 1978 Attorney General

opinion (1955 PA 274, MCL 322.701 *et seq*) has since been repealed. It was replaced by MCL 324.32501 *et seq*, (the Great Lakes Submerged Lands Act, P.A. 1994, No. 451, added by P.A. 1995, No. 59, § 1). The provisions of the Great Lakes Submerged Lands Act, discussed below, deprive the 1978 Attorney General opinion of any precedential value whatever.[2]

Under the Great Lakes Submerged Lands Act, the public's right to navigate the Lake Huron shore below the high water mark is statutorily protected:

> The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakewards of the natural ordinary high-water mark . . . .

MCL § 324.32502 (emphasis added).

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

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

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

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

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

> By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the crown of England, are in the king. Such waters, and the lands which they cover, either at all times, or at least when the primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects. Therefore the title, jus privatum, in such lands, as of waste and unoccupied lands, belongs to the king, as the sovereign; and the dominion thereof, jus publicum, is vested in him, as the representative of the nation and for the public benefit.

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

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

> The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment – a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefor, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

146 US at 436-37. The Court went on to hold that the State of Illinois holds the title to the lands under the navigable waters of Lake Michigan "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed

from the obstruction or interference of private parties." 146 US at 451. This trust, the Court ruled, cannot be abdicated by the state (146 US at 453).

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

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

152 US at 49 (emphasis added).

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

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

127 Mich at 585.

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

doctrine on both the state and federal levels:

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

446 Mich 194-196.

Consistent with this federal navigational servitude and the venerable legal authorities establishing that the public trust extends to the high water mark of the Great Lakes, is the local custom of the public of walking along the Lake Huron shore in Greenbush Township, where defendants' riparian property is located. In their deposition testimony, defendant Mr. Goeckel and his predecessor in title Mrs. Kushmaul both confirmed that it has been their own custom, as well as the public's custom, to walk the beach above the water line – an area between the low and high water marks. In fact, when Mr. Goeckel was asked whether he objected to plaintiff walking above the water's edge, he responded "Absolutely not."

Defendants' claim that the public (including plaintiff) is confined to walking in the water to navigate the Lake Huron shoreline fails as a matter of law, so that their motion for summary disposition should be denied. Instead, plaintiff is entitled to judgment in her favor as a matter of law (MCR 2.116(I)(2)). The Court should thus render judgment that plaintiff, like other members of the public, has the right to navigate the shore of Lake Huron below the high water mark.

4. *Conclusion*

Defendants' motion for summary disposition should be denied because the admissible evidence of record establishes that it is plaintiff, not defendants, who is entitled to summary disposition with respect to her prescriptive easement rights, and her right to navigate the shore of Lake Huron lying below and lakeward of the natural, ordinary high water mark.

For these reasons, the Court should grant plaintiff summary disposition under MCR 2.116(C)(10) in conjunction with MCR 2.116(I)(2).

Respectfully submitted,

Dated: March 2, 2002

Pamela S. Burt (P47857)
Attorney for Plaintiff

PROOF OF SERVICE

The undersigned certifies that a copy of Plaintiff's Brief Opposing Defendants' Motion for Summary Disposition was served upon the attorney for defendants by mailing same to: Brent R. Babcock, 450 W. Lake St., Box 786, Tawas City, MI 48764-0786, with first class postage fully prepaid, on the 3rd day of March, 2002. I declare under penalty of perjury that this statement is true to the best of my information, knowledge, and belief.

Pamela S. Burt