STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
THE HONORABLE PETER D. O'CONNELL PRESIDING

JOAN M. GLASS,

Plaintiff/Appellant
v

RICHARD A. GOECKEL
and KATHLEEN D. GOECKEL,

Defendants/Appellees
_____/

Supreme Court Dkt No.126409
Court of Appeals No. 242641
Alcona Circuit Ct. No. 01-10713-CK

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_____/

**BRIEF IN SUPPORT OF**

**DEFENDANTS'/APPELLEES'**
**MOTION FOR REHEARING**

Submitted by:

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## STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction to entertain this Motion pursuant to MCR 7.313(D)(1).

## STATEMENT OF QUESTIONS PRESENTED

I. HAS THIS COURT WRONGFULLY IGNORED ITS OWN PRECEDENTS AND MISINTERPRETED PRECEDENTS IT DID ACKNOWLEDGE?

Defendants/Appellees' Answer: Yes

II. IS THE COURT'S RELIANCE ON *TRUDEAU* MISPLACED?

Defendants/Appellees' Answer: Yes

III. IS WALKING A PUBLIC TRUST RIGHT IN MICHIGAN?

Defendants/Appellees' Answer: No

IV. DOES THE COURT'S DECISION EFFECT A TAKING AND VIOLATE DUE PROCESS?

Defendants/Appellees' Answer: Yes

## STATEMENT OF FACTS

Defendants rely upon the Statement of Facts contained in its Supreme Court Brief on Appeal.

## INTRODUCTION

> And, while it was said that it was quite common to use the shore for various purposes of passage, that was regarded not as rightful, but merely by sufferance, and analogous to the frequent passage over uninclosed lands, which was not lawful, but was seldom complained of. *Lorman* v *Benson*, 8 Mich 18, (1860).

With its decision in this case, this esteemed Court has, with due respect, committed grave error, working a grave injustice upon tens of thousands of families owning waterfront property in Michigan, and missing an historic opportunity to confirm Michigan law. Despite this Court's[1] pronouncement to the contrary, the Court has indeed changed the law in Michigan. If followed, the effect of the decision will not simply be to allow people to walk the beach. They will now hunt, fish, swim, bathe, and drive vehicles in front of the homes and cottages of thousands of families across the State. Families who have long enjoyed respite at these dwellings will now be at the mercy of the State and local governments to control these uses. To reach this radical result, the Court has wrongfully ignored its own precedents properly presented to it; it has misinterpreted the precedents it did acknowledge; it has improperly relied on dictum, dissenting, and concurring opinions for authority; it has mistaken or misrepresented concurring opinions as those of a majority; it has misrepresented Defendants' position; it has ignored the precedents of our sister Great Lakes states, seizing only upon a single decision of a single state in which the issue was uncontested and contrary to prior precedent; and, not insignificantly, it has ignored the pronouncements of the U.S. Supreme Court.

[1] Defendants respectfully submit that the poor reasoning of the Court's decision, as well as its failure to better define the ordinary high water mark, will not help settle Michigan law, but will instead spark additional debate and legislative and judicial action, consuming State and private resources for many years and decades to come. This is exactly the opposite of the decision in *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930), which sought to provide to the Legislative and executive branches a "more precise statement of the legal situation," and which opinion was clear and well-followed for 75 years.

So unprecedented is this Court's expansion of the public trust doctrine that it greatly exceeded the demands of the trustee,[2] and surprised counsel for the complaining beneficiary.[3] It runs contrary to a well-established principle of law that has prevailed since at least 1930, and which has informed state policy since that time.

By changing such a firmly understood and acknowledged rule of property under the guise of "finding" the common law, this Court has, as suggested by the amicus brief of the Michigan Chamber of Commerce, usurped the legislative power contrary to the Michigan Constitution; it has abdicated its paramount and solemn duty to uphold the state and federal constitutions and their protection of private property; and it has effected a substantial injustice to the families owning cottages, homes, and small businesses along Michigan's coastline without their being a party. The result is a rule of law that is unfamiliar in Michigan and most other Great Lakes states. If followed, the Court's new rule will not preserve, but will substantially change, usage of this state's Great Lakes shores, contrary to the reasonable and legitimate expectations of this state's transferees of shoreline property. This Court should reconsider its decision, correcting the substantial errors outlined above, as more specifically identified in this brief, and confirm the rule of riparian title and exclusive use, subject to the public's right of navigation, to the water's edge.

[2] The brief of the MDEQ and the MDNR agreed that Plaintiff had no right to walk on Defendant's dry shore. See Brief of Amici Curae, the Michigan Departments of Environmental Quality and Natural Resources, p 28.

[3] Plaintiff's counsel was quoted as saying "never in a million years" did she think the walkers' cause would get the support among the justices that it did. *Michigan Supreme Court Ends Term With Land-Use Ruling, Other Cases*, Detroit News, Saturday, August 6, 2005.

## ARGUMENT

### I. THIS COURT HAS WRONGFULLY IGNORED ITS OWN PRECEDENTS AND MISINTERPRETED PRECEDENTS IT DID CONCEDE.

#### A. This Court Has Ignored Its Predecential Statements From *Hilt* and *Peterman*, Followed by the State for Decades, Which Granted Exclusive Use to the Riparian.

In the words of Justice Weist, who dissented from the decision in *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930), that decision "constitutes the Michigan shoreline of 1,624 miles private property, *and thus destroys for all time the trust* vested in the state for the *use and benefit* of its citizens (emphasis added)." *Id*. at 231. In view of this Court's decision in the case at bar, it appears Justice Weist severely underestimated the power of today's Court, for with its decision, public use and benefit of the shore, if it ever existed, is suddenly back! To achieve this *fait accompli*, this Court has overruled the holding of the Court of Appeals—granting exclusive use to the water's edge—by ignoring the precedent that court relied upon. The Court of Appeals cited both *Hilt* v *Weber* and *Peterman* v *Dep't of Natural Resources*, 446 Mich 177; 521 NW2d 499 (1994) to support its "exclusive use" holding. See *Glass* v *Goeckel*, 262 Mich App 29, 40-41; 683 NW2d 719 (2005). This Court in *Hilt* was very explicit about the nature of riparian rights, naming four specific rights. The third right named was "access to navigable waters." *Id*. at 225. The *Hilt* Court then described this right further:

> Most of the upland owners' rights are included in the general right of access, which is quite broad. *Id*. at 226.

In listing those rights, the *Hilt* Court said:

> *The riparian owner has the exclusive use of the bank and shore*, and may erect bathing houses and structures thereon for his business or pleasure (emphasis added). *Id*.

In a 1978 opinion reflecting state policy both before and after its issuance, this State's Attorney General cited the *Hilt* Court's reference to "exclusive use" in opining that riparians had exclusive use and trespass control to the water's edge. 1978 OAG No 5327 (July 6, 1978). Finally, this Court in *Peterman* referenced with approval the riparian's right of "exclusive use of the bank and shore" before reinstating a damage award in favor of the riparian for loss of his beach. *Peterman* at 192.

Despite the fact that this Court has twice specifically held, in clear and unequivocal language, that the riparian is entitled to exclusive use, and despite the fact that these holdings[4] have informed state policy since 1930 through today, this Court has imposed a public use on Defendants' land without mention *by a single justice of the majority* of these important precedential statements. This Court should not ignore such obvious and direct precedential statements on a key issue before it. This Court still follows the rule of *stare decisis*, and is duty-bound to acknowledge prior decisions of this Court properly brought to its attention, and to either follow them, distinguish them, modify them, or overrule them. The Court of Appeals, the litigants, and the residents of this State deserve to see these precedents acknowledged and addressed. Certainly, when Justice Weist in *Hilt* asserted his belief that the decision would destroy public trust "use and benefit" of the shoreline, he had assumed this Court would acknowledge and understand that decision. Defendants respectfully submit that only by ignoring the *Hilt* Court's "exclusive use" rule and misinterpreting that decision's finely crafted pages can this Court resurrect what Justice Weist pronounced dead.

[4] Defendants use the term "holdings" to be consistent with this Court's usage of the term. For example, see this Court's characterization of language quoted with approval from another case in *Peterman* at 198. Opinion, pp 21, 40.

B. This Court Has Otherwise Failed to Properly Acknowledge *Hilt*.

Since 1930, this Court's decision in *Hilt* v *Weber*, has, without contest, represented the law in Michigan. It has been the "leading decision" on the issue of riparian rights. (See Exhibit 1). Until now, no decision of any court has suggested that *Hilt* stood for anything other than the dividing line of public and private rights, excepting the right of navigation. Yet this Court criticizes the Michigan Court of Appeals for its reliance on *Hilt*, stating:

> But our concern in *Hilt* was the boundary of a littoral landowner's *private* title, rather than the public trust.

Opinion, p 25. This is an inaccurate characterization of the issue involved in *Hilt.* The issue in *Hilt* was the extension of the public trust to the meander line effected by the *Kavanaugh cases*. The land contract purchaser did not want to pay because of the cloud on his title brought about by those cases. Thus, the boundary of the State's public trust was the issue presented. So that all of us—including the majority in this case—could understand this point, the *Hilt* Court purposefully demonstrated it near the bottom of page 224 of its decision. There Justice Fead tells us precisely the type of title that the *Kavanaugh* cases had granted to the state, which the *Hilt* Court was overruling: public trust title, and not "absolute title." The *Hilt* Court then tells us very specifically that it is this very concept of title—public trust title—which it rejects with its water's edge decision, and places that title back into the hands of the riparian free of public trust rights:

> Perhaps, also, some of the apprehension of the extent of the injury to the state and its citizens would be allayed if the scope of the *Kavanaugh* decisions were not so misunderstood and misrepresented. The notion seems to be widespread, in official as well as in private circles, that they gave the State substantially absolute title so it can sell or lease the lake shores to strangers to the upland or use them for any public purposes. On the contrary, while declaring the legal title in fee to be in the State, *they confirmed its ownership to the same trust which applies to the bed of the*

> *lake, i.e., that the State has title in its sovereign capacity and only for the preservation of the public rights of navigation, fishing, and hunting* (emphasis added). *Id*. at 224.

Indeed, by placing the title to the land between the meander line and the water's edge in the riparian, the *Hilt* Court intended its ruling to eliminate "the overhanging threat of the State's claim of right to occupy it for State purposes" inherent in that doctrine. *Id*. at 227.[5] Thus, when the *Hilt* Court overruled the *Kavanaugh* cases and limited the State's title to the water's edge, there can be no debate that this Court was speaking *specifically* to the boundary of the state's public trust title. Moreover, the Court in *Hilt* could not have found for the seller had the Court moved the public trust title to the shoreline, but left the public trust on the shore, as this Court implies must have happened. The issue in *Hilt* was misrepresentation of title. *Hilt* at 227. The seller had represented his title as being "fee simple absolute." *Hilt* record, pp 1-2, 12, 14 (See Exhibit 2). Had this Court found the shore burdened by the public trust, the seller would have been unable to deliver "fee simple absolute title," which entails a number of rights inconsistent with the public trust. *See* Cameron, Michigan Real Property Law, 3rd Ed, §7.8, p 262 (ICLE 2005). Because the seller's title went to the water's edge, the *Hilt* Court found no misrepresentation. *Id*. at 227.

Equally unsupportable is this Court's gratuitous assertion that relicted land "is not at issue in this case." Opinion, p 25, note 18. Whether this Court's assertion is a statement of fact or law, it is equally incorrect. As a factual matter, Defendants specifically asserted that land at issue was relicted land. Defendants' brief, p 14:

> In Argument 1 3A, Plaintiff attempts to distort the clearly enunciated adoption of the moveable freehold doctrine in *Hilt* by arguing that the

[5] It is indeed ironic that this Court today brings to fruition the very threat it thought it eliminated 75 years ago. That this Court does so without properly acknowledging its prior unequivocal statements that the riparian has "exclusive use of the bank and shore" is instructive.

> doctrine is limited to a rule of accretion and reliction resulting in *permanent* changes. This is unsupportable.

Moreover, the land at issue in this case clearly is within the meaning of "relicted land" as that term was used in *Hilt*, as set forth in Save Our Shoreline's brief at pp 21-26 and in Defendants' brief at p 14. See also *Kavanaugh* v *Baird* at 242:

> The trial judge found the strip was the result of accretions, but we are satisfied from the record and the facts of which we take judicial notice that it was formed by both accretions and reliction, the latter being the most potent. Saginaw Bay is very shallow at the shores and but slight recession of the water uncovers a large area.

Aside from the parties, the Court of Appeals clearly considered the rule of reliction at issue in this case, as it specifically refers to the rule. *Glass* v *Goeckel*, 262 Mich App 29, 42; 683 NW2d 719 (2005). The characterization of the land at issue in both *Hilt* and this case was a substantial issue in this case presented by the briefs. This Court's attempt to address the issue in an unsupported footnote, and to suggest the case did not involve the issue of reliction, is disingenuous.

This Court's inaccurate assertion that *Hilt* did not address the boundary of the public trust also belies what occurred in *Kavanaugh* v *Baird*, a case decided before *Hilt*, but later reconsidered and reversed in light of *Hilt*. The contest in that suit to quiet title was between the State, which asserted title under the "Trust Doctrine" to the meander line, and Kavanaugh, a riparian owner who asserted absolute title to "the low water mark or the water's edge." *Steinberg*, "God's Terminus: Boundaries, Nature, and Property on the Michigan Shore," The American Journal of Legal History, Vol XXXVII (1993) at 80. This Court affirmed a decision in favor of the State, which decision "fixed the title to the land in question in the state in trust for its people." *Kavanaugh* at 253. But after the *Hilt* decision specifically overruled *Kavanaugh,* this Court *sua sponte* ordered a rehearing in *Kavanaugh* and, after noting its decision in *Hilt,* ruled:

> In the orderly administration of justice, this necessitates the court now holding that the plaintiff herein is entitled to a decree quieting the title in him to the relicted land involved as prayed in his bill of complaint. *Kavanaugh* v *Baird*, 253 Mich 631; 235 NW 871 (1931).

Certainly, the *Baird* Court would not have reverted the public's title in trust down to the low water mark or water's edge,[6] referencing only the *Hilt* decision, had the decision in *Hilt* not found the low water mark or water's edge as the boundary of the public trust.[7]

Further illuminating the intent of the *Hilt* Court to eliminate public trust rights between the water's edge and the meander line is the post-*Hilt* reversal of *Staub* v *Tripp*, 248 Mich 45; 226 NW 667 (1929), rev'd 253 Mich 633; 235 NW 844 (1931). In *Staub*, a riparian owner sought to plat land "between the meander line and the water of [Lake Michigan]." *Id*., 248 Mich at 46. The state rejected the plat on the grounds that, under the *Kavanaugh* cases, the State owned that land. The riparian therefore sued his grantor, asserting a "breach of covenant of title."[8] This Court affirmed a judgment of damages in favor of the riparian against his grantor on the basis of the breach of title. In doing so, this Court noted many of the resulting restrictions on his land as a consequence of the state's title. But after *Hilt*, this Court reversed its decision, holding that because the riparian's "title extended beyond the meander line to the water's edge, there was in fact no failure of title." *Id*. at 634. Surely, the Court would not have so held if it

[6] The *Kavanaugh* Court's reference to the Plaintiff's complaint in that case, which apparently treats low water mark and water's edge as one and the same, is significant. *A fortiori*, if low water mark and water's edge were synonymous, then "high water mark" is similarly synonymous. That the *Hilt* court believed so is evidenced in numerous places in its decision, including its reference to *People* v *Warner*, 116 Mich 228; 74 NW 705 (1898) (suggesting absence of tides "practically makes high and low water mark identical") and at the bottom of p 212 (equating "lowest water mark" to "water's edge.")

[7] The *Kavanaugh* decision affects the platted lots of Aplin Beach in Bay County. That decision is now *res judicata*. Consider the implications of today's *Glass* v *Goeckel* decision on the residents of Aplin Beach, and whether the dry beaches on their lots are now subjected to the public trust despite their grantor's victory against the State. To suggest those lots between water's edge and the meander line remain subject to the public trust would be preposterous.

[8] Although not described by the *Staub* court, a warranty deed carries with it several implied covenants of title, including a warranty that the title is "free from all encumbrances." MCL

thought the property burdened by the public trust rights or the right of passage on dry land now imposed by this Court.[9] These cases demonstrate that, with thousands of warranty deeds written in light of prior precedent, warranting title to riparian land, this Court's decision is sure to open the floodgates of litigation, with riparians claiming that their grantor's deeds warranted against such public use.

C. This Court Has Mischaracterized *Peterman* and Ignored Its Result.

The thrust of this Court's decision in this case, from pages 21-26, rests on the following assertion:

> Michigan's courts have adopted the ordinary high water mark as the landward *boundary* of the public trust (emphasis added). *Id*. at 21.

As to the Great Lakes, this assertion cannot be sustained, and the Court's attempts to do so fall far short. No Michigan case has *ever* held that on the Great Lakes, the ordinary high water mark constitutes the boundary of the public trust.

In an attempt to support its assertion, this Court misinterprets the decision of *Peterman* v *Dep't of Natural Resources*, 446 Mich 177, 198-199; 521 NW2d 499 (1994), asserting that in that case:

> We held that public rights end at the ordinary high water mark. Opinion, p 21.

There was no such "holding" in *Peterman*, and this Court's elevation of citing another case with approval to the status of a "holding" is alarming. See Opinion, p 40. Instead, the "holding" in *Peterman* was that the state must compensate the riparian for destruction of his beach, even that

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§565.151. "Anything that constitutes a burden on the title is an encumbrance, including a right of way . . ." Cameron, *Michigan Real Property Law*, §10.22 (1985).

[9] Another failure-of-title case is *Klais* v *Danowski*, 373 Mich 262; 129 NW2d 414 (1964), where the land contract vendee alleged breach due to a failure of "marketable title" resulting from the State's claim that the land at issue was submerged land. This court found that the State had no title, and therefore found no breach.

portion below the alleged "ordinary high water mark." In its reasoning, the *Peterman* Court noted the federal navigational servitude. It also cited a case finding that the "*limit* of the public's right is the ordinary high water mark of the *river* (emphasis added)" at issue in that case, but it cited no case involving the Great Lakes. *Id*. at 198. The *Peterman* Court then acknowledged "the general rule that only the loss of fast lands must be compensated," presumably as a result of the federal navigational servitude and the Michigan rule as to rivers. *Id*. at 200. This Court did not decide the case on this basis, but on other grounds: the negligent design of the boat launch. There was no "holding" in *Peterman* that public rights on the Great Lakes independent of the navigational servitude extend at all times to any so-called "ordinary high water mark," and because it was not necessary to deciding the case, any such holding would have been dictum.

Missed by the majority opinion of this Court in the case at bar is the result of *Peterman*: that the Plaintiff was awarded compensation for his lost "property" without deduction for any so-called "public trust rights" now said to exist by this Court. The *Peterman* Court affirmed an award of damages in the amount of $35,000 in favor of the riparian and against the state for destruction of his property, including that portion below the so-called ordinary high water mark:[10]

> We hold that . . . compensation must be awarded for the loss of the beach . . . Hence, we reverse the judgment of the Court of Appeals in part and reinstate the damages awarded by the trial court. Id. at 208.

Of course, to determine whether an award for loss of property was appropriate, the Court had to first consider the nature of the property rights to be taken, and then determine whether those rights are protected by law. *Id*. at 191-193. After noting that "riparian rights are property," the

[10] This Court acknowledges that the plaintiff in *Peterman* was awarded damages for property above the so-called "ordinary high water mark," but wholly ignores in its opinion that this Court affirmed an award of damages below that mark. (Opinion, p 21). Of course, the Court cannot fully appreciate the significance of the *Peterman* award of damages for loss of the beach if it will not acknowledge the holding.

Court defined some of the riparian rights relevant to the case,[11] including the right to natural flow of a stream, the right of exclusive use, and the right to acquisitions through accretion or reliction. The Court specifically quoted with approval from *Hilt* that "[t]he riparian owner has exclusive use of the bank and shore." *Id*. at 192. Since the navigational servitude did not in that case insulate the state from liability, this Court awarded the riparian damage for the loss of his property—derived from his riparian rights—including his constitutionally protected right of exclusive use.

This Court now denies the existence of the same property right—the right of exclusive use—it demanded be compensated in *Peterman*. It does so by relying upon a footnote from *Peterman*, and therefrom concluding that *Peterman* "rooted [the] 'navigational servitude' in the public trust doctrine." Opinion, p 21, citing *Peterman* at 194, n 22. Whatever the "roots" of the navigational servitude, this Court cannot fairly deny that between the competing rights of the public and the Great Lakes riparian owner, only the navigational servitude has been previously found by this Court to override riparian rights, including the right of exclusive use. Though not acknowledged by this Court in its opinion, this fact led the *Hilt* Court to quote with approval a Connecticut decision:

> The only substantial paramount public right is the right to the free and unobstructed use of navigational waters for navigation. Id. at 226, citing *Town of Orange* v *Resnick*, 94 Conn 573, 578; 109 Atl 864 (19__) .

The *Peterman* decision, awarding damages to Plaintiff for loss of "natural flow of stream," for loss of his "exclusive use," and loss of sand from "acquisitions to land, through accession or reliction," is evidence of that rule. Had this Court believed in 1994 that Plaintiff's land was

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[11] That the *Peterman* decision listed only a few riparian rights relevant to its decision, while omitting others (see, eg, *Hilt* at 225), evidences the fact that the Court intended to compensate Plaintiff for the rights listed by its ruling.

subject to public uses of hunting, fishing, or boating, or "activities inherent in the exercise of those rights," such as this Court's new right of beach walking, it certainly would have noted those rights as affecting the amount of damages. Instead, the *Peterman* Court reminded us of the riparian's right of "exclusive use of the bank and shore." As noted above, this Court offers no explanation of how this Court could announce and implement a rule of exclusive use in both *Hilt* and *Peterman*, but now impose a public use. Instead, it ignores its prior statements in *Hilt* and *Peterman*.

Finally, but not insignificantly, *Peterman* is a curious decision on which to base the Court's new expansion of the public trust doctrine. The briefs on appeal from both sides in that case assumed without question that the beach at issue was plaintiff's beach. Instead, the focus of the briefs was whether the state's groins along a boat launch constituted a "trespass-nuisance" and were therefore not subject to governmental immunity. The briefs, therefore, said nothing of ownership, the dividing line of ownership, or the public trust. After oral argument, the Court ordered the parties to brief the issue of unconstitutional taking. Portions of those briefs discussed the navigational servitude and its effect on takings claims. Still, however, there was no discussion of the public trust, the division between public and private rights, or the extent of riparian title. The sole exception is the following two-sentence assertion of the MDEQ made at the end of its 32-page supplemental brief, which brief had characterized the beach or shoreline in question as being that of "plaintiff" numerous times:

> In addition, plaintiffs presented no evidence whatsoever at trial showing where the ordinary high water mark is located with respect to their property. This is significant to note because the State of Michigan holds title to the bottomlands of the Great Lakes, *Hilt* v *Weber*, 252 Mich 198, 122 NW 159 (1930), and, therefore, any erosion or other change in the

> shoreline or beach area that occurred lakeward of the ordinary high water mark is not compensable. *Id*. at 32.[12]

As a result, this Court in *Peterman* embarked on its lengthy analysis of riparian rights and its discussion of the public trust without the benefit of briefing. Moreover, because the Court ultimately rested its decision on the negligent construction of the groins, its discussion on the foregoing issues was dictum, and lacks the force of precedent under principles of *stare decisis*. *People* v *Borchard—Ruhland*, 460 Mich 278; 597 NW2d (1999).

Members of this Court have vigorously eschewed the use of dictum to decide controversies, especially where the issues contained in dictum were not briefed by the parties. See *People* v *Bell*, 473 Mich 275; —-NW2d—[2005 WL 1705813 (Mich)] (2005) (Opinions of Weaver, J, Kelly, J and Cavanaugh, J); *Lugo* v *Ameritech Corp Inc*, 464 Mich 512; 629 NW2d 384 (2001) (Weaver, J: "The severe harm standard is not at issue on the facts of this case, is not briefed by the parties, and is not essential to the determination of this case.") Justice Cavanaugh has been especially critical of decisions made without sufficient briefing, as occurred in *Peterman* and *State* v *Trudeau*, 139 Wis 2d 91, 103; 408 NW2d 33 (1987), both heavily relied upon by this Court in the case at bar:

> The majority claims that any briefing on the propriety of the rule in *McCummings* would be a waste of time because 'additional briefing would not assist the Court in addressing this question of law.' Op. at 58. This comment flies in the face of the foundations of our adversarial system, in which the parties frame the issues and arguments for a (presumably) passive tribunal. The adversarial system ensures the best presentation of arguments and theories because each party is motivated to succeed. Moreover, the adversarial system attempts to ensure that an active judge refrain from allowing a preliminary understanding of the issues to improperly influence the final decision. This allows the judiciary to keep an open mind until the proofs and arguments have been adequately submitted. In spite of these underlying concerns, the majority today claims that the benefits of full briefing are simply a formality that can be

[12] Of course, *Hilt* does not stand for this proposition, as we and our supporting amici have briefed.

> discarded without care. The majority fails to comprehend how the skilled advocates in this case could have added anything insightful in the debate over the proper interpretation of a century's worth of precedent. Whatever its motivation, the majority undermines the foundations of our adversarial system. *Mack* v *City of Detroit*, 467 Mich 186, 222-223; 649 NW2d 47 (2002).

Finally, aside from *Peterman*, the only other direct authority this Court offers for its proposition that our courts "have adopted the ordinary high water mark as the landward boundary of the public trust" is *State v Venice of America Land Co*, 160 Mich 680; 125 NW 770 (1910), and specifically pages 701-702. Defendants have looked in vain to find any reference to the promised holding or any reference to the "ordinary high water mark" on those pages because, of course, it is not there. In truth, there is nothing in *Venice* which could be read to support the meaning this Court attributes to it. Aside from a review of the decision itself, this point is immediately suggested by the Court's unwillingness to direct us to the specific language it references and explain how it supports its decision.

The third and last Michigan authority this Court relies upon for its novel assertion that the ordinary high water mark is the landward boundary of the public trust on the Great Lakes is *People* v *Broedell*, 365 Mich 201, 206; 112 NW2d 517 (1961), and its supposed "suggestion" that there is some ambiguity in the law. The referenced language from the *Broedell* Court is the very epitome of dicta, that Court quickly noting that the decision "may be controlled by another factor" which it proceeded to determine the case upon. If this Court thought the dicta in *Broedell* persuasive, it should have paid heed to that court's acknowledgment that "this Court *has referred* to the low water mark as the boundary of the trust ownership of the state (emphasis added)."[13] In contrast, "language seemingly favorable to the high water mark theory" falls far short of

[13] Like every decision before it, the *Broedell* decision certainly did not anticipate that there would be two separate lines on the Great Lakes—one for ownership and another for public trust rights—manufactured by this Court in the case at bar.

establishing precedent. By its own admission, the *Broedell* Court did not fully consider the question before this Court, and this Court's reliance on that decision to establish a non-existent ambiguity in the law is misplaced.

Finally, while not offering it in its main text, this court at note 16 asserts:

> In *Collins*, supra at 60, (Fellows, J, concurring), our Court differed and used the high water mark as the boundary to private title [on an inland stream].

Once again, this Court stretches. It is axiomatic that a concurring opinion does not speak for the Court. The issue in *Collins* v *Gerhardt*, 237 Mich 38; 211 NW 115 (1926) was whether a riparian on a stream could exclude the public from fishing in the stream. The case presented no question of boundary, and none was discussed in the majority opinion of Justice McDonald, joined by Justices Sharpe, Snow, Fellows, and Clark. Justice Fellows wrote separately because he had "pronounced views" on the topic, apparently views that his brethren did not share. How this esteemed Court can attribute Justice Fellows' views as those of the entire Court is bewildering. Interestingly, though this Court refers us to page 60 of the opinion for its high water mark holding, we can see at that page only a brief quotation of another court's holding, without any indication of whether Justice Fellows agreed.[14]

The foregoing demonstrates that the concept of ordinary high water mark as a *boundary* of public trust on the Great Lakes is foreign in this State. As we shall demonstrate below, it remains foreign in law of our Great Lakes neighbors, except one whose recent caselaw is weakly rooted.

[14] Justice Fellows' opinion quotes numerous precedents which conflict with this Court's newly found rights. See, eg, *Id*. at 53, citing *Peck* v *Lockwood*, 5 Day 22 (Conn 1811) ("the right of fishing on the soil of another, when overflowed with the tide from the sea, or arm of the sea, is a common right.") Under this court's methodology employed in today's opinion, Justice Fellows' citation of these authorities would mean they, too, represent the view of this Court.

## II. THIS COURT'S RELIANCE ON *TRUDEAU* IS MISPLACED.

There can, of course, be no better evidence that this Court makes a new rule for Michigan, in violation of constitutional protections, than its resort to Wisconsin law to define the Court's newly set boundary for public trust rights. Unnecessary and irrelevant in Michigan jurisprudence for 167 years, this Court now searches elsewhere to define a boundary for its newly granted rights. It is instructive that, despite Justice Kelly's assertions at oral argument, this Court does not cite a decision from any other neighboring Great Lakes states referring to a right to walk upon the dry shore.

In any event, the decision in *State* v *Trudeau*, 139 Wis 2d 91; 408 NW2d 33 (1987) makes for a weak foundation upon which to base a new rule for Michigan. In *Trudeau*, the defendant did not contest the State's assertion that the ordinary high water mark represented the boundary of the lake. Rather, it readily admitted it in its brief:

> The state's interest is limited to the land area within the ordinary high water mark.

Brief and Appendix of Defendants—Respondents and Petitioners, p 13. Instead, the Defendant was convinced that his property, which was across the road from the lake, was not within the ordinary high water mark of the lake. That the *Trudeau* court conducted little research is suggested by that court's opinion on this issue, which is a virtual reprint of the State's brief in that case. *See Trudeau* at 101-102; Brief and Appendix of Plaintiff—Appellant and Respondent, pp 18-20 (See Exhibit 3). Of course, as a biased litigant, the state did not mention *Jansky* v *City of Two Rivers*, 227 Wis 228; 278 NW 527 (1938), which relied upon *Doemel* v *Jantz*, 180 Wis 225; 193 NW 393 (1923), among other cases. In *Jansky*, a unanimous Wisconsin Supreme Court held as follows:

> Consequently, by virtue of their deed, describing lots which, as platted, were bounded by Lake Michigan, the plaintiffs became riparian owners, and as such owners are entitled to all land extending to the natural shoreline as it was in 1835, and as it changed from time to time thereafter by reason of accretions formed upon or against that land, or by reason of the uncovering of portions of the adjoining bed of the lake by the gradual retrocession of the water therefrom. *Jansky*, 278 NW at 530-531.

Therefore, until the uninformed *Trudeau* decision in 1987, the so-called "ordinary high water mark" was not applied to the Great Lakes in Wisconsin. Thus, this Court's statement that the *Trudeau* court's ordinary high water mark definition "has served another Great Lakes state for some hundred years" rings hollow. Opinion, pp 29-30.

## III. WALKING IS NOT A PUBLIC TRUST RIGHT IN MICHIGAN, AND THIS COURT'S CHANGE OF THE LAW IS ILL-ADVISED.

To support its unprecedented claim that shoreline walking is a public right, this Court "first note[s] that neither party contests that walking falls within public rights traditionally protected under our public trust doctrine." Opinion, p 32. The Court then elevates this to the parties' "agreement." Like myriad assertions in this Court's opinion, this one distorts the true facts. After noting a statutory listing of the rights of the public, including "hunting, fishing, swimming, pleasure boating, or navigation," Defendants' brief states unequivocally:

> 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. Defendants' Brief, p 28.

Defendants therefore demonstrated that walking was not one of "the rights of the public," either by statute or common law, because it was not a use "associated with activities on or in the water itself." *Id*. Thus, the first basis of this Court's "right to walk"—"the parties agreement"—is a fallacy.

This leaves the Court with only a bare assertion—one that over 160 years of history along the Great Lakes shores proves untrue:

> In order to engage in those activities specifically protected by the public trust doctrine, the public must have a right of passage over land below the ordinary high water mark. Opinion, p 33.

For 167 years, excepting the *Kavanaugh* years, the public has fished, hunted, and navigated without exercising "a right of passage" over Michigan's shores. Moreover, the public has done so in light of the presumed enforcement of the State's long-held position that riparian lands were privately controlled. The public has nevertheless fished or hunted, but it has done so from boats or shallow waters. The Court fails to demonstrate why the public *must* "have a right of passage" on the shores to exercise these rights. The Court's bare assertion, without any reference to precedent, and without any factual support, is fallacious.

Unmentioned is the authority of *Lorman* v *Benson*, supra, quoted in this brief's Introduction, *supra*, which recognizes that walking the shores is not "rightful," but is done at sufferance of the owner. *Id*. at 30. Once again, this Court ignores precedent to reach its result. That result, of course, is to now invite the public to do something never before seen in Michigan: to use private beaches for hunting, fishing, and recreational boating for sure, as these rights the Court has clearly acknowledged. Opinion, p 32. Uses also suggested by the Court's opinion include swimming, bathing, and "sustenance." Opinion, p 18, 33. Logic also dictates that if walking the beach is an "inherent" part of fishing and hunting, then dogs, four-wheelers, and snowmobiles must be included, too. The peace and tranquility enjoyed by riparians since before statehood will now be enjoyed only at the discretion of the state or local governments and their policing authorities.

Michigan's beaches are not equivalent to vast ocean beaches. Unlike Justice Young's photograph, they are often narrow, with crowded homes on small lots within a few feet of the shore. Homeowners adjoining public parks, road ends, and access easements will be especially hard hit by this Court's decision, as those homeowners will now have to compete with the public to enjoy what often is a small beach in front of their home or cottage. A municipality seeking to provide public recreational area now need only buy a few feet of access, and allow the public to crowd the beachfronts of nearby homes. Over time, this Court's decision will effect a drastic change in the nature of Michigan's beaches. This is not what riparians bargained for when they purchased their land. This is not the "exclusive use" that this Court promised riparians in *Hilt* when it endeavored to encourage "development of the lake shores." *Hilt* at 226, 227. This is not the fee title, free of public trust rights, that it awarded Mr. Kavanaugh on reconsideration in *Kavanaugh* v *Baird*, supra.

This Court's unprecedented utilization of the public trust doctrine of this state effects a grave injustice to riparian owners. In the words of this Court:

> For the courts to hold on any conceivable finespun theory that they are not entitled to compensation for the damage suffered would be to do them a grievous wrong which would be a blot on the jurisprudence of the State of Michigan. The solid foundation upon which the civil liberties of the American people rest is the proposition that no man shall be deprived of his property, his liberty, or his life without due process of law.

*Bator* v *Ford Motor Co*, 269 Mich 648, 671; 257 NW 906 (1934).

## IV. THE COURT'S DECISION EFFECTS A TAKING AND VIOLATES DUE PROCESS.

Since at least 1930, as a result of this Court's decisions and pronouncements in *Hilt*, *Kavanaugh*, *Staub*, and *Peterman*, riparians have as a matter of fact enjoyed exclusive use of their property. The State's chief law enforcement officer—the attorney general—has consistently acknowledged the rule[15] and as a result, this Court could take judicial notice of the fact that law enforcement officials throughout the State have enforced the rule.[16] As described in the briefs filed with the Court, the State, through the MDEQ and the MDNR, have consistently acknowledged, distributed for public consumption, and followed the rule. That the public nevertheless walked the beach at the sufferance of the true owner does not in any way affect the rule. *Lorman* v *Benson*, 8 Mich 18, 30 (1860). This Court cannot, and does not, dispute that the rule of exclusive riparian use has been the firm, consistent, applied, and acknowledged rule among the courts, the bar, the State and its law enforcement departments since at least 1930.

This Court cannot fairly deny that its decision in this case changes that rule, and the practices that resulted from the rule. The opinion implicitly concedes this fact when it must resort to Wisconsin law to define the extent of rights "found," and then—in what seems to be an invitation—reminds us that the Legislature can regulate those rights. Opinion, p 36.

[15] See, eg, OAG 1978, No 5327 (July 6, 1978) ("The riparian has the exclusive use of the bank and shore . . .") and correspondence from Frank J. Kelley, Attorney General, to Robert M. Hea dated June 5, 1968 ("with respect to the Great Lakes, a riparian owner (one who owns land bordering the lake), owns the land between the meander line and the water, has exclusive use of the bank and shore, and may erect bathing houses and structures thereon . . .") See Exhibit 4.

[16] See, eg, correspondence dated 9-25-87 from Arenac County Prosecutor Jack W. Scully to James Balten ("A riparian owns to the water. The above being the case, a riparian may prohibit non-owners from the use of the strip of land between the upland and the water's edge.") See Exhibit 5.

While "the states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit,"[17] once defined, this Court may not take those rights away without just compensation. Moreover, while this Court defines Michigan's common law, to do so is not without limits:

> As a general matter, the Constitution leaves the law of real property to the states. But . . . a state may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate "background law"—regardless of whether it is really such—could eliminate property rights." *Stevens* v *City of Cannon Beach*, 510 US 1207, 1211; 114 S Ct 1332; 127 LEd2d 679 (1994) (Scalia, J, dissenting from denial of certiorari), citing *Lucas* v *South Carolina Coastal Council*, 505 US 1003; 112 S Ct 2886; 120 LEd2d 798 (1992).

*See* generally Sarratt, *Note: Judicial Takings and the Course Pursued*, 90 Va L Rev 1487 (2004). In *Lucas*, the US Supreme Court quoted with approval from *Webb's Fabulous Pharmacies, Inc* v *Beckwith*, 449 US 155, 164; 101 S Ct 446, 452; 66 LEd2d 358 (1980):

> a state, by *ipse dixit*, may not transform private property into public property without compensation.

*Lucas*, 505 US at 1031. In *Phillips* v *Washington Legal Foundation*, 524 US 156, 167; 118 S Ct 1925; 141 LEd2d 174 (1998), the US Supreme Court said:

> a state may not sidestep the takings clause by disavowing traditional property interests long recognized under state law.

The principle that there are constitutional limits to what this Court may do in interpreting our common law is best explained by Justice Stewart in *Hughes* v *Washington*, 389 US 290; 296-298; 88 S Ct 438; 19 LEd2d 530 (1967). In his concurring opinion, he wrote:

> Such a conclusion by the State's highest court on a question of state law would ordinarily bind this Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of

[17] Opinion, p 43, citing *Phillips Petroleum Co* v *Mississippi*, 484 US 469, 475; 108 S Ct 791; 98 LEd2d 877 (1988).

> the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.
>
> We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, *unpredictable in terms of the relevant precedents*, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court (emphasis added).

Plaintiff respectfully submits that the Court's decision in the case at bar—ignoring *Hilt's* long-standing exclusive rule, among other things—effects a taking in violation of our state and federal constitutions, and violates due process.

This result need not be the case. Justice Markman's well-reasoned opinion offered this Court an opportunity to make Michigan's shoreline rules crystal clear. Although this Court properly notes that his "wet sand" proposal is unprecedented (Opinion, pp 41-42), his proposed "wet sand" rule might more properly be implemented as a "clarification" of the "water's edge," a term that has not yet been defined in any Michigan case, than this Court's confiscatory "ordinary high water mark" rule. Though this Court violates constitutional protections when it ignores *Hilt's* "exclusive use" rule, among other things, this Court has the right, and indeed, the duty, to clarify the law. By clarifying the term "water's edge" to include the wet sands on the surface of the beach infused with water daily—equivalent to the rule applied to the sea as *Hilt* contemplated—this Court would stay in relative harmony with Michigan's precedent. This principle would also best serve the old English common law rule, contrasted from that of Roman law, that all property capable of productive use be privately owned. Kehoe, *The Next Wave in*

*Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 Fordham L Rev 1913, 1919-1920 (1995).

## CONCLUSION

Defendants will not dispute that the state has sought what riparians have—title to Michigan's Great Lakes shoreline, including exclusive use—for a long time. Over the last 100 years, it has asserted its claims against an unorganized public repeatedly. Yet the claims of the executive branch were rebuffed, first in *Hilt*, then with the Court's reconsideration and reversal of *Kavanaugh* v *Baird.* But after this Court's signal in *Broedell*, as demonstrated in Save Our Shoreline's brief, the executive branch moved quickly to claim rights to the ordinary high water mark and began a concerted effort to persuade the Legislature to act. In 1968, the Legislature passed a bill which its sponsor claimed defined the boundary at the ordinary high water mark as sought by the executive branch. All that was left was for this Court to countenance the move. In 2005, with editorial boards across the state demanding not allegiance to the law, but open beaches, this Court has met those demands. Defendants respectfully submit that the law demands something better.

WHEREFORE, Defendants Richard and Kathleen Goeckel respectfully request that this Honorable Court grant their Motion for Rehearing and hold that Defendants are entitled to exclusive use, as well as title, to the water's edge, free of public trust. Alternatively, Defendants request that this Honorable Court vacate its decision, and adopt the well-reasoned opinion of Justice Markman—which allows beach walking, but reduces or eliminates myriad other problems presented by the majority's decision—as its own.

Dated: August 19, 2005

Respectfully submitted,

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