

STATE OF MICHIGAN
IN THE SUPREME COURT

JOAN M. GLASS,

Plaintiff/Appellant

v

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

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and KATHLEEN D. GOECKEL,

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BRIEF OF AMICUS CURIAE

**SAVE OUR SHORELINE
AND
GREAT LAKES COALITION, INC.**

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STATEMENT OF QUESTIONS PRESENTED

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

Trial Court's Answer	:	No
Plaintiff/Appellant's Answer	:	No
Defendant/Appellee's Answer	:	Yes
Amicus' Answer	:	Yes

II. DOES THE GREAT LAKES SUBMERGED LANDS ACT MODIFY THE RULE OF OWNERSHIP TO THE WATER'S EDGE ESTABLISHED BY HILT v WEBER?

Trial Court's Answer:	:	Yes
Plaintiff/Appellant's Answer:	:	Yes
Defendant/Appellee's Answer:	:	No
Amicus' Answer	:	No

INTEREST OF AMICUS CURIAE

Formed in August of 2001, Save Our Shoreline (SOS) is a Michigan nonprofit membership corporation committed to the preservation of riparian rights, which in Michigan includes the right of ownership of Great Lakes riparian lands to the water's edge, wherever that may be at any given time. Since its formation in 2001, the grass-roots group has rapidly grown to over 2,000 households. SOS members have a direct and substantial interest in this Court's decision regarding the extent and nature of their ownership of Great Lakes riparian lands. In addition to its amicus effort in this litigation, the group recently pursued and obtained passage in this state of 2003 PA 14, which relates to a riparian's right to maintain their waterfront property, including the control of vegetation on Michigan's beaches. The group has also participated by way of amicus brief in Borden Ranch Partnership v US Army Corps of Engineers, 536 US 903; 122 S Ct 2355 (mem); 153 L Ed 2d 178 (2002), regarding the reach of federal statutes over Great Lakes beaches as well as other matters. The organization is responding to what it perceives as an organized effort, which includes units of state and federal government, and others, to increase public control of the lakeshores, to the prejudice of private owners and the principle of private property. The theories

proffered by Plaintiff in this case have been specifically used and developed as part of that effort.

Incorporated as a Michigan non-profit corporation in 1986, the Great Lakes Coalition, Inc. represents thousands of Great Lakes private property owners. Also known as the International Great Lakes Coalition ("IGLC"), it works directly with the International Joint Commission, Boards of Control, and federal and state entities on issues of concern to lakefront owners. It also provides to such entities technical and scientific research, and participates in various studies regarding the Great Lakes. It was incorporated in 1986 as a Michigan non-profit corporation.

ARGUMENT

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

A. The Seminal Case of Hilt v Weber Governs this Case.

The issue at bar is governed by this Court's landmark decision of Hilt v Weber, 252 Mich 198; 233 NW 159 (1930), in which this Court clearly and unambiguously held that shoreline property owners on the Great Lakes own to the water's edge, at whatever stage. The decision also specifically dispelled the notion that the public trust extended landward beyond the water's edge. Since its issuance in 1930, the decision has stood unscarred, being neither overturned nor criticized, by any Michigan case. To the contrary, its principle of ownership to the water's edge at whatever stage was reaffirmed by this Court in Peterman v DNR, 446 Mich 177; 521 NW2d 499 (1994), a case which specifically held that the riparian owner, and not the public, owned the beach between the water's edge and the so-called "ordinary high water mark."¹ Under the authority of these cases, the argument that the public has any fee ownership

¹ The concept of "ordinary high water mark" is often referred to, but seldom defined, in case law, and is further clouded by many varied judicial, statutory, and administrative definitions and references. As an example, but not by way of limitation, the early decisions relate the marks in terms of tidal changes in water level, exclusive of other types of change (see, eg, People v Warner, 116 Mich 228; 74 NW 705 (1898)). Others refer to other periodic changes uninfluenced by tide. See Doemel V Jantz, 180 Wis 225; 193 NW 393 (1923). This difference becomes significant when trying to extrapolate a rule for tidal waters, and apply it to non-tidal waters, as Plaintiff does in her brief. Because the term means different things to different people this brief will treat the term guardedly.

interest in property between the water's edge and the so-called "ordinary high water mark" must fail.

The decision of Hilt v Weber, supra, is widely cited by state and national authorities for its determination of the boundary for the intersection between the Great Lakes and riparian land. In Hilt, a land contract purchaser of shoreline property, in defending against foreclosure, asserted that the seller misrepresented the property line as a boundary near the water. He argued that the meander line², being 277 feet from the water, was the boundary under the authority of Kavanaugh v Rabior, 222 Mich 68; 192 NW 623 (1923) and Kavanaugh v Baird, 241 Mich 240; 217 NW2d (1928) (hereinafter the "Kavanaugh cases"). The Hilt court expressly overruled the Kavanaugh cases, and held that because the boundary line extended to the water's edge, no damage occurred.

A study of the Hilt decision and its history reveals its intellectual and historical significance. According to Professor Theodore Steinberg, a presidential scholar at the University of Michigan, "[b]efore the Kavanaugh case, property owners along Michigan's shores believed that they owned to the water's edge," which "seemed to be a sensible boundary."

² A meander line, according to Hilt, is simply an approximation of a shoreline boundary for the purpose of computing the amount of acreage sold by the government, and was never intended to be a boundary in fact. Hilt at 204-206.

Steinberg, "God's Terminus: Boundaries, Nature, and Property on the Michigan Shore," The American Journal of Legal History, Vol. XXXVII (1993) (See Exhibit "A"). The Kavanaugh cases changed that historical and legal understanding, and "converted to public property Michigan's hundreds and hundreds of miles" of shore. Id. at 77.

According to Steinberg, the judicial appropriation effected by the Kavanaugh cases caused a flurry of new activity. Shoreline renters began to withhold rent. Surveyors began marking the new property lines. Shoreline owners organized. Real estate brokers complained, and a bill before the legislature to clarify the water's edge as the boundary was passed, but vetoed by the governor. In some areas of the state, hundreds of feet of property between the water's edge and upland property was declared public land. Id. at 77-78, 82. In light of this legal turmoil, this Court promptly accepted the Hilt case for review and set forth its reason for doing so:

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

Hilt at 202. The court noted that in addition to the briefs of the parties, it had the benefit of those of "the attorney general and others representing public and private interests as

amicus curiae." Id. Hence, the Hilt decision is not some ordinary decision on the topic; it was a momentous decision intended to clarify a serious legal problem to a young, developing state. A studied reading of the exhaustive decision evidences the fact that the court intended the decision to be the final word on the issue, not only by the decision's legal standing, but by the strength of its reasoning. In its analysis, the Hilt court carefully and methodically addressed all of the arguments that might be brought to bear on the issue, including an historical analysis of relevant federal and state decisions and consideration of the public trust doctrine. With virtually every page of the Hilt decision carefully crafted, and in light of the historical background, there can be no doubt that this Court knew of the import of its decision; that it applied the appropriate amount of resources in finding and determining the law; and that it intended to bring final resolution to the issue of shoreline ownership in Michigan.

(1) Factual Background of the Hilt Decision.

The allegations of fraud in Hilt arose from a visit to the property on December 1, 1925 (See Record, Hilt v Weber, p. 88-91, attached hereto as Exhibit "B"). At that time, the seller's agent represented that a stake "driven in the shore 100 feet from the water" represented the boundary." Hilt at 201.

The water at this point in time was extraordinarily low. A review of data from the U.S. Army Corps of Engineers demonstrates that from 1918 through 2002, Lake Michigan water levels have fluctuated by over six feet, with record highs and lows appearing on a 25 to 40 year cycle, and with near record low water levels on December 1, 1925 (See Exhibit "C"). Indeed, it appears from the chart that only about four to six months from the chart's 84-year coverage saw equal or lower water levels. In other words, since 1918 the water has been higher than at the time of the Hilt dispute about 99.5% of the time.

In Hilt, the "disputed strip" of land at issue involved the land (or shore) between the stake and the meander line 277 feet from the water. Thus, the "disputed strip" involved land starting 100 feet from the water, and extending 177 feet upland. The court revealed that at least a portion of this 177-foot strip of land was "made dry land partly by accession and partly by reliction." Id. at 201. As explained in Section I(B) below, the term "reliction," as it was used by the court, specifically includes the cyclical fall of water levels in the Great Lakes.³ Thus, the issue in Hilt specifically involved the nature of the ownership of land which was made dry by the cyclical recession

³ Plaintiff's assertion at p. 33 of her application that the land at issue was "permanently above the high water mark" is unsupported and belies the Hilt record. See Hilt record, pp 90-91: ("beach extends back from the water's

of water on the Great Lakes. As a result, the Hilt conclusions about ownership of relicted land were not dictum, but were essential to the case. Because no rule of law would distinguish between ownership of the relicted land at issue in Hilt, and the relicted land represented by the first 100 feet from the water's edge in that case, the rule announced by Hilt necessarily applies to such land.⁴

(2) Federal and State Decisions; Ownership to Water's Edge.

On commencing its analysis, the Hilt court first noted that even in the earlier, contrary case of Kavanaugh v Baird, supra, the court had acknowledged that "the decision was against the weight of authority, supported by the fact that the contrary authority is substantially unanimous, in state and federal courts, in this country and England." Hilt at 203.⁵ As for federal law, the court cited St Paul & P Railroad Co v Schurmeier, 7 Wall 272, 286; 19 LEd 74 (1868) ("the water-

edge...over 100 feet...[which] was formerly lake (emphasis added)"). (See Exhibit B).

⁴ Indeed, the Hilt court seemed to find that by referring to the stake 100 feet from the shore, Plaintiff did indeed misrepresent the boundary, but since Defendant actually owned to the water's edge, he suffered no harm: "Under this ruling, Defendants suffered no damage from misrepresentation of the boundary line." Id. at 227.

⁵ The Kavanaugh decision provided at p. 252:

. . . These holdings may be out of line with the holdings in other jurisdictions. They may be out of line with the writings of textwriters and the decisions of other courts. We may concede them to be against the overwhelming weight of authority, but we should not overrule them . . . (emphasis added).

course, and not the meander-line, as actually run on the land, is the true boundary") and Hardin v Jordan, 140 US 371, 380; 11 S Ct 808, 811; 35 L Ed 428 (1890) ("the waters themselves constitute the real boundary"). After citing additional cases from other Great Lakes states, the court concluded that under federal law, "the purchaser from the government of public land on the Great Lakes took title to the water's edge (emphasis added)." Hilt at 206.

(3) Michigan Property Rights Are Defined By Michigan Law.

The Hilt court next held that once waterfront property was acquired by a private person, state law, and not federal law, controlled the extent of that person's rights:⁶

The state law became paramount on the title after it vested in a private person.

Id., citing Hardin v Jordan, supra. This proposition was espoused by the court in Kavanaugh v Baird, supra, at 254, and by the Brief of the Attorney General acting as Amicus Curiae in the Hilt case at p.1:

It is a settled rule of law that each state determines for itself the question of the rights of the riparian owner.

⁶ Plaintiff apparently concedes this point. See Plaintiff's Application, p.17 (" . . . each state is free to govern the title and rights of Great Lakes riparian owners . . .").

(See Exhibit "D"). This remains the law today. See Oregon v Corvallis Sand and Gravel Co, 429 US 363, 372; 97 S Ct 582; 50 L Ed 2d 550 (1977) ("that land had long been in private ownership and, hence, under the great weight of precedent from this court, subject to the general body of state property law").

(4) Under Michigan Law Prior to Hilt, Shoreline Owners Owned To the Water's Edge.

After examining and exposing the underpinnings of previous cases on the subject, the Hilt court concluded that prior to the Kavanaugh decisions, "this court, in common with public opinion and in harmony with the weight of authority, assumed, without question, that the upland proprietor owns to the water's edge . . . (emphasis added)." Id. at 212. A detailed review of those cases supports that assertion.

That the water's edge was the boundary between public and riparian ownership was first suggested early in this State's jurisprudence in La Plaisance Bay Harbor Co v Council of City of Monroe, Walk. Ch 155 (1843):

So, with regard to our Great Lakes, or such parts of them as lie within the limits of the state; the proprietor of the adjacent shore has no property whatever in the land covered by the water of the lake (emphasis added).

Id., cited in People v Silberwood, 110 Mich 103, 106; 67 NW 1087 (1896). Thus, only five years after admission to the Union, this Court recognized in plain language that while title to land

covered by water is in the state, the "adjacent shore" is not. The term "shore" is typically defined as "[t]he space bounded by the high and low water marks." Black's Law Dictionary (West 1979). Thus, this Court in La Plaisance identified the border between state and private land: the low water mark, or higher on the shore to the point where the land is no longer "covered by water."

Forty years followed the La Plaisance decision with relative silence on the issue of riparian ownership. But the next 46 years, commencing in 1884, saw a relative flurry of decisions from this Court that culminated in the Hilt decision in 1930. After the exhaustive Hilt decision followed 64 years of relative silence from this Court on the issue, until the Hilt holding was renewed in 1994 by Peterman v DNR, 446 Mich 177; 521 NW2d 499 (1994).

Without reference to La Plaisance, supra, this Court in Lincoln v Davis, 53 Mich 375; 19 NW 103 (1884) could not find complete agreement on the extent of riparian ownership, despite agreement in the result. The case involved the lessee of an island and his removal of the plaintiff's fishing nets from the water in front of the island. The majority opinion affirmed a judgment of damages for trespass in favor of plaintiff. That was based on the existence of a statute governing navigable

water which precluded "private erections" in such water. The Court held that while the state may act, a private person could not act to remove another person's stakes unless they were nuisances. Since these nets were not nuisances, the riparian owner wrongfully removed the nets, and plaintiff was entitled to recover for defendant's wrongful act of removing plaintiff's property. Id. at 391.

While the majority held that plaintiff's riparian rights did not extend to the right to remove the fishing net and stakes in the case, it was not prepared to further limit riparian rights:

I am not prepared to hold, however, that lands under water are not appurtenant to the upland so far as they can be used at all (emphasis added).

Id. at 392. Thus, the majority was unwilling to accept concurring Justice Champlin's claim that the riparian's title did not extend lakeward of the low water mark. But on one point the court was unanimous: on the Great Lakes, there is no distinction between low and high water mark:

I think there is no doubt of the right of the owner of lands on the borders of the lakes to make such use of the covered lands adjacent as will not injuriously affect navigation; and that there is no proprietary division known on these waters as high or low water mark. I agree that it depends on the law of the State how far rights may be exercised consistently with public easement of navigation in the submerged lands (emphasis added).

Id. at 389-390. By this language, Justice Campbell was expressing his agreement on this issue with that of concurring Justice Champlin. The concurring justice analogized the Great Lakes to the seas, which:

would seem to call for the application of the same principals as to boundaries which were applied to lands bordering on those seas, with this difference: as there is no periodical ebb and flow of tide in these waters the limit should be at low instead of at high water mark.⁷

Id. at 385. Contrary to the majority opinion, the concurring justice had "no hesitation in saying" that the boundaries of the government's grant to the island in question is "limited by low water mark." Id. at 384-385. Thus, a reader of this decision in 1884 would fairly conclude that according to the unanimous opinion of the State's highest court, the public's title would in no case extend upland beyond the low water mark.

Four years later, Justice Champlin wrote the majority opinion in Sterling v Jackson, 69 Mich 488; 37 NW 845 (1888), a decision involving the public right to navigate and hunt in water over privately owned soil traced to a swamp land patent. The Court held that under such a patent, the patent holder owned the patented soil beneath the waters of the Great Lakes. As a result, although the Defendant, as a member of the public, was

⁷ This view was accepted by the U.S. Supreme Court. See Note 10, *infra*.

entitled to use of the water because of the paramount right of navigation⁸, that right was not without limits:

So long as that license continued, he could navigate the water with his vessel, and do all things incident to such navigation. He could seek the shelter of the bay in a storm, and cast his anchor therein; but he had no right to construct a "hide," nor to anchor his decoys for the purpose of attracting ducks within reach of his shotgun. Such acts are not incident to navigation, and in doing them, Defendant was not exercising the implied license to navigate the waters of the bay, but they were an abuse of such license (emphasis added).

Id. at 497. This court affirmed a judgment of trespass. The two dissenting justices would not have granted such a limitation on the public's rights. Yet both seemed to assume the riparian's ownership of the shore. Concluding that "there is no part of the open water from which the riparian owner can exclude the public," Justice Campbell emphasized that "the riparian owner's rights in the bed away from the shore are purely theoretical and valueless (emphasis added)." Id. at 509. And in his dissent, Justice Morse referred to the "riparian owner of the shore," preceded by an assertion of his right, as a member of the public, to "lie dreamily in [his] . . . anchored boat . . . [and] to note the ripple of its waters as they beat upon the

⁸ It is important to distinguish this right of navigation with those rights under the public trust. Had Defendant been hunting over state waters held in public trust, he would not have been so limited. But because he was on waters over lands held by Plaintiff in fee, he was limited only to rights of navigation.

shores of the riparian owner (emphasis added)." Id. at 535, 537.

The low water mark was again referenced in People v Silberwood, supra. In that case, the defendant was convicted of cutting vegetation growing on submerged land in front of his shoreline property, in violation of a state statute. He claimed that as a riparian, he owned to the center of Lake Erie and had the right to cut the vegetation. The Court disagreed. New to the Court, Justice Moore's opinion twice referred to La Plaisance Bay Harbor Co v Council of City of Monroe, supra, quoting the passage referenced above:

[T]he proprietor⁹ of the adjacent shore has no property whatever in the land covered by the water of the lake.

Id. at 106. The unanimous Court also held that "[t]his doctrine is in harmony with the decisions of all the states bordering on these great seas." Id., 110 Mich at 108-109. The decisions he referenced were cases from New York, Pennsylvania, and Ohio, all holding that "the fee of the riparian owner ceases at the low water mark (emphasis added)." Id. at 107.¹⁰ The decision then

⁹ Black's Law Dictionary (West 1979) defines the term "proprietor" as "one who has the legal right or exclusive title to anything. In many instances, it is synonymous with owner." That dictionary also defines "shore" as "[the] space bounded by the high and low water marks."

¹⁰ See also Massachusetts v New York, 271 US 65; 92-93 S Ct; 70 LEd 838 (1925) (Rule that grants extending to high water mark on tidal waters does not apply to non-tidal waters; there "are no public rights in the shores of non-tidal waters"). This decision refutes Plaintiff's assertion that U.S. Supreme Court

quotes with approval the opinion in Illinois Central Railroad Co v Illinois, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892): "the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several states belong to the respective states," and that "the same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes . . . (emphasis added)." Silberwood at 107. Thus, this Court in Silberwood unanimously confirmed the public trust doctrine for lands covered by water, and further unanimously confirmed that the riparian's fee title ended at the low water mark, where the state's title began.¹¹

This court received little rest on the issue of riparian ownership. Less than two years after Silberwood, the court, without any change in its composition, decided People v Warner, 116 Mich 228; 74 NW 705 (1898). Warner involved the ownership of a marshy island in Saginaw Bay which was once submerged, but over time became exposed. Warner, being the owner of an adjacent dry island, claimed he owned the marshy island as an accretion to his island. The state claimed the marshy island was an accretion to islands over which it asserted fee

cases mandate public trust ownership to the high water mark in the Great Lakes. See Plaintiff's Application, p.28.

¹¹ The Hilt decision, while referring to the Silberwood decision, does not fully acknowledge the clarity of the court's decision on the issue of shoreline boundary at the low water mark.

ownership, and not simply ownership as part of the bed of the lake. The trial court directed a verdict in favor of the state. This Court reversed, and ruled that a factual dispute existed as to whether the marshy island "gradually extended" from a point on Warner's island, or whether land arose from the water and was later then connected to Warner's island "at times of low water (emphasis added)." Id. at 240, 241. The Court, through Justice Hooker, stated its view of the law:

So, if, by the imperceptible accumulation of soil upon the shore of an island belonging to a grantee of the government, or by reliction, it should be enlarged, such person, and not the state, would be the owner . . . (emphasis added).

Id. at 239. The Warner court knew it was dealing with a case of low cyclical water, and applied the rule of reliction to such facts. It noted that the land at issue "has appeared above the water "since surveys were conducted." Id. at 235. And it found necessary an inquiry whether land was revealed "at times of low water." Id. Yet, its reference to a difference between high and low water marks related only to such marks as set by tides:

The depth of water upon submerged land is not important in determining the ownership. If the absence of tides upon the Lakes, or their trifling effect if they can be said to exist, practically makes high and low water mark identical for the purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked. The adjoining proprietor's fee stops there, and there that of the State begins, whether the water

be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation.

Id. at 239. By this language, the Court once again clarified that the State's land is that which is covered by water, though that water may be of shallow depth. Without deciding whether tides have an effect on the Great Lakes, the Court suggested that the absence of tide "makes high and low water mark identical." Id. at 239. The resulting water mark is the boundary, with the state owning all land covered by water, but not relicted land. By placing the low water mark, high water mark, and water's edge at the same line (in the absence of tidal influence), the Court stayed in intellectual harmony with the Silberwood decision's reference to the low water mark as the boundary. Having acknowledged fluctuations in Great Lakes water levels ("times of low water"), while suggesting the lack of tide would make low and high water mark identical, the Warner decision calls for but one water boundary as acknowledged by Hilt: the water's edge. Hilt, supra, at 222.

Only three years later, and again without any change in composition, this court considered State v Lake St Clair Fishing & Shooting Club, 127 Mich 580; 87 NW 117 (1901). The majority opinion did not address the issue, but Justice Hooker, who

concurrent¹² in the Silberwood decision, and who wrote the Warner opinion, wrote an extensive concurrence. If there was any doubt about Justice Hooker's interpretation of the law in his Warner opinion and his concurrence in earlier cases, he clarified it in this concurrence:

Under the cases of People v Silberwood, 110 Mich 103 (67 NW 1087, 32 LRA 694), and People v Warner, supra, it must be taken as settled law that all land submerged, when the water in the lakes stands at low water mark, is a part of the lake, and the title in the State, and all land between the low-water mark and the meander line belongs to the abutting proprietor, holding under an ordinary patent from the Federal Government or State (emphasis added).

Id. at 590. Thus, while Justice Hooker clearly believed that the privileges of the public "extend to high water mark in all tide waters," he acknowledged that on the Great Lakes, the tides have "a trifling effect if they can be said to exist." State v St. Clair Fishing & Shooting Club at 586; Warner at 239. As a result, he found them to be governed by a different rule: one that sets the boundary between the state and riparian firmly at the low water mark, at least where the water is no higher.

After a long period of substantially consistent decisions from this Court announcing riparian ownership of the shores-- while recognizing public trust rights in the soil covered by

¹² Plaintiff mistakenly represents this as the court's decision. (Plaintiff's Application, p. 18). The concurring opinion appears first in the Michigan Reports, which can be confusing to the reader.

water--the rule was blurred by a newly composed court in Ainsworth v Munoskong Hunting & Fishing Club, 159 Mich 61; 123 NW 802 (1909).¹³ That case involved a riparian's interference with hunters in the waters of Munoskong Bay, and his claim of ownership of submerged land. There was no claim that the submerged land was ever dry; Defendant simply asserted he owned to the middle of the water. Citing the La Plaisance, Lincoln, Silberwood, Warner, and St Clair Fishing & Shooting Club decisions, in two of which he was found in the majority,¹⁴ Justice Grant announced that:

It is the established law of this state that riparian owners along the Great Lakes own only to the meander line, and that title outside this meander line, subject to the rights of navigation, is held in trust by the State for the use of its citizens (emphasis added).

Id. at 64. The court also asserted: "In these cases, and others cited therein, the subject has been fully discussed, and further discussion here would be unprofitable." Id. Of course, while the cited decisions acknowledged the public's rights in submerged lands, each of them cite the shore or the low water mark as the boundary, and not the "meander line." The Hilt decision well explained the error in the court's choice of

¹³ Only Justices Moore and Grant remained from the court that decided Silberwood, Warner, and St Clair Fishing & Shooting Club, supra.

¹⁴ This would include the Silberwood, supra, and Warner, supra, decisions.

words, and specifically overruled the "meander line" statement as an unfortunate mistake by the court, resulting in part from the fact that the "meander line" and the waterline were the same under the facts of that case; the terms were used interchangeably in the case; and "the bill conceded that Defendant owned to the water's edge":

The dictum in Ainsworth v Hunting & Fishing Club, supra, 'that riparian owners along the Great Lakes own only to the meander line' is overruled.

Hilt, 252 Mich at 207, 208-213.

The overruled Ainsworth case was followed by State v Venice of America Land Co, 160 Mich 680; 125 NW 770 (1910). That case involved title to a portion of an island that was periodically submerged, including being so at the time of statehood. The Defendant claimed he owned the land as a result of a chain of title leading back to a grant from the British government, "antedating the title of the United States." Id. at 682. The court's decision does not reflect a consideration of whether Defendant owned the land as a riparian owner of adjacent upland, though it stated that the fact that the land is "unsurveyed lands, and within the meander lines, is significant." Id. at 701. The court affirmed the trial court, which held that Defendants' predecessor "never had title" to the land at issue. Id. at 689.

The decision, concurred in by Justice Hooker, the writer of the Warner opinion, referred with approval to his concurring opinion in State v St Clair Fishing & Shooting Club, supra, describing it as:

An exhaustive discussion of the nature of the state's title to the land beneath the waters of the Great Lakes . . .

Id. at 702. Thus, the St Clair Fishing & Shooting Club majority likely was approving Justice Hooker's view of riparian ownership to the low water mark, at least where dry.

Thus, with the exception of the mistake by the Ainsworth case, Michigan law, as announced in this court's opinions, was consistent from the 1843 La Plaisance decision through the 1910 Venice of American Land Co decision that the state's fee ended at the low water mark, or perhaps the water's edge, if higher. The Hilt decision properly found that the riparian owned to the water's edge.

(5) The Public Trust Doctrine Ends At The Water's Edge.

The Hilt court acknowledged that the so-called public trust doctrine (termed the "trust doctrine" by the court) had been recognized by Michigan courts as early as 1843 in La Plaisance Bay Harbor Co v City of Monroe, supra, which decision noted that "the proprietor of the adjacent shore has no property whatever in the land covered by the water of the lake" (emphasis added).

Hilt at 208. The court also noted the reference to the doctrine in several other cases. Id. Finally, the Hilt court acknowledged heated and vigorous arguments, presumably made by the state Conservation Department and others by way of amicus briefs, that the trust doctrine should not end at the water's edge, but should extend upward across the dry shore. Hilt at 224. The Hilt court clearly and unequivocally rejected this extension of the public trust doctrine for "public control of the lakeshores":

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

Hilt at 224. The court went on to point out that even under the Kavanaugh cases, the alleged title to the meander line was merely that of trustee under the public trust: "only for the

preservation of the public rights of navigation, fishing, and hunting." Id. at 224. So when the Hilt court opined that the state's title ended at the water's edge, it was speaking in terms of that title which is held in public trust. If there is any question from the words used by the majority opinion, it was clarified by this statement from the dissent:

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

Of course, the majority's decision indicated that no trust was destroyed by its decision, because it never existed in the first place. But in any event, it is clear from the Hilt decision that no public trust extended beyond the water's edge and onto the dry lakeshore. This is consistent with Doemel v Jantz, 180 Wis 225; 193 NW 393 (1923), which the Hilt court cited with approval.¹⁵

B. Plaintiff's Attempts to Distinguish the Hilt Decision Are Unpersuasive.

Adjudicating a dispute involving land uncovered by near record low water levels, the Hilt v Weber majority squarely characterized the case as one involving the "rule of reliction,"

¹⁵ The Doemel court held: "so that during periods of high water the riparian ownership represents a qualified title, subject to an easement [for public trust rights] while during periods of low water it ripens into an absolute ownership

holding that the riparian owner was the fee owner of relicted land. Id. at 220. Seventy-four years after that decision, citing no subsequent case, and disregarding the plain and unambiguous language used by the Hilt court, Plaintiff now asserts that by using the term "reliction," the Court intended some type of "permanent" recession of the water, without offering to explain the type of "permanence" the Court might have been referring to. The assertion belies both the facts and the law as explained by Hilt.

While not mentioning the near record low water levels at work in the case, the Hilt court did seem to note that the reliction in question had occurred only since Michigan's admission to the Union, a mere 93 years earlier:

While some of the disputed strip undoubtedly has always been upland since before admission of the state into the Union, and the rest has been made dry land partly by accession and partly by reliction, the whole will be referred to as relicted land . . . Nor are we concerned with the specific cause of the reliction or accession so it be gradual, imperceptible, and natural or general to the lake (emphasis added).

Id. at 201. Plaintiff offers no facts, no explanation, and no citation to the record or otherwise, that would cause the Hilt court to conclude that the "reliction" that occurred in Hilt was somehow permanent, never to return, and that in a brief period

as against all the world, with the exception of the public rights of navigation...." Id. at 398.

of 93 years since the State was admitted to the Union and acquired the lakebottom from the federal government, it knew it to be so.

The idea that the term "reliction" means some type of permanent lowering of water also belies the Hilt court's tossing the term into the same pot as other types of constant, as opposed to permanent, change:

The most ordinary effect of a large body of water is to change the shoreline by deposits or erosion gradually and imperceptibly...

Id. at 219. Similar to such deposits and erosion, perhaps the "most ordinary effect of the Great Lakes" is to change water levels gradually and imperceptibly. Hilt was not concerned with the cause of "reliction" that was "gradual, imperceptible, and natural or general to the lake." Id. at 201. This Court, in Klais v Danowski, 373 Mich 262; 129 NW 414 (1964), after citing Hilt, specifically employed the term "reliction" to describe the recession of water after "periods of high water level":

Where, during a period of high water level and inundation of lands of the private claim, conveyance is made of all or some portion thereof by description stating that it runs to the lake, it must be held to mean, unless a contrary intent is clearly expressed, that it extends at least to the border of the lake as of the date of the patent, and, by reason of riparian rights and the consequent right to accretions, beyond if and when accretions or reliction cause the border of the lake to recede further lakeward."

Id. at 423. Finally, note that the Hilt court introduces a new term not before mentioned in the earlier cases: "accession." Hilt at 201. The term refers to "all that is added to the property (esp. land) naturally or by labor." Black's Law Dictionary (8th ed. 2004). Such additions need not be "permanent."

Further evidence of the Court's usage of the term "reliction" is found in the interplay between the opinion and the concurrence of Justice Potter. With the subject dominating his concurrence, Potter seemed to write separately to express his disagreement with the majority on the meaning of reliction:

The doctrine of reliction has no application to lands temporarily laid bare by a recession in the water due to variation in the amount of evaporation and precipitation, nor the lands laid bare by a recession of the water due to diversion or drainage (emphasis added).

Id. at 228. Justice Potter cited no authority for his conclusions, as his concurrence contained not a single citation. In contrast, as quoted above, the majority was not "concerned with the specific cause of the reliction," so long as it was "natural and general to the lake (emphasis added)." Id. at 201.

Further evidence of the Hilt court's intended meaning of the term is revealed by its citation to Brundage v Knox, 279 Ill 450; 117 NE 123 (1917). See Hilt at 220. Characterized by the

Hilt case as one involving the "rule of reliction," Brundage involved the recession of water on Lake Michigan, and the riparian owner's actions in building structures to protect the shoreline, which the state asserted was unlawful. Evidence in that case showed that the water had receded between 1890 and 1915, but that it had at various times come up to destroy a fence earlier built to the water's edge. Like Plaintiff in the case at bar, the state's attorney general argued that the riparian's title extended only to the "ordinary high water mark of Lake Michigan." Id. at 470. The Illinois Supreme Court disagreed, and after considerable analysis concluded:

The decree of the circuit court rightly fixed appellee's easterly boundary as the edge of Lake Michigan when free from disturbing causes.

Id. at 473. So in announcing its rule of reliction, the Hilt court chose to cite a case which specifically rejected the ordinary high water mark as the riparian boundary, and set it at the edge of the water.

Further clarifying the point, the court referred to the application of the "rule of reliction" in Doemel v Jantz, 180 Wis 225; 193 NW 393 (1923). That case involved the very issue presented at bar, as urged by Plaintiff:

[T]he defendant and the state contend that the plaintiff's title stops at the ordinary high water mark, and that the title of the land constituting the shore between such ordinary high

and low water marks is held in trust for the benefit of the public . . . [including] the purposes of public travel and public purposes generally.

Id. at 394. The court conceded:

It is true, as contended by counsel who have appeared as amici curiae, that it is unfortunate in one sense that this court, in treating of the boundaries of the riparian owner, has used a variety of expressions, such as "water's edge," "natural shore," "waterline," "ordinary low-water mark," and "ordinary high water mark."¹⁶

Id. at 397. Still, the court noted that a "careful reading of all these cases will disclose but very little conflict, from the standpoint of principle, with respect to the issue involved, and when the principles are applied to the facts in each particular case." Id.

The court then observed 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 inflowing 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 (emphasis added).

¹⁶ Likewise, Plaintiff in the case at bar characterizes the Hilt court's use of similar phrases as "unfortunate." Plaintiff's Application, p. 25.

Id. at 398. In the shadow of the ostensibly conflicting Wisconsin decisions, the Doemel court bravely concluded:

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. 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 (emphasis added).

Id.¹⁷

Citing it no less than three times, the Hilt decision fully adopts the reasoning of the Doemel court which, like Hilt and Brundage, has never been criticized or called into question by

¹⁷ Notably, and akin to the Hilt decision, the Doemel court felt compelled to this conclusion based on the early development of the law in Wisconsin:

If the rights of riparian owners had not attached or been declared by the courts, a different situation would be presented. Early in the history of this State this court, in harmony with other courts, has firmly declared that the title of a riparian owner on a navigable inland meandered lake extends to low-water mark. In the early period of our history the lands surrounding these lakes were the property of the state. From time to time the state made grants to private individuals of lands abutting upon the inland waters, and it might be said that by far the greater portion of these grants were executed subsequent to the solemn declaration of the rights of riparian owners by this court. These rights were always considered valuable, and, as a result of such declarations, the doctrines pertaining to riparian rights have become fixed rules of property. Whatever may be our individual inclinations or desires or our views as to property or the public welfare, we cannot disturb the interests which have so become vested. Id.

any reported decision. Like it characterized the Brundage decision, the Hilt court referred to Doemel as one involving the "rule of reliction." As a result, the proposition that the Hilt court's use of the term did not include variations in water level from time to time, as observed by the Doemel court, is untenable.

C. Hilt v Weber Remains the Law in Michigan.

A number of decisions issued since Hilt have adopted its holding, and the decision continues to represent the law in Michigan. See, eg, Boekeloo v Kuschinski, 117 Mich App 619; 324 NW2d 104 (1982). Most notably, the decision was upheld and followed by this Court 64 years later in Peterman v DNR, 446 Mich 177; 521 NW2d 499 (1994). In that case, beachowners sued the DNR for compensation due to the destruction of their beach caused by the DNR's negligently installed boat launch and jetties. Citing Hilt v Weber, this Court held that the state must compensate the riparian owner for its negligent destruction and the resulting "loss of the beach below the ordinary high water mark." Peterman at 200-202. In its decision, the Peterman court specifically referenced with approval the Hilt court's conclusion that "the riparian owner has the exclusive use of the bank and shore." Peterman, 446 Mich at 192, citing Hilt, supra, at 226. And like the Hilt decision, the Peterman

court, 64 years later, repeated the Hilt court's recognition of the benefits of "public control of the lakeshores," but quoted again its conclusion that the state has no power "which will justify it in taking private property without compensation." Peterman, 446 Mich at 193.¹⁸ Thus, the argument that the State's fee under the public trust doctrine extends beyond the actual water's edge, even when below the ordinary high water mark, has been specifically rejected by this state's highest court in 1930 and 1994. Both Hilt and Peterman remain the law in Michigan without criticism by any reported decision.

D. The Court of Appeals, While Reaching the Right Result, Critically Erred in its Analysis, Requiring Prompt Correction by this Court.

In an otherwise well-written and persuasive decision, the Court of Appeals in this case critically erred in asserting that the State owned title in fee up to the so-called "ordinary high water mark":

Although the riparian owner has the exclusive right to utilize such land while it remains dry, because it once again may become submerged, title

¹⁸ The Peterman court did state that "riparian owners hold a limited title to their property that is subject to the power of the state to improve navigation," but that discussion was dictum, it was provided despite no briefing on the issue of riparian rights, and in any event offers no consolation to plaintiff in this case. Peterman at 193-198; see also the briefs therein. See also Hilt at 225, 226 ("Riparian rights are property, for the taking or destruction of which by the state compensation must be made, unless the use has a real and substantial relation to paramount trust purpose . . . The only substantial paramount public right is the right to the free and unobstructed use of navigable waters for navigation.") As explained in Sterling v Jackson, *supra*, the public right of navigation excludes any use of the soil, and is to be distinguished from the State's rights under the public trust. Mrs. Glass does not navigate on defendant's beach, and has no right to any use of the soil thereon.

remains with the state pursuant to the public trust doctrine.

(Opinion, p.9). See also page 7 of the opinion:

Although the state holds title to land previously submerged, the state's title is subject to the riparian owner's exclusive use, except as it pertains to navigational issues.

These statements, as they relate to title, are not, and never have been, the law in Michigan. Moreover, the conclusion is set forth without substantial analysis, and without credible citation of authority. In the first assertion, the Court of Appeals refers us only to Hilt, supra, at 226. The cited page, which also is cited in an erroneous Attorney General opinion (see argument II, infra), contains no such conclusion by the Hilt court. But the court, in listing and explaining the various riparian rights, did refer to the Doemel decision in the following sentence:

And it has been held that the public has no right of passage over dry land between low and high water mark but the exclusive use is in the riparian owner, although title is in the state. Doemel v Jantz, supra.

Hilt at 226. Even Plaintiff agrees that by this language, the Hilt court was not adopting this statement as a rule of law. Plaintiff's Application, p. 31. It would be odd indeed that an opinion of 27 printed pages on the issue of riparian title, quoting numerous authorities on the topic, reflecting

substantial research and analysis, and without any other discussion on the distinction between low and high water mark, would leave so important a holding to a simple reference to what another case held. It would be even more odd that such a holding be premised on a case which stands for the opposite proposition from the one asserted, as occurs with the Doemel case. The focus of the language quoted was the right of the riparian, and not the interests of the state. The citation merely emphasizes that a riparian has rights of exclusive access even where he does not have title. The Hilt decision offers no support for the assertion of the Court of Appeals referenced above.

For the second assertion of the Court of Appeals quoted above, the court cites the Peterman case at page 195. Again, this page from Peterman contains nothing to support the assertion made. Quite to the contrary, the Peterman court characterized the property below the ordinary high water mark as that of the riparian:

In other words, riparian owners hold a limited title to their property that is subject to the power of the state to improve navigation.

Id. at 195. The issue in Peterman was the loss of sand from the "loss of the beach below the ordinary high water mark." Id. That beach was "plaintiff's beach." Id. at 208. The assertion

that Peterman supports a holding of state title to dry land above the water is clearly and unambiguously wrong, and the Court of Appeals' mistaken assertions of state title above the water's edge should be immediately corrected by this Court.

Contrary to the conclusions of some, the issue of ownership of title between what some assert as ordinary high and low water marks is not merely theoretical and unimportant. See, eg, Hilt v Weber, supra at 228 (concurring opinion of Potter, J). While the hydrograph at Exhibit "C" shows seasonal fluctuations of a foot or two, it also shows cyclical fluctuations over 25 to 40 years of more than six feet. Not surprisingly, governmental entities have in recent times sought to expand their jurisdiction by asserting that the ordinary high water mark exists near record highs reached perhaps only in a few years over an entire lifetime. (See Exhibits "E" and "F"). Like plaintiff in this case, the Michigan Department of Environmental Quality ("MDEQ") asserts that the State, and not riparian owners, has ownership to the ordinary high water mark. (See Exhibit "G"). That Department has relied on its claims of state ownership to bypass public debate and to implement a self-directed policy to stop customary beach grooming. (See Exhibit "H"). In 2001, this belief caused that agency, reminiscent of what occurred in the 1920's, to place boundary stakes on the

shores of the Saginaw Bay, in Bangor Township. Those stakes marked the State's asserted title, presumably in an effort to curtail beach grooming by the riparian owner. Such acts contributed to the formation of amicus Save Our Shoreline.

The MDEQ policy is extremely unpopular state wide, as reflected by a Detroit News internet poll (See Exhibit "I"). The policy has resulted in numerous problems, including the establishment of invasive, non-native vegetation, such as phragmites, which grows thicker and several feet taller than native vegetation, between upland and water. This vegetation has substantially interfered with riparian access and use of the water. Riparians who purchased their properties in reliance on this court's prior opinions finding title to the low water mark, or to the water's edge, did not bargain for the interposition of title between their land and the water for such state uses.¹⁹ Recognizing state aspirations for "development of the lake shores," the Hilt court recognized that interposing a state owned title between land and water would be destructive of that goal; it would cloud a riparian's enjoyment of his land, in part

¹⁹ Because the "basis of the riparian doctrine, and an indispensable requisite to it, is actual contact of the land with the water," the "interposition of a fee title between upland and water destroys riparian rights, or rather transfers them to the interposing owner." Hilt at 218.

The Corps of Engineers has a similar plan for use of Michigan's riparian land: "The Corps believes that vegetated buffers are a critical element of the overall aquatic ecosystem in virtually all watersheds . . . The Corps believes we need to protect open waters better than we have in the past, and vegetated buffers are a critical element of that protection." Federal Register Vol 67, No 10, p 2064 (1-15-2002).

because of "the overhanging threat of the state's claim of right to occupy it for state purposes." Hilt at 227. Indeed, Plaintiff urges this court to put in effect in Michigan the ruling from Shively v Bowlby, 152 US 1 (1894), which asserts, according to Plaintiff, that the state could properly sell state lands abutting riparian property to someone other than the riparian.

Thus, identifying the owner of the title to the shore is indeed of substantial import, especially to riparians who, under the rulings of this Court, believed they owned the fee to at least the water's edge. Failure to immediately correct the Court of Appeals decision will wreak havoc on an issue of substantial economic import to this state. Substantial confrontation, and therefore litigation, is the likely result. Riparian grantees, typically holding deeds from their grantors "to the water's edge," would promptly consider suit for breach of warranty. Zealous state and federal agencies, eager to "manage" the shoreline, will likely be emboldened by the Court of Appeals' unprecedented decision. Confident of their rights based on over 160 years of jurisprudence from this Court, shoreline owners will vehemently oppose such efforts. Continued expenditure of public and private resources will be the result. Judicial economy, and the substantial interests of this great

State, require prompt correction of the Court of Appeals decision by this Court.

Another reason why the question is no longer unimportant is the fact that state legislation, and its applicability to the area in question, hinges on the issue. As discussed in Part II, infra, the Great Lakes Submerged Lands Act purports to apply to lands "owned or held in trust" by the state. The ownership of the land in question therefore governs the applicability of that law which, heretofore, has not applied to riparian lands.

E. As a Rule of Property Law, Hilt Should Not Be Overturned.

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

The rules of property law which it is proposed to change have been fully established for over 60

years, and the underlying concepts for over 125 years. Riparian and littoral land has been purchased in reliance on these rules of law, and expenditures have been made to improve such land in the expectation, based on decisions of this Court, that the public has no right to use waters not accessible by ship or wide or deep enough for log flotation, and that, even if there is navigable access to a small inland dead end lake, the public may not enter over the objection of the owner of the surrounding land, and that the only recreational use recognized by this Court as an incident of the navigational servitude is fishing. The Legislature can, if it is thought to be sound public policy to enlarge public access to and the use of inland waters, pass laws providing for the enlargement of the rights of the public in those parts of the state where the Legislature finds that there is a shortage of public access to inland rivers and lakes and for the compensation of landowners affected by the enlarged servitude (emphasis added).

The Court further stated:

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

riparian or littoral owners for the enlarged servitude and the resulting reduction in amenities and economic loss.

Id. at 77. Since the La Plaisance decision in 1843, confirmed by Silberwood, supra, Warner, supra, Hilt, supra, and Peterman, supra, riparian owners have relied on the rule of property law established, and under the foregoing authority, the rule should stand.

II. THE GREAT LAKES SUBMERGED LANDS ACT DOES NOT MODIFY THE RULE OF OWNERSHIP TO THE WATER'S EDGE ESTABLISHED BY HILT v WEBER.

Many commentators have negligently (or overeagerly) referred to the Great Lakes Submerged Lands Act of 1955, recompiled as amended at MCL 324.32501 et seq., as a basis for public ownership of that dry land which lies below the so-called "Ordinary High Water Mark" as defined by that Act in a 1968 amendment. Such a construction not only is impermissible by the statute's language, but would be unconstitutional, as further described below.

Contrary to the understanding of some commentators, the Great Lakes Submerged Lands Act of 1955 was not new. In 1913, the Act's predecessor, 1913 PA 326, CL 1915, §606 et seq., provided in part as follows: "[a]ll of the unpatented overflowed lands, made lands and lake bottom lands belonging to the state of Michigan or held in trust by it, shall be held,

leased and controlled by the state board of control (emphasis added).” Nedtweg v Wallace, 237 Mich 14; 208 NW2d 51 (1926) (legislature may authorize lease of trust lands for private use through Act) (See Exhibit “J”, 1913 PA 326). Like the 1955 Act (See Exhibit “K”), the 1913 Act provided for leases of public trust lands. Nedtweg at 18. Thus, at the time of the Hilt decision, this court had to be keenly aware of the existence of the existing Submerged Lands Act, and its directive that lands “belonging to the state of Michigan or held in trust by it” be “held” by the state. Yet the court made no mention of the Act in determining the rule of ownership to the water’s edge that prevails to this day, nor did the Peterman court mention the Act in awarding compensation to a riparian owner for the loss of the portion of his beach which Plaintiff in this case says the Act granted to the state 39 years earlier. Since the court found ownership of the lakeshore to be private, there was no reason to look at a statute which applied only to property owned or held in trust by the state.

Twenty-five years after the Hilt court declared that private ownership of riparian land on the Great Lakes extended to the water’s edge, the Michigan Legislature passed the Great Lakes Submerged Lands Act of 1955, formerly compiled at MCL 322.701 et seq, and now compiled at MCL 324.32502. The stated

purpose of the Act, as amended, prior to recompilation in 1995 by PA 1994, No. 451, was as follows:

An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors thereof, belonging to the state of Michigan or held in trust by it; to permit the private and public use of waters over submerged patented lands and the making of agreements limiting and regulating the use thereof; to provide for the disposition of revenue derived therefrom; and to provide penalties for violation of this act (emphasis added).

See PA 1955, No. 247, PA 1958, No. 94, §1, PA 1965, No. 293.

(See Exhibit "L"). Thus, the title of the act limited the act to lands "belonging to the state of Michigan or held in trust by it." Id. As this Court knows, Article 4, §24 of the Michigan Constitution provides:

No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

This constitutional provision was "designed to prevent the legislature from passing laws not fully understood . . ." 22 Michigan Civil Jurisprudence, Statutes, §22. From the Act's title, it is clear that it was intended to apply only to lands "belonging to the state of Michigan or held in trust by it."

This Court having held 25 years earlier in Hilt that the state neither owned nor held in trust lands on the Great Lakes beyond the water's edge, the legislature is presumed to have known that the Act did not apply to any lands above the water's edge. 73 Am Jur, Statutes, §184 ("the legislature has been presumed to have known and considered the state of the common law").

The Act's language in its current amended form repeats the phrase requiring state ownership with or without the public trust burden:

Sec. 32502. 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 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 (emphasis added).

(See Exhibit "M"). Again, under this section, the Great Lakes Submerged Lands Act applies only to those "bottomlands and . . . lands in the Great Lakes . . . belonging to the state or held in trust by it." The Act defines the term "lands" by referring to "the aforesaid described . . . bottomlands and . . . lands . . . in the Great Lakes . . . lying below the natural ordinary high water mark . . ." Accordingly, since the "aforesaid described bottomlands and lands" are limited to those "belonging to the state or held in trust by it," the term "lands" does not include the lands which the Hilt Court previously declared private property: land above the water's edge, wherever it occurred at any given moment. Nor does it apply to relicted lands, which this Court has defined in Hilt. Thus, the Act and its subsequent statutory definition of the ordinary high water mark in this section has no bearing on the issue of the extent of riparian ownership. Simply put, the Act has no application

to private riparian land above the water's edge, and that is why neither the Hilt nor Peterman courts referred to the Act in their decisions.²⁰

Indeed, the Michigan Supreme Court in Peterman, supra, determined ownership to the water's edge without reference to the Great Lakes Submerged Lands Act, even 39 years after the Act's passage. Similarly, not a single reported decision has held that the Act sets the line between public and private ownership.²¹ The position espoused by plaintiff in this case may represent the hopes and dreams of the Coastal States

²⁰ This interpretation of the Great Lakes Submerged Lands Act of 1955 was also the interpretation given it by Michigan's Department of Conservation in 1961, as explained by this Court in People v Broedell, 365 Mich 201, 206; 112 NW2d 517 (1961):

Plaintiff says that in administering the submerged lands acts, above mentioned, it follows the "philosophy" which it says is found in Hilt v Weber [citations omitted] 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 shoreline at whatever level it may happen to be from time to time.

²¹ The Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan has published, as part of its Land Title Standards, 5th Edition, a section discussing the boundary of property adjoining the Great Lakes. Section 24.6 provides as follows:

The Waterfront Boundary Line of Property Abutting the Great Lakes is . . . the naturally occurring water's edge . . ."

Having rejected the proposition that the Great Lakes Submerged Lands Act of 1955 establishes public ownership of the lakeshore, the Committee mentions the Act in a "Caveat":

To the extent the Act suggests that the state owns all unpatented land below the Ordinary High Water Mark, the Act conflicts with Hilt v Weber, supra. This conflict has not been considered or resolved by the courts.

Amicus does not consider all parts of Section 24 of the Land Title Standard as authoritative, in part because of our research disclosing that 2 of the 6 members on the Water Rights Subcommittee were MDEQ employees, and one of those was a biologist, and not an attorney. The above-quoted passages, however, do provide some guidance to the court.

Organization²² (See Plaintiff's Court of Appeals Brief, Appendix I) and those acting in concert with it²³, but it is not the law in the State of Michigan.

Nearly 50 years after the passage of the Great Lakes Submerged Lands Act, there is simply no authority to support the proposition that the Act redefined the boundary between private and public property along the shore of the Great Lakes.²⁴ More

²² Much confusion relating to the interpretation of the Great Lakes Submerged Lands Act has resulted from both the casual misreading of the statute, and from the bias of strong, well-moneyed organizations that seek a meaning of the statute different from its legislative intent. For an example of casual misreading, see Research Memorandum, Ohio Legislative Service Commission, June 22, 2001 (See Exhibit O) ("It appears that the statute indicates that the state owns lakeward of the high water mark"). For an example of biased writings, see "Putting the Public Trust Doctrine to Work," 2d Edition, p 72 (Coastal States Organization 1997) ("Michigan, by statute, has defined the upper boundary of its public trust shorelands as the 'ordinary high water mark . . .'"") The first edition of this work was cited extensively by plaintiff in the Court of Appeals, and her current Application cites the second edition. The Coastal States Organization is an organization of governors of coastal states dedicated to "improved [governmental] management of the nation's coasts, oceans, and Great Lakes." Its above-referenced work (2nd edition) reflects its bias when it laments that "over 90 percent of the adjacent uplands are privately owned, raising difficulties for the public to access the trust shorelands below the ordinary high water mark." *Id.* at 2. Further, it advocates the public trust doctrine as "a useful tool" that can be used to "improve the stewardship of state trustees" over the lands the authors believe come under the doctrine. *Id.* at xiii. In other words, the focus of the work is to use the public trust doctrine to expand governmental control of property so that such property can be "managed" by the government, to the exclusion of private citizens.

²³ Associate Professor Chris Schaeffer, currently of Cooley Law School, and formerly Chief of the Shorelands Division of the MDNR, was a contributor to that publication. Professor Schaeffer at least twice testified on behalf of himself before the state legislature in opposition to 2003 PA 14, and Plaintiff's Application reflects his assertions of law.

²⁴ Often cited by public rights advocates is a 1978 Attorney General opinion which is quizzically characterized as "well reasoned" in an otherwise well-respected work. See Cameron, Michigan Real Property Law, 2d Edition, §3.5 (ICLE 1993), citing 1977-1978 OAG No. 5,327 at 518 (July 6, 1978) (See Exhibit P). The plaintiff is right in being critical of the 1978 opinion, as she was in the Court of Appeals, but for the wrong reasons. (See Plaintiff's Court of Appeals Brief, p.7). A prior published opinion asserted that ownership extended to the water's edge. See 1932-1934, OAG, p.286 (July 13, 1933) (See Exhibit Q).

The 1978 opinion gratuitously mentions *Hilt v Weber*, but not its holding of ownership to the water's edge. That is the first mistake of the opinion. The opinion cites the Great Lakes Submerged Lands Act of 1955, and simply concludes, without analysis, that the Act "indicates the dividing line between

importantly, because Hilt and its predecessors established a rule of property law,²⁵ any readjustment of the property line without compensation would be an unconstitutional taking, and such a construction would render the statute void. Thayer v Michigan Dept of Agriculture, 323 Mich 403; 35 NW2d 360 (1949). Indeed, both the Hilt and Peterman decisions warned that to gain "public control of the lake shores . . . the state may do so only by gift, negotiation, or, if necessary, condemnation." Peterman at 193, citing Hilt at 224. A taking by legislative fiat was not listed as a permissible way for the state to

the upland and the submerged land is the ordinary high water mark." The failure to provide any analysis for that conclusion, or to explain how the legislation could do so without condemnation, is the second mistake of the opinion. Finally, the opinion cites Hilt out of context and in a misleading fashion in its conclusion that "[t]he riparian owner has exclusive use of the bank and shore . . . , although title is in the state." Unfortunately, it is the missing language that reveals the Hilt court's intent. It is true that the decision held that "the riparian owner has exclusive use of the bank and shore." Hilt at 226. That holding comports with the decision's determination of ownership to the water's edge, at whatever stage. But the court did not hold that "title is in the state." Instead, as argued above, it merely referred to a Wisconsin decision which so held, in an effort to demonstrate that a riparian's right to exclusive use would apply even in jurisdictions that deprive a riparian of fee title:

And it has been held that the public has no right of passage over dry land between low and high water mark, but the exclusive use is in the riparian owner, although the title is in the state. Doemel v Jantz, supra [180 Wis 225, 193 NW 393 (1923)]"

As explained above, the Doemel decision determined title in the riparian, and not the state. By its presentation of the Hilt decision, the 1978 opinion was either intellectually dishonest, or it represented sloppy research and writing. Neither bodes well for the authority of the opinion. An attorney general opinion is not binding on this court, and this court should disregard the 1978 opinion in its analysis of the issue at bar. Danse Corporation v City of Madison Heights, 466 Mich 175; 644 NW2d 721 (2002).

²⁵ Also, a long-standing construction given to a statute by the executive of the Department of the State Government, which has been accepted as universal, will not be disturbed without strong reasons, especially where it has become, to some extent, a rule of property, and where many titles depend on it. Malonny v Mahar, 1 Mich 26 (1847), cited in 22 Mich Civ Juris, Statutes, §168.

acquire the lakeshore. As set forth above, and to its credit, the legislature never so intended.

CONCLUSION

The lakeshore which the Circuit Court wrongfully appropriated from the defendant in this case belongs to the defendant riparian owner, as clarified in the last century by the Michigan Supreme Court in Hilt (1930) and Peterman (1994), and by the U.S. Supreme Court in Massachusetts v New York, supra (1925). No reported decision has since held to the contrary. The Great Lakes Submerged Lands Act does not, and constitutionally could not, change the ownership of Defendant's riparian property, and again, no case has ever held to the contrary.

The Court of Appeals reached the proper result, but in an otherwise well-reasoned decision, erred in declaring title to dry land below the high water mark held in fee by the state, (and by failing to find the Great Lakes Submerged Lands Act inapplicable as a result). At least when not covered by water, that fee is held by the riparian owner, though it may be a qualified one, being subject to the state's right of navigation. Though clearly limited and separate from rights granted under the public trust doctrine under Sterling v Jackson, supra, the extent of that right is not before the Court. But in no case

does the right of navigation grant Plaintiff the right to interfere with Defendants' exclusive use of their land by traversing upon it. The erroneous declaration of fee title was dicta in direct conflict with this Court's ruling in Peterman, supra, and its correction does not merit formal submission to this Court.

Michigan's 3,288 miles of shoreline is perhaps some of the most expensive real estate in the world. Taxes generated by this property serve to fund local governments and schools, and the property supports our nation's number one industry (and our state's number two industry), travel and tourism, of which beaches are the primary factor (See Houston, "The Economic Value of Beaches--A 2002 Update," Exhibit "N"). Assertions of ownership by state and federal agencies, as well as Plaintiff and those similarly situated, cloud riparian titles, negatively impacting real estate values and the resulting tax base. Further, unless corrected, the error of the Court of Appeals will invite a flurry of lawsuits, as riparians, their grantors, and the public jostle to define the newly granted rights.

Amici Save Our Shoreline and IGLC respectfully request, in lieu of granting leave to appeal, that this Honorable Court enter its final decision pursuant to MCR 7.302, affirming the result of the Court of Appeals, but vacating portions of the decision, including that language at pages 7 and 9, which assert that the state holds title to dry land between low and high

water mark, in trust or otherwise, and holding that the riparian owner holds title in fee to such property.

In the alternative, Save Our Shoreline and IGLC request that this Honorable Court seize upon this unique opportunity to be briefed by a united shoreline community, together with other amici, and grant leave to appeal to once again consider this issue of immense import to our great State and hold that shoreline owners own to the water's edge, or alternatively, the low water mark.

Dated: July 19, 2004

Respectfully submitted,
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