

STATE OF MICHIGAN
IN THE SUPREME COURT

2000 BAUM FAMILY TRUST, BAUM FAMILY TRUST; JOSEPH BEAUDOIN and SANDRA BEUDOIN, husband and wife, ADELE MEGDALL REVOCABLE TRUST; PAUL NOWAK and JOAN NOWAK TRUST; MARILYN ORMSBEE; MARK SCHWARTZ and WENDY SHWARTZ, husband and wife; and THOMAS THOMASON,

Plaintiffs/Counter-
Defendants/Appellants,

v

WILLIAM and JUDY BABEL, husband and wife; JAMES CAHILL and GLORIA CAHILL, husband and wife; JAMES EHINGER and MARY ANN EHINGER, husband and wife; DANIEL ENGSTROM and PENNY ENGSTROM, husband and wife; THOMAS HELZERMAN and PATSY HELZERMAN, husband and wife; SHAUN MAC MILLAN and RACHEL MAC MILLAN, husband and wife; DAVID OSHABEN and PAMELA OSHABEN, husband and wife; MARION PARKER; SALLY J. SIPPEL, DOUGLAS H. PHILP, JR. and NANCY M. PHILP, husband and wife; ARTHUR A. RANGER, Trustee of the Arthur A. Ranger Trust; PATRICIA L. RANGER, as Trustee of the Patricia L. Ranger Trust; GAYLE SHELDON and SHERRY SHELDON, husband and wife; and CHARLEVOIX COUNTY ROAD COMMISSION,

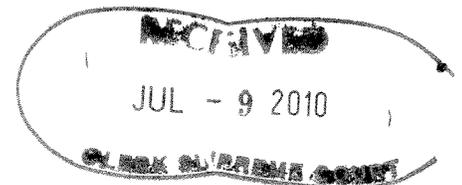
Defendants/Counter-
Plaintiffs/Appellees,

Supreme Court No. 139617

Court of Appeals No. 284547

Charlevoix County Circuit Court
Case No. 07-61121-CH
Honorable Richard M. Pajtas

**AMICUS CURIAE BRIEF OF THE
MICHIGAN WATERFRONT ALLIANCE
AND THE HIGGINS LAKE PROPERTY
OWNERS ASSOCIATION IN SUPPORT
OF PLAINTIFFS/APPELLANTS**



and

AL GOOCH and ELIZABETH GOOCH,
husband and wife, JESSE HALSTEAD and
LINDA HALSTEAD, husband and wife;
MICHAEL MAC MILLAN and KAYE
MAC MILLAN, husband and wife,
ROBERT SCHOFIELD and KATHY
SCHOFIELD, husband and wife;
RICHARD BERGLUND and LINDA
BERGLUND, husband and wife, ROGER
NESBURG and ANNETTE NESBURG,
husband and wife, THOMAS E.
BERGMANN; LOUIS M. SAPPS; ELTON
WILKERSON and JUDY WILKERSON,
husband and wife; MARY HENSEN; and
DAVID NIEWICK and WENDY
NIEWICK, husband and wife,

Intervening Defendants/Counter-
Plaintiffs/Appellees,

and

CHARLEVOIX TOWNSHIP; EDWARD
ENGSTROM; RICHARD SAYWARD,
JOHN DOE, and JANE DOE,

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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.....	iii
STATEMENT OF APPELLATE JURISDICTION	v
AMICUS CURIAE’S STATEMENT OF QUESTIONS PRESENTED.....	vi
STATEMENT OF FACTS	viii
IDENTITY OF THE AMICUS CURIAE.....	ix
STATEMENT OF THE INTEREST OF THE AMICUS CURIAE.....	xi
I. GENERAL MATTERS	1
A. Introduction.....	1
B. Legal Errors by the Court of Appeals	2
C. Negative Practical Effects of the Court of Appeals’ <i>2000 Baum Family Trust</i> Decision.....	3
D. The Case Law Regarding this Matter Before June, 2009 was Well-Settled and Correct.....	4
E. The Peculiar Obliviousness of the Michigan Court of Appeals to Prior Binding (and Longstanding) Case Precedent Regarding this Area	7
F. Allowing the Court of Appeals’ Decision Below to Stand in this Case Would Have Devastating Statewide Impacts.....	8
G. Certainty is Particularly Important in Real Property Matters	10
H. If the Court of Appeals’ Decision in this Case is not Reversed, it Could Have a Domino Effect with Regard to the Case Law Involving Publicly-Dedicated Parks, Beaches, Promenades, and Other Plat-Dedicated Properties Throughout Michigan	11
I. The Ultimate Decision in this Case Will Affect Not Only Dedications Under the 1887 Plat Act, but Other Platting Statutes as Well	12
J. “Be Careful What you Wish for ... ”.....	14
II. ARGUMENT.....	15
A. The Statutory Dedication of a Road or Public Way Under the 1887 Plat Act does not Convey a Typical Fee Simple Interest to the Accepting Municipality.....	15
1. The statutory dedication of a public road or way does not convey fee simple title to the municipality.....	15
2. The statutory dedication of a platted public way or road creates a very limited determinable fee in favor of the accepting municipality	15
B. The Owners of the Platted Lots Fronting on a Platted Public Way or Road Own the Adjacent Riparian Lands.....	17
C. The Attempts by Appellees and Amicus Curiae CRAM to Distinguish Away Existing Controlling Case Law are Unsuccessful	27

D.	The First Tier Lots are Riparian Even Though the Lots' Legal Descriptions do not Expressly Extend to the Water's Edge	32
E.	The Law Allows Two Different Legal Interests to Occupy the Land Comprising Beach Drive at the Same Time—the Charlevoix County Road Commission's Limited Statutory Base Fee and the First Tier Lot Owners' Ownership of the Riparian Rights.....	35
F.	The Court of Appeals Improperly Expanded the Scope of Usage Rights for Public Roads	39
G.	The Scope of Usage Rights for Beach Drive are Limited on the Face of the Plat	39
H.	This Case is of Sufficient Finality for this Court to Review and Reverse the Decision of the Court of Appeals Below	40
I.	If the Decision of the Court of Appeals Below is not Reversed, Who Does Own the Riparian Rights Associated with the Public Road?.....	41
J.	Even if <i>McCardel v Smolen</i> and Progeny were Wrongfully Decided, They Should Stand as Long-Settled Reasonable Court Precedent.....	41
III.	CONCLUSION.....	42

INDEX OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Backus v City of Detroit</i> , 49 Mich 110; 13 NW 380 (1882).....	passim
<i>Bay County v Bradley</i> , 39 Mich 163 (1878)	26, 27
<i>Bott v Comm'n of Natural Resources</i> , 415 Mich 45; 327 NW2d 838 (1982).....	10
<i>Croucher v Wooster</i> , 271 Mich 337; 260 NW 739 (1935)	passim
<i>Dobie v Morrison</i> , 227 Mich App 536; 575 NW2d 817 (1998)	passim
<i>Dorothy A Oliver Revocable Trust v Denton Twp</i> , unpublished Michigan Court of Appeals decision issued August 13, 2002 (Docket No. 230765)	23, 28
<i>Douglas v Harting</i> , Michigan Court of Appeals decision issued December 18, 2008; 2008 WL 5273425 (Docket No. 277892)	9
<i>Glass v Goeckel</i> , 473 Mich 667; 703 NW2d 58 (n 1) (2005)	x
<i>Higgins Lake Property Owners Assn v Gerrish Twp</i> , 255 Mich App 83; 662 NW2d 387 (2003)	x, 2, 3, 9
<i>Higgins Lake Property Owners Assn v Gerrish Twp</i> , Michigan Court of Appeals decision issued October 20, 2005; 2005 WL 2727702 (Docket Nos. 262494, 262533, and 262717)	x, 9
<i>Higgins Lake Shores Lakefront Property Owners v Lyon Twp</i> , Michigan Court of Appeals decision issued December 2, 2008; 2008 WL 5076595 (Docket No. 278894)	9
<i>In Re McBride's Estate</i> , 253 Mich 305; 235 NW 166 (1931)	36
<i>Jacobs v Lyon Twp (after remand)</i> , 199 Mich App 667; 502 NW2d 382 (1993).....	passim
<i>Johnson v Grenell</i> , 118 NY 407 (81 NE 161, 13 LRA [NS] 551).....	18, 19, 24
<i>Jonassen v Kirtland</i> , 24 Misc 3d 1241(A), 2009 WL 2619235 (NY City Ct), 2009 NY Slip Op 51838(U).....	10
<i>Jonkers v Summit Twp</i> , 278 Mich App 263; 747 NW2d 901 (2008).....	passim
<i>Kempf v Ellixson</i> , 69 Mich App 339; 244 NW2d 476 (1976)	passim
<i>Kirchen v Remenga</i> , 291 Mich 94; 288 NW 344 (1939)	36
<i>Kleiner v Wachowicz</i> , Michigan Court of Appeals decision issued February 12, 2004; 2004 WL 258259 (Docket Nos. 244053, 244328).....	9
<i>Krause v Dept of Commerce</i> , 451 Mich 420; 547 NW2d 870 (1996)	x
<i>Little v Kin</i> , 249 Mich App 502; 644 NW2d 375 (2002); 468 Mich 699; 664 NW2d 749 (2003)	38
<i>Magician Lake Homeowners Assn, Inc v Keller Twp Bd of Trustees</i> , Michigan Court of Appeals Case No. 278469, 2008 WL 2938650 (July 31, 2008)	ix, 9
<i>McCardel v Smolen</i> , 71 Mich App 560; 250 NW2d 496 (1976), reversed in part, 404 Mich 89; 273 NW2d 3 (1978)	passim
<i>Michigan Central Park Assn v Roscommon County Road Comm'n</i> , 2 Mich App 192; 139 NW2d 333 (1966).....	passim

<i>Pentz v Schlimgen</i> , unpublished Michigan Court of Appeals decision issued December 19, 2006; 2006 WL 3733236 (Docket No. 258130)	28, 32
<i>Sanderson v Saxon</i> , 834 SW2d 676 (S Ct Ky 1992).....	10
<i>Sheridan Drive Assn v Woodlawn Back Property Owners Assn</i> , 29 Mich App 64; 185 NW2d 107 (1970).....	passim
<i>Thies v Howland</i> , 424 Mich 282; 380 NW2d 463 (1985).....	passim
<i>Twp of Dalton v Muskegon County Bd of Road Comm'rs</i> , 223 Mich App 53; 565 NW2d 692 (1997).....	37
<i>Village of Kalkaska v Shell Oil Co (after remand)</i> , 433 Mich 348; 446 NW2d 91 (1989).....	passim
<i>Wayne County v Miller</i> , 31 Mich 447 (1875)	26

Statutes

1925 PA 360	12, 13
1929 PA 172	12, 13
MCL 560.101 <i>et seq.</i>	12
MCLA 221.20.....	2
Michigan Plat Act of 1887 (1887 PA 309).....	passim
<i>Thompson v Enz</i> , 379 Mich 667; 154 NW2d 473 (1967)	38

Rules

MCR 7.302(B)(3).....	v
MCR 7.302(B)(5).....	v, 1
MCR 7.302(C)	v

Other Authorities

Cameron, Michigan Real Property Law (3rd ed), § 25.12, p 1467.....	25
Michigan Land Title Standards (5th Ed), Standard 24.5, Comment B.....	25
<i>Michigan Real Property Law</i>	25, 26

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to MCR 7.302(B)(3), 7.302(B)(5), and 7.302(C).

AMICUS CURIAE'S STATEMENT OF QUESTIONS PRESENTED

- I. Does a statutory plat dedication of a public way or road which runs contiguous/parallel to an inland lake constitute a conveyance of a fee simple interest in the land over which the way is platted, thereby conveying riparian rights to the accepting municipality?

Appellants say "No."

Appellees say "Yes."

The Trial Court says "Uncertain."

The Michigan Court of Appeals says "Uncertain."

Amicus Curiae MWA and HLPOA say "No."

- II. Does a statutory plat dedication of a public way or road convey fee simple title to the land comprising the way or road to the municipality?

Appellants say "No."

Appellees say "Yes."

The Trial Court says "Yes."

The Michigan Court of Appeals says "Yes."

Amicus Curiae MWA and HLPOA say "No."

- III. Does a statutory plat dedication of a public way or road create only a very limited statutory base or determinable fee (which is akin to an easement) in favor of the accepting municipality?

Appellants say "Yes."

Appellees say "No."

The Trial Court says "No."

The Michigan Court of Appeals answered "No."

Amicus Curiae MWA and HLPOA say "Yes."

- IV. Do the owners of platted lots adjacent to a platted lakeside parallel road or way control and generally own the riparian rights opposite the public way or road adjacent to their respective lots?

Appellants say "Yes."

Appellees say "No."

The Trial Court says "No."

The Michigan Court of Appeals answered "No."

Amicus Curiae MWA and HLPOA say "Yes."

- V. Do the owners of platted lots adjacent to a platted lakeside parallel road or way control and generally own the riparian rights opposite the public way or road adjacent to their respective lots, even if that original plat (and the individual lots' legal descriptions) does not show such lots as extending to the water's edge?

Appellants say "Yes."

Appellees say "No."

The Trial Court says "No."

The Michigan Court of Appeals answered "No."

Amicus Curiae MWA and HLPOA say "Yes."

- VI. Under the 1887 Plat Act, can the local municipal road authority do virtually whatever it desires with a platted public road right-of-way contrary to *Jacobs v Lyon Twp (after remand)*, 199 Mich App 667; 502 NW2d 382 (1993) and progeny?

Appellants say "No."

Appellees say "Yes."

The Trial Court says "Uncertain."

The Michigan Court of Appeals answered "Yes."

Amicus Curiae MWA and HLPOA say "No."

- VII. Is the Michigan appellate case law in this situation well-settled, such that it is governed by *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976), reversed in part, 404 Mich 89; 273 NW2d 3 (1978), *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935), and progeny?

Appellants say "Yes."

Appellees say "No."

The Trial Court says "No" (implicitly).

The Michigan Court of Appeals answered "No" (implicitly).

Amicus Curiae MWA and HLPOA say "Yes."

STATEMENT OF FACTS

The Higgins Lake Property Owners Association and the Michigan Waterfront Alliance adopt the Statement of Facts as set forth in Plaintiffs/Appellants' Application for Leave to Appeal Brief dated September 2, 2009 and also their Brief on Appeal dated April 4, 2010.

IDENTITY OF THE AMICUS CURIAE

The Michigan Waterfront Alliance (“MWA”) is a Michigan nonprofit corporation. The MWA is a membership organization. It is comprised of both lake associations and individual members. Some of the lake association members of MWA include the following:

- Arnold Lake Association
- Burt Lake Association
- Burt Lake Preservation Association
- Clear Lake Property Owners Association
- Clifford Lake Association
- Corey Lake Association
- Crockery Lake Association
- Deer Lake Property Owners Association
- Derby Lake Cottage Owners Association
- Derby Lake Property Owners Association
- Diamond Lake Association
- Dinner Lake Association
- Eagle Lake Improvement Association
- Elk-Skegemog Lakes Association
- Farwell Lake Association
- Fish Lake Association
- Higgins Lake Property Owners Association
- Hubbard Lake Improvement Association
- Indian Lake Association of Vicksburg
- Island, Lower Long & Forest Lake Association
- Klinger Lake Association
- Lake Avalon Association
- Lake Avalon Property Owners Association
- Lake Fenton Property Owners Association
- Lake Lansing Property Owners Association
- Lake Lapeer Property Owners Association
- Lenawee Lake Preservation League
- Long Lake Preservation Association
- Lower Herring Lake Association
- Magician Lake Improvement Association
- North Buckhorn Lake Association
- Otsego Lake Association
- Oxbow Lake Association
- P.B.W.O.A., Inc.
- P.J.C. Lakes Association
- Paw Paw Lake Association
- Payne Lake Association
- Pentwater Lake Association
- Pinecone Beach Association
- Robinson Lake Improvement Association
- Sand Lake Association
- Shavehead Lake Association
- Silver Lake Improvement Association
- Three Lakes Association
- Torch Lake Property Owners Association
- Twin Lakes Improvement Association
- Twin Lakes Property Owners Association
- Vineyard Lake Association
- Walloon Lake Association
- West Lake Improvement Association
- Windover Lake Property Owners Association

MWA represents, directly and indirectly, thousands of lakefront/riparian property owners throughout Michigan.¹ MWA has actively represented the interests of its members.

The Higgins Lake Property Owners Association (“HLPOA”) is a Michigan nonprofit corporation. HLPOA has approximately 800 members, all of whom own lakefront property at Higgins Lake. HLPOA and its membership have devoted decades of effort and tremendous financial resources toward the protection of their riparian interests and the betterment of Higgins Lake. See for instance:

Higgins Lake Property Owners Assn v Gerrish Twp, 255 Mich App 83; 662 NW2d 387 (2003)

Higgins Lake Property Owners Assn v Gerrish Twp, Michigan Court of Appeals decision issued October 20, 2005; 2005 WL 2727702 (Docket Nos. 262494, 262533, and 262717)

Jacobs v Lyon Twp (after remand), 199 Mich App 667; 502 NW2d 382 (1993)

Krause v Dept of Commerce, 451 Mich 420; 547 NW2d 870 (1996)

McCardel v Smolen, 71 Mich App 560, 562; 250 NW2d 496 (1976), affirmed in part, vacated in part, 404 Mich 89; 273 NW2d 3 (1978)

Kempf v Ellixson, 69 Mich App 339; 244 NW2d 476 (1976)

Michigan Central Park Assn v Roscommon County Road Comm’n, 2 Mich App 192; 139 NW2d 333 (1966)

Sheridan Drive Assn v Woodlawn Back Property Owners Assn, 29 Mich App 64; 185 NW2d 107 (1970)

¹ As this Honorable Court well knows, although property rights associated with a lake are technically deemed “littoral” and rights associated with watercourses or flowing bodies of water (such as rivers, streams, and creeks) involve “riparian” rights, Michigan courts and the general public alike often utilize the word “riparian” to refer to both types of rights. See *Thies v Howland*, 424 Mich 282, 288 (n 2); 380 NW2d 463 (1985); *Glass v Goeckel*, 473 Mich 667, 672; 703 NW2d 58 (n 1) (2005). Accordingly, in this Brief, Amicus Curiae MWA and HLPOA will refer to littoral and lakefront rights as “riparian.”

STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

Many of the individual members of MWA and HLPOA own platted lots at lakes in situations which are similar, if not identical, to the *2000 Baum Family Trust* Plaintiffs/Appellants in the current case. A large number of the platted lots at Higgins Lake, as well as many of the other lakes around Michigan at which members of MWA own property, are separated from the lake by a platted public street which runs parallel to the shoreline, as is the situation in the current case. Due to longstanding Michigan case law before last June, such lot owners have long reasonably believed that their respective properties are waterfront/riparian lots. Should this Court uphold the decision of the Michigan Court of Appeals below in this case, it will have a devastating impact upon many members of MWA and HLPOA, as well as the owners of countless other “first tier” lots at lakes throughout Michigan. The turmoil (emotional, financial, political, and legal) which would result if this Court upholds the decision of the Michigan Court of Appeals below would be almost unfathomable for the large number of property owners (as well as realtors, local government assessors, title insurance companies, and others) involved statewide.

I. GENERAL MATTERS

A. Introduction

The decision by the Court of Appeals below dramatically changes the riparian and property rights of the owners of likely tens of thousands of platted lots at or near lakes throughout Michigan. It appears that every county within the state has at least several lakes that will be severely impacted by this case. The issues in this case are not trivial or exotic, but rather will determine whether or not probably tens of thousands of lots scattered geographically throughout the state will or will not be riparian. The stakes are huge. If the decision of the Court of Appeals is not reversed in this case, it will drastically change over a century of long-settled real property law.

Under MCR 7.302(B)(5), the decision of the Michigan Court of Appeals below in this case is not only clearly erroneous, but conflicts with no fewer than five prior published Michigan Court of Appeals decisions that involve facts virtually identical to the current case. See *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976), reversed on other grounds, 404 Mich 89; 273 NW2d 3 (1978); *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976); *Michigan Central Park Assn v Roscommon County Road Comm'n*, 2 Mich App 192; 139 NW2d 333 (1966); *Sheridan Drive Assn v Woodlawn Back Property Owners Assn*, 29 Mich App 64; 185 NW2d 107 (1970); and *Jonkers v Summit Twp*, 278 Mich App 263; 747 NW2d 901 (2008). In addition, the Court of Appeals' declarations in *2000 Baum Family Trust v Babel*, 284 Mich App 544; 773 NW2d 44 (2009), that public roads and public road rights-of-way created pursuant to the Michigan Plat Act of 1887 (1887 PA 309) (the "1887 Plat Act") can be used for any use or purpose whatsoever desired by the local county road commission (or other municipal body having authority) directly contradicts numerous Michigan Supreme Court and Court of Appeals decisions, including *Village of Kalkaska v Shell Oil Co (after remand)*, 433 Mich 348; 446

NW2d 91 (1989), *Backus v City of Detroit*, 49 Mich 110; 13 NW 380 (1882), and *Jacobs v Lyon Twp (after remand)*, 199 Mich App 667; 502 NW2d 382 (1993). Finally, the declaration by the Michigan Court of Appeals below in this case that public roads and public road rights-of-way need not be limited to only travel purposes and uses directly conflicts with several prior published Michigan Court of Appeals decisions including *Jacobs v Lyon Twp (after remand)*, 199 Mich App 667; 502 NW2d 382 (1993), and *Higgins Lake Property Owners Assn v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003).²

Defendant/Appellee Charlevoix County Road Commission seeks to downplay the importance of this case by pointing out that not all parallel roads along lakes in Michigan are dedicated platted public roads—some were created by the “highway-by-user doctrine” (MCLA 221.20) and some were created by deed or other instrument (although those types of roads are not common). While those other types of public roads may not be directly affected by the Court of Appeals’ decision below in *2000 Baum Family Trust*, that does not change the fact that there are a huge number of parallel dedicated public roads and first tier lots throughout Michigan which will be dramatically impacted by the final decision in this case.

B. Legal Errors by the Court of Appeals

In its June 23, 2009 published opinion in *2000 Baum Family Trust Family Trust v Babel*, 284 Mich App 544; 773 NW2d 44 (2009), the Court of Appeals made no fewer than five general legal errors as follows:

1. Mischaracterized what constitutes a statutory “base fee” under Public Act 309 of 1887 (the “1887 Plat Act”) (and did not comprehend the very limited rights under such a fee).

² The decision by the Court of Appeals below in this case is a vivid example of the “law of unintended (and unforeseen) consequences.”

2. Overturned over a century of binding and controlling Michigan appellate case law regarding “parallel roads” at lakes (without apparently even realizing or indicating that it was doing so).³
3. Incorrectly held that the beneficiary of a statutory fee for a platted road (including a county road commission) can use the property for virtually any purpose whatsoever, thus implicitly overruling over a century of other Michigan appellate court precedent such as *Jacobs v Lyon Twp (after remand)*, 199 Mich App 667; 502 NW2d 382 (1993), *Higgins Lake Property Owners Assn v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003), *Village of Kalkaska v Shell Oil Co (after remand)*, 433 Mich 348; 446 NW2d 91 (1989), and *Backus v City of Detroit*, 49 Mich 110; 13 NW 380 (1882).⁴
4. Applied a grossly and clearly erroneous reading and application of *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985).
5. Disregarded longstanding Michigan case law that indicates that lots extend to the water’s edge by operation of law (“through” and under dedicated roads, parks, walks, etc.), even if not so shown on the original plat and not indicated in the lot’s legal description. See *Thies v Howland*, *Dobie v Morrison*, 227 Mich App 536; 575 NW2d 817 (1998); *McCardel, Kempf, Michigan Central Park Assn, Sheridan Drive Assn*, and *Jonkers*.

C. Negative Practical Effects of the Court of Appeals’ 2000 Baum Family Trust Decision

In addition to the June 23, 2009 decision of the Court of Appeals in *2000 Baum Family Trust* being legally erroneous in several respects, if left to stand, the opinion will have numerous

³ The June 23, 2009 decision of the Michigan Court of Appeals in *2000 Baum Family Trust* explicitly overruled five prior published decisions of the Court of Appeals directly on point. Those cases were *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976), reversed on other grounds, 404 Mich 89; 273 NW2d 3 (1978); *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976); *Michigan Central Park Assn v Roscommon County Road Comm’n*, 2 Mich App 192; 139 NW2d 333 (1966); *Sheridan Drive Assn v Woodlawn Back Property Owners Assn*, 29 Mich App 64; 185 NW2d 107 (1970); and *Jonkers v Summit Twp*, 278 Mich App 263; 747 NW2d 901 (2008). Amazingly, the Court of Appeals never even mentioned these five appellate decisions in its June 23, 2009 opinion, even though the amicus curiae brief filed by the MWA and HLPOA with the Court of Appeals not only cited four of those decisions, but also argued their specific applicability to the *2000 Baum Family Trust* case. In addition, those four prior published Court of Appeals’ decisions were the main basis for Plaintiffs/Appellants’ Motion for Reconsideration (dated July 6, 2009) to the Court of Appeals. However, the Court of Appeals again ignored those prior published decisions in its order for summary denial of the reconsideration motion dated August 6, 2009. See **Exhibit A**.

⁴ While that holding by the Court of Appeals in *2000 Baum Family Trust* may be *dicta*, it is nevertheless both sweeping and erroneous. Dozens of Michigan appellate cases have held that the uses to which a county road commission or other government road authority can put a road constituting a statutory base fee is limited to travel purposes only.

negative impacts (many of which were probably unintended by the Court of Appeals), including the following:

1. The holding could extend to a variety of other items created by dedication via the platting process including parks, alleys, walkways, and beaches, thus also upsetting years of settled appellate case law in those areas as well.
2. The Court of Appeals never did decide which governmental unit or person owns the riparian rights to the road at issue.
3. The decision implicitly overruled the longstanding scope of usage rights cases regarding public road ends at lakes. See *Jacobs v Lyon Twp* (after remand), 199 Mich App 667; 502 NW2d 382 (1993) and progeny.
4. Property values for first tier lots along platted lake roads will plummet.
5. Property taxes (and municipal revenues) for such lots will fall.
6. Title insurance companies will face many claims and lawsuits.
7. The sanctity of property rights and real property law will be greatly diminished.
8. It will cause new and endless acrimonious political battles by and between road commissions, former riparian property owners, backlot property owners, and others throughout Michigan.
9. It will undermine confidence in the judiciary by sending a statewide message that valuable, longstanding property rights can be changed arbitrarily at any time by judicial fiat.

D. The Case Law Regarding this Matter Before June, 2009 was Well-Settled and Correct

Prior to the appellate decision in this case by the Michigan Court of Appeals on June 23, 2009, the major issue in this case had long been considered well-settled case law. That is, all of the prior appellate cases had held that where a platted public road right-of-way or easement runs “parallel” along the shore of a lake in Michigan, there was no existing land shown between the water and the road in the original plat, and there exists “first tier” platted lots fronting on the public road, those first tier lots are deemed to be lakefront and riparian. Thus, the common law in Michigan has long held that the side lot lines of those first tier lots are deemed to extend under

and through the platted road right-of-way and to the lake (notwithstanding that the first tier lots' legal descriptions do not extend to the water's edge and the original plat map showed the lots as being separated from the lake by a public road right-of-way). And, in fact, the Michigan Court of Appeals itself, in a case which is factually similar to the current case, held that pursuant to the 1887 Plat Act, such first tier lots are lakefront and riparian, subject to what is effectively an easement/right-of-way for road uses (*i.e.*, travel). See *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976), reversed on other grounds, 404 Mich 89; 273 NW2d 3 (1978). In *McCardel*, the Court of Appeals stated:

Who owns the riparian rights?

The plaintiff front lot owners also own the riparian rights in the boulevard frontage. That issue was resolved in their favor by three previous decisions of this Court, all of which involved Higgins Lake property. *Michigan Central Park Association v Roscommon County Road Commission*, 2 Mich App 192; 139 NW2d 333 (1966), *Sheridan Drive Association v Woodlawn Backproperty Owners Association*, 29 Mich App 64; 185 NW2d 107 (1970), and *Kempf v Ellixson*, 69 Mich App 33; 224 NW2d 476 (1976). Each of those cases relied on *Croucher v Wooster*, 271 Mich 337 ; 260 NW 739 (1935). The cited cases support the trial judge's ruling that only the plaintiffs have riparian rights in the boulevard frontage.

The defendants ask us to distinguish *Croucher* because the government in that case had only a highway easement, whereas Roscommon County is said to have a fee simple title to the boulevard property involved in this case under the terms of the plat act in effect when the subdivision plat was recorded. 1887 PA 309. Actually, that statute provided that the government would take a fee 'in trust to and for the uses and purposes therein [the plat] designated, and for no other use or purpose whatever.' Even if a distinction is possible we will not adopt it. There are problems with the *Croucher* rule, but an exception vesting the riparian rights in the public would create problems of its own—including the need to precisely define the underlying title in every case. *Croucher* at least offers uniformity, a more attractive feature than any offered by the defendants' proposed distinction. [71 Mich App 560, 565-565 (1976) .]

While this Court overturned other parts of the decision by the Court of Appeals in *McCardel v Smolen*, 404 Mich 89; 273 NW2d 3 (1978), the above quotation from the 1976 published opinion by the Michigan Court of Appeals remains intact and is binding precedent.

Furthermore, despite assertions to the contrary by the Charlevoix County Road Commission, Charlevoix Township, and the amicus curiae party known as the County Road Association of Michigan (“CRAM”), this Court in *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985) did not overturn the above quotation from the Court of Appeals’ decision in *McCardel v Smolen*, either implicitly or expressly.

Interestingly, *McCardel v Smolen* expressly rejected (in the above quote) the very distinction that the Appellees try to make in this case; that is, since *Croucher v Wooster* involved only a public highway-by-user easement, *Croucher* supposedly should not apply to plat-dedicated public roads. Clearly, *McCardel v Smolen* expressly rejected that distinction (as did this Court in *Thies* implicitly) and MWA and HLPOA respectfully assert that this Honorable Court should also now expressly reject that already-discredited nondistinction.

In addition to disregarding *McCardel v Smolen*, the Court of Appeals’ recent decision in *2000 Baum Family Trust* also violated the four other prior published opinions in *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976); *Michigan Central Park Assn v Roscommon County Road Comm’n*, 2 Mich App 192; 139 NW2d 333 (1966); *Sheridan Drive Assn v Woodlawn Back Property Owners Assn*, 29 Mich App 64; 185 NW2d 107 (1970); and *Jonkers v Summit Twp*, 278 Mich App 263; 747 NW2d 901 (2008).

The Court of Appeals’ *2000 Baum Family Trust* decision needlessly (and erroneously) overturned over a century of clear, binding, and settled precedent regarding parallel platted public roads at lakes. This Court should reverse the *2000 Baum Family Trust* decision and reinstate the longstanding, correct, practical, and wise pre-June, 2009 precedent for this area of road and riparian law.

E. The Peculiar Obliviousness of the Michigan Court of Appeals to Prior Binding (and Longstanding) Case Precedent Regarding this Area

Even though the brief of amicus curiae Michigan Waterfront Alliance and Higgins Lake Property Owners Association below alerted the Michigan Court of Appeals to four of the five prior published decisions of that Court which were directly on point with regard to the current case (See *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976), reversed on other grounds, 404 Mich 89; 273 NW2d 3 (1978); *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976); *Michigan Central Park Assn v Roscommon County Road Comm'n*, 2 Mich App 192; 139 NW2d 333 (1966) and *Sheridan Drive Assn v Woodlawn Back Property Owners Assn*, 29 Mich App 64; 185 NW2d 107 (1970). *Jonkers v Summit Twp*, 278 Mich App 263; 747 NW2d 901 (2008) was the fifth case), the Court of Appeals simply ignored those five prior published decisions in its June 23, 2009 published opinion in *2000 Baum Family Trust Family Trust v Babel*. In its published opinion, the Court of Appeals not only did not attempt to overturn or distinguish those five prior published cases, but simply ignored those cases.

Plaintiffs/Appellants filed a motion for reconsideration with the Court of Appeals dated July 6, 2009. That motion (in its Sections 4 and 5) succinctly and simply asked the Court of Appeals to reconsider as follows:

4. In reaching the conclusions noted in paragraph 3 above, the Court of Appeals has ignored binding precedent. Among those cases ignored by the Court of Appeals are the following: *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976); *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976), affirmed in part, vacated in part, 404 Mich 89; 273 NW2d 3 (1978); *Michigan Central Park Assn v Roscommon County Road Comm'n*, 2 Mich App 192; 139 NW2d 333 (1966); *Sheridan Drive Assn v Woodlawn Back Property Owners Assn*, 29 Mich App 64; 185 NW2d 107 (1970).
5. Each of the cases cited above hold that where owners of lots in a platted subdivision are separated from the waters edge by a public way, riparian privileges attach. Each of the cases cited above reached the conclusion on facts identical to the facts presented in the instant case. The decision in

the instant case represents a radical departure from existing case law and was reached in error. [Plaintiffs/Appellant's Motion for Reconsideration (dated July 6, 2009) at 2-3.]

The Court of Appeals issued an order dated August 6, 2009 that summarily denied Plaintiffs/Appellants' motion for reconsideration. **Exhibit A.** Once again, the Court in its order failed to overturn or distinguish the five prior published Michigan Court of Appeals decisions directly on point and ignored them yet again.

It is almost unbelievable that an appellate court would simply ignore its own overwhelming prior binding precedent in an important real property case such as this and be content with impliedly or implicitly overturning that longstanding precedent by silence and omission. *Stare decisis* demands more.

F. Allowing the Court of Appeals' Decision Below to Stand in this Case Would Have Devastating Statewide Impacts

As this Court knows, there are generally two types of public roads at or adjacent to lakes in Michigan which have generated significant lake access and usage controversies statewide over the years. First, some public roads terminate at lakes and are often referred to as "road ends." Second, it is even more common for public roads to run parallel along the edge or shoreline of a lake. Such roads are often referred to as "parallel roads." This Court has expressly recognized that distinction in *Thies v Howland*, 424 Mich 282, 295; 380 NW2d 463 (1985).

Situations involving road ends (which terminate perpendicular to a lake) have generated the most Michigan appellate decisions. The key decision in the area is *Jacobs v Lyon Twp* (after remand), 199 Mich App 667; 502 NW2d 382 (1993).⁵ The *Jacobs v Lyon Twp* precedent has been followed in numerous appellate cases, including:

⁵ *Jacobs* and progeny also have long made it clear (contrary to *2000 Baum Family Trust*) that proper road use is limited and must be for travel only.

Higgins Lake Property Owners Assn v Gerrish Twp, 255 Mich App 83; 662 NW2d 387 (2003) .

Higgins Lake Shores Lakefront Property Owners v Lyon Twp, Michigan Court of Appeals decision issued December 2, 2008; 2008 WL 5076595 (Docket No. 278894)

Magician Lake Homeowners Assn, Inc v Keller Twp Bd of Trustees, Michigan Court of Appeals Case No. 278469, 2008 WL 2938650 (July 31, 2008).

Higgins Lake Property Owners Assn v Gerrish Twp (Michigan Court of Appeals Case Nos. 262494, 262533, and 262717, 2005 WL 2727702, decided October 20, 2005).

Kleiner v Wachowicz, Michigan Court of Appeals decision issued February 12, 2004; 2004 WL 258259 (Docket Nos. 244053, 244328)

Douglas v Harting, Michigan Court of Appeals decision issued December 18, 2008; 2008 WL 5273425 (Docket No. 277892)

MWA and HLPOA (the amicus curiae parties which authorized this brief) do not want to minimize the conflict and problems associated with road end situations. Nevertheless, those situations will likely pale when compared to the potential explosion of conflict, controversy, and repercussions involving parallel roads should the June 23, 2009 decision of the Court of Appeals in *2000 Baum Family Trust* be allowed to stand.

Why is the parallel road issue potentially even more contentious than the road end situation? Quite simply, there will be many more property owners affected by the status of parallel roads than road ends at lakes. Road end cases and controversies tend to directly impact only the adjoining riparian property owners (as well as potentially lakefront property owners for a limited distance on either side of the road end). With parallel road situations, the parallel roads can stretch along the lakeshore for quite some distance (sometimes miles), involving numerous “first tier” lots. This Court can take judicial notice of the fact that there are likely thousands if not tens of thousands of first tier lots throughout Michigan that will be directly impacted by the final decision in this case.

G. Certainty is Particularly Important in Real Property Matters

If ever there is an area of the law that should remain settled (due to reasonable reliance by countless members of the public in buying, selling, and holding real estate over time), it is the area of real property law. For example, the New York City Court noted in *Jonassen v Kirtland* recognized: "... the need for certainty in rules applicable to interests in real property dating to feudal times." 24 Misc 3d 1241(A), 2009 WL 2619235 (NY City Ct), 2009 NY Slip Op 51838(U), **Exhibit B**. See also, *Sanderson v Saxon*, 834 SW2d 676, 678 (S Ct Ky 1992) ("the need to establish, with certainty, rights of parties to a commonly used estate in real property convinced as to grant discretionary review"). This Court in *Bott v Comm'n of Natural Resources*, 415 Mich 45; 327 NW2d 838 (1982), recognized the importance of rights and expectations of property owners that are legitimately grounded in longstanding recognition of such rights and expectations. *Stare decisis* is absolutely essential to real property law.

It has been commonly accepted in Michigan for at least three quarters of a century or more that first tier lots in this type of situation are riparian. MWA and HLPOA are confident that if real estate and riparian attorneys, Michigan real property law school professors, realtors, and other experts had been polled on this subject pre-2000 *Baum Family Trust*, the almost universal opinion would have been that first tier lots along publicly-dedicated platted roads at shorelines throughout Michigan are riparian. In fact, most legal experts would not have even considered it a "close call" before last June.

For three quarters of a century or more, countless realtors, appraisers, real estate attorneys, purchasers and sellers of first tier lots, local municipal taxing authorities, and others have reasonably relied on the long-settled case law that indicated that first tier lot owners in this type of situation are riparian. First tier lot owners, many county road commissions, local municipal governments, the real estate market, and others have almost universally acted for three

quarters of a century or longer as if first tier lots in this situation are riparian. The prior long-settled case law, past practice, and common knowledge have been reasonably relied upon in this type of first tier lot situation for many years statewide. If the Court of Appeals decision below is not reversed, all of those reasonable expectations, experiences, and investments will be for naught.

H. If the Court of Appeals' Decision in this Case is not Reversed, it Could Have a Domino Effect with Regard to the Case Law Involving Publicly-Dedicated Parks, Beaches, Promenades, and Other Plat-Dedicated Properties Throughout Michigan

If the decision of the Court of Appeals below (which effectively held that title granted to the local municipality for public dedications under the 1887 Plat Act constitutes a *de facto* fee simple title) is not reversed, it could start a domino effect on other longstanding case law with regard to publicly-dedicated parks, beaches, promenades, and other properties. As with *McCardel v Smolen* and progeny, the appellate courts in Michigan have long held that plat-dedicated properties running along the shores of a lake (such as plat-dedicated parks, beaches, promenades, walkways, etc.) do not divest the first tier lots fronting on such dedicated properties platted of their riparian status. See *Dobie v Morrison*, 227 Mich App 536; 575 NW2d 817 (1998), and *Thies v Howland*. Should the Court of Appeals' decision in this case stand, courts throughout Michigan will be called upon to reverse longstanding case law in these other areas as well.

It should also be kept in mind that the Michigan platting statutes prior to the 1887 Plat Act had language similar to the 1887 Plat Act and that the language regarding public dedications in the 1887 Plat Act remained intact until 1967 (with the enactment of the Subdivision Control

Act of 1967, later renamed the “Land Division Act”).⁶ Accordingly, a huge number of plats created over more than a century and a half throughout Michigan will be directly affected by the final decision in this case.

I. The Ultimate Decision in this Case Will Affect Not Only Dedications Under the 1887 Plat Act, but Other Platting Statutes as Well

As Defendant/Appellee Charlevoix County Road Commission points out on page 8 of its Answer to Application for Leave to Appeal, the same language contained in the 1887 Plat Act governed all plat dedications (including roads) until the Subdivision Control Act was adopted in 1967. MCL 560.101 *et seq.* The relevant language in the six successive Michigan platting statutes regarding public dedication results was almost identical from 1839 to 1967. The 1967 statute (commonly called the “Subdivision Control Act of 1967,” and now, the “Land Division Act”) first significantly changed the relevant language. The 1967 statute instituted the phrase “fee simple” and replaced the word “fee” from the earlier the platting statute. The successive statutes were as follows:

1839 PA 91; 1859 PA 35; and 1885 PA 111:

The territorial act of March 12, 1821, governing town plats, provided that when made, acknowledged and recorded in accordance with the statute, they ‘shall be deemed a sufficient conveyance, to vest the fee of such parcels of land as are therein expressed, named or intended to be for public uses, in the county in which such town lies, in trust to and for the uses and purposes therein named, expressed or intended, and for no other use or purpose whatever.’ 1 Territorial Laws, p. 816. The same language was continued in Section 2 of the act of April 12, 1827 (2 Territorial Laws, p. 577). This language was continued in Act No. 91, § 2, Pub.Acts 1839, as originally enacted and as amended by Act No. 35, Pub.Acts 1859, and Act No. 111, Pub.Acts 1885.

1887 PA 309:

The map so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may

⁶ The 1925 plat act (1925 PA 360) and the 1929 plat act (1929 PA 172) both had relevant language virtually identical to the 1887 Plat Act. See, *supra*.

be therein designated for public uses in the city or village within the incorporate limits of which the land platted is included, or if not included within the limits of any incorporate city or village, then in the township within the limits of which it is included in trust to and for the uses and purposes therein designated, and for no other use or purpose whatsoever.

1925 PA 360:

The map so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be herein designated for public uses in the city or villages within the incorporate limits of which the land platted is included, or if not included within the limits of any incorporated city or village, then in the township within the limits of which it is included in trust to and for the uses and purposes therein designated, and for no other use or purpose whatever.

1929 PA 172:

The plat so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be herein designated for public use in the municipality within the limits of which the land platted is included, in trust to and for the uses and purposes therein designated and for no other use or purpose whatever.

1967 PA 288:

This is the Land Division Act, formerly known as the Subdivision Control Act, MCL 560.101 *et seq.*, which provides:

When a plat is certified, signed, acknowledged and recorded as prescribed in this act, every dedication, gift or grant to the public or any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance to vest the fee simple⁷ of all parcels of land so marked and noted, and shall be considered a general warranty against the donors, their heirs and assigns to the donees for their use for the purposes therein expressed and no other. MCL 560.253(1). (emphasis added)

Needless to say, the final decision in this case will affect all dedicated public roads created pursuant to any plat dated from 1887 through at least 1967, and those created even before 1887.

⁷ 1967 was the first time the word “simple” was added to “fee” in the Michigan platting statutes.

J. “Be Careful What you Wish for ...”

Many county road commissions throughout Michigan have long dreaded dealing with public road end situations. Most county road commissions do not have enough funds available to adequately upgrade, maintain, and repair normal county roads, let alone being confronted with spending scarce public funds on road battles at lakes. Should this Honorable Court agree with the Court of Appeals that first tier lot owners do not own the riparian or waterfront rights attendant to their respective lots, county road commissions throughout the state will become embroiled in dock and boat moorage disputes along parallel roads, both politically and via expensive litigation.

Both the MWA and the HLPOA (and presumably other people who have followed this case) are somewhat perplexed as to why the Charlevoix County Road Commission and the County Roads Association of Michigan (“CRAM”) are advocating the position which they take in this case—that is, that the local county road commission effectively owns the soil located under a parallel public road right-of-way and the owners of the first tier of lots not only do not have any interest in the land underlying the road right-of-way, but are also not lakefront or riparian property owners. Presumably, if that is correct, the local county road commission is the riparian or lakefront property owner. Should the position being advocated by the Charlevoix County Road Commission and CRAM prevail on appeal before this Court, then presumably the county road commissions in more than one county will be chagrined at the outcome.

II. ARGUMENT

A. **The Statutory Dedication of a Road or Public Way Under the 1887 Plat Act does not Convey a Typical Fee Simple Interest to the Accepting Municipality**

1. **The statutory dedication of a public road or way does not convey fee simple title to the municipality**

The Charlevoix County Road Commission and Charlevoix Township would have this Court believe that the 1887 Plat Act essentially transfers the fee simple title for a property to a municipality when a public road or public road right-of-way was dedicated under that statute. Clearly, that is not true. The 1887 Plat Act itself contains significant express limitations on the title or interest obtained by the local county road commission, or village or city road authority:

The map so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be therein designated for public uses in the city or village within the incorporate limits of which the land platted is included, or if not included within the limits of any incorporated city or village, then in the township within the limits of which it is included in trust to and for the uses and purposes therein designated,⁸ and for no other use or purposes whatsoever. [1887 Plat Act; emphasis added.]

Both the Court of Appeals below and Appellees seemingly ignore the fact that the 1887 Plat Act creates a special statutory (not common law) fee and that such a fee is little more than a glorified easement or right-of-way. See *Village of Kalkaska, Jonkers v Summit Twp*, 278 Mich App 263; 747 NW2d 901 (2008), and *Backus v City of Detroit*. This case does not involve a common law fee.

2. **The statutory dedication of a platted public way or road creates a very limited determinable fee in favor of the accepting municipality**

The Court of Appeals and the Appellees are effectively treating the fee created by a dedication under the 1887 Plat Act as a fee simple absolute. That is simply incorrect. Many

⁸ The “uses and purposes therein designated” in public road situations are travel only.

Michigan appellate decisions have long held that the fee granted by the statutory plat language is very limited and is something akin to an easement. For example, the Court of Appeals itself only two years ago noted:

[P]latted public roads convey either a mere public easement or, at most, a ‘base fee’ that amounts to little more than nominal title and no beneficial ownership whatsoever. [*Jonkers v Summit Twp*, 278 Mich App 263, 278; 747 NW2d 901 (2008); emphasis added]

This Court in *Village of Kalkaska v Shell Oil* (after remand), 433 Mich 384; 446 NW2d 91 (1989), also indicated that the statutory fee accorded by the Michigan pre-1967 plat acts for roads is extremely limited and is akin to an easement or road right-of-way. This Court stated:

In *Wayne Co v Miller*, 31 Mich 447, 449 (1875), the county attempted to recover lands dedicated as a street. In rejecting the county’s claim, the Court said, ‘It is very clear that *no purpose existed* [in the 1839 plat act] *to give title in the nature of private ownership*’ [emphasis added]. In *Bay Co v Bradley*, 39 Mich 163, 166 (1878), the Court held that the county could not maintain an ejectment action with respect to land dedicated pursuant to the 1839 plat act for public use and observed that the county ‘*acquires no beneficial ownership of the land*’; ‘the law vests it with nominal title’; ‘[i]t cannot grant or otherwise dispose of the premises ...’ [emphasis added]. In *Backus v Detroit*, 49 Mich 110, 115; 13 NW 380 (1882), the Court said that the plat act

passed the fee in all streets marked upon it to the county in which the city is situated: Comp L § 1345; but this was only a trust for street purposes. We attach no special importance to the fact that the title passed instead of a mere easement. *The purpose of the statute is not to give the county the usual rights of a proprietor*, but to preclude questions which might arise respecting the public uses, other than those of mere passage, to which the land might be devoted [emphasis added]. [*Kalkaska* at 356-357; emphasis in original; footnotes omitted.]

Justice Riley’s concurring opinion in *Kalkaska* is also instructive:

RILEY, C.J. (*concurring*). I concur with the result reached by Justice LEVIN because I am persuaded that the dedication pursuant to the various plat acts involved herein cannot reasonably be interpreted to have transferred oil and gas beneath the platted streets.

I believe that the specific language of the plats evidences an intention to convey an easement necessary to effectuate the limited purpose for which the dedication was enacted.

Finally, I believe that our holding today is consistent with prior Michigan case law. [*Kalkaska* at 358; emphasis added.]

B. The Owners of the Platted Lots Fronting on a Platted Public Way or Road Own the Adjacent Riparian Lands

The prior binding (and longstanding) Michigan court precedent in this area before last June should govern and should not be overturned. The five directly on point prior Michigan Court of Appeals cases that constituted the controlling precedent in this area should be examined closely, as there are no facts or law to distinguish them from the current case (except, of course, the current Court of Appeals' decision to implicitly overturn these five prior published decisions).

Michigan Central Park Assn v Roscommon County Road Comm'n, 2 Mich App 192; 139 NW2d 333 (1966), involved a Michigan Central Park subdivision on Higgins Lake. The specific plat at issue was the Michigan Central Park Plat, which was platted in 1901. See **Exhibit C**. Accordingly, the plat would have been created under the same 1887 Plat Act applicable in the *2000 Baum Family Trust* case. As can be seen from the plat itself (**Exhibit C**) and the diagram depiction at 2 Mich App 194, Michigan Central Park Boulevard was created pursuant to the platting process (dedicated to public use) and was quite wide. There was no intervening land between Michigan Central Park Boulevard and the lake on the original plat. Defendants argued that since the road was platted and dedicated to public use, the riparian rights are shared by all lot owners in the plat and also by the general public. Nevertheless, the Court of Appeals in 1966 agreed with the plaintiffs that the first tier lot owners were riparian, even though their lot lines did not extend through the road to the water's edge on the plat.

The lower court found that Michigan Central Park boulevard, running parallel with Higgins lake, was a public highway as contemplated by the McNitt act, as amended, CLS 1961, § 247.669 (Stat Ann 1958 Rev § 9.1097[19]) and that the public authorities had assumed jurisdiction thereof as a county road.

That court further found that the plaintiff Michigan Central Park Association of Higgins lake and all other abutting property owners have riparian rights along the shore of Higgins lake, each lot owner having riparian rights in the shore and lake opposite his lot. This finding of the court below is squarely supported by *Croucher v Wooster* (1935), 271 Mich 337, and the New York case of *Johnson v Grenell* (1907), 188 NY 407 (81 NE 161, 13 LRA [NS] 551) cited therein. (In both of those cases, the lots involved were part of a plat: the road in the Michigan case had been established by user, while that in the New York case had been dedicated by the plat.) The only exception to the above general proposition found by the lower court is where there is land in private ownership lying between Michigan Central Park boulevard and the lake, riparian rights belong to the owners of such lands and not to the owners of lands on the opposite side of the boulevard. [*Michigan Central Park Assn* at 197-198; footnote omitted.]

In *Sheridan Drive Assn v Woodlawn Back Property Owners Assn*, 29 Mich App 64; 185 NW2d 107 (1970), the plat at issue was known as “Woodlawn,” which also fronted on Higgins Lake. Sheridan Drive was created via the plat, runs along the shoreline of Higgins Lake, and was dedicated to the public. See **Exhibit D**. Since this plat was created in 1902, it was also governed by the 1887 Plat Act. Plaintiffs were the owners of lots that front on Sheridan Drive (*i.e.*, first tier lot owners). The defendants were the owners of backlots that did not front on Sheridan Drive. Plaintiffs asserted that they had riparian rights in the lake immediately opposite the road from their lots because their lots border on Sheridan Drive, which is a public platted road contiguous to the lake shore. Plaintiffs sought to enjoin the defendants from using Sheridan Drive for lounging, picnicking, launching boats, bathing, and placing docks out into the water. The Court of Appeals in 1970 cited *Michigan Central Park Assn v Roscommon County Road Comm’n* and agreed with that case:

It is seemingly settled in Michigan that one whose property is separated from a navigable lake solely by a public street or highway has riparian rights in that lake. Thus each lot owner in plaintiff association has riparian rights in the shore and

lake opposite his lot, which rights they can exercise exclusively. [*Sheridan Drive Assn* at 70-71.]

The Court of Appeals in *Sheridan Drive Assn* also noted:

As previously noted, the trial court found that ‘there is no intervening land between the easterly border of Sheridan Drive and the said lake.’ This finding is supported by the map of the plat of Woodlawn attached to plaintiffs’ complaint which shows Sheridan Drive following the shore line of Higgins Lake and contiguous to it. Under such circumstances the law of Michigan seems to be settled that the owner of the land separated from a lake by only a public road has riparian rights in the lake. In *Croucher v Wooster* (1935), 271 Mich 337, 342, the Court said in part:

Since lot 26 fronted upon the highway at a place where there was no land intervening between the lake and the opposite side of the highway, the conveyance of the lot on the south side carried with it, subject to express limitations appearing therein, the same riparian rights on the opposite side of the highway as it would had the lot itself been contiguous to the shore line.

At page 345 of the opinion the Court concluded:

The instant case being one of first impression in this jurisdiction, we adopt the rule of law announced in the decisions first above cited as being more acceptable and based upon sounder reasoning than the opposite holding. It follows that because of their ownership in fee of lot 26 on the southerly side of the highway, there being no land intervening between the northerly side of the highway and the water’s edge, the Woosters, in the absence of an intent appearing to the contrary, are possessed of riparian rights in the lake immediately opposite lot 26.

This determination was applied to the very lake in question by this Court in *Michigan Central Park Association, supra*, where it was said at p 197:

The basic issue then is whether or not members of plaintiff association have riparian rights in Higgins Lake as owners of lots abutting Michigan Central Park Boulevard. * * *

That court further found that the plaintiff Michigan Central Park Association of Higgins Lake and all other abutting property owners have riparian rights along the shore of Higgins Lake, each lot owner having riparian rights in the shore and lake opposite his lot. This finding of the court below is squarely supported by *Croucher v Wooster* (1935), 271 Mich 337, and the New York case of *Johnson v Grenell* (1907), 188 NY 407 (81 NE 161, 13 LRA NS 551) cited therein. (In both of those cases, the lots involved

were part of a plat: the road in the Michigan case had been established by user, while that in the New York case had been dedicated by the plat.) The only exception to the above general proposition found by the lower court is where there is land in private ownership lying between Michigan Central Park Boulevard and the lake, riparian rights belong to the owners of such lands and not to the owners of lands on the opposite side of the boulevard. [*Sheridan Drive Assn* at 69-70.]

In *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976), the Court of Appeals once again confirmed that platted lots that front on a platted public road running along the lakeshore of the lake are riparian lots. It appears that the plat involved in this case was the Plat of Shoppenegons Lodge, which also abutted Higgins Lake.⁹ See **Exhibit E**. That plat was created in 1901, such that the 1887 Plat Act would have applied. The Court of Appeals in 1976 agreed with the trial court that the first tier lot owners have riparian rights, while the backlot owners do not.

They first argue that, because the shoreline and the right of way boundary do not always coincide, the rule that riparian rights attach to land separated from a body of water by a highway should not be applied here. In the Supreme Court opinion adopting this rule, *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935), and in the opinions of this Court applying it, *Michigan Central Park Association v Roscommon County Road Commission*, 2 Mich App 192; 139 NW2d 333 (1966), and *Sheridan Drive Association v Woodlawn Backproperty Owners Association*, 29 Mich App 64; 185 NW2d 107 (1970), the lack of an ‘appreciable amount of land lying between the highway and the lake,’ *Croucher*, 271 Mich at 342, is emphasized. The fact crucial to application of the rule, *i.e.*, no land intervening between the water and the highway abutted by the lots for which riparian rights are claimed, is certainly shown when the highway right of way extends into the lake. The trial court correctly refused to distinguish *Croucher* on the grounds offered. [*Kempf* at 341-342.]

The *Kempf* Court also noted:

Appellants’ other argument involving the location of the Sam-O-Set right of way in relation to the shoreline is equally without merit. Despite no express mention of riparian rights in the plats in which the boulevard was dedicated, appellants

⁹ Unfortunately, the opinion in *Kempf* does not specifically indicate which plat was involved, but it did indicate that the parallel public road was Sam-O-Set Boulevard, such that it appears from the state of Michigan plat web page that the plat involved was Shoppenegons Lodge. **Exhibit E**.

argue that placement of the boundary of the boulevard in the water indicates an intention to create rights in the public to use the dedicated area not only for travel but also for waterfront recreation. We do not see an intent to expand the nature of the dedication beyond one for a roadway. On the contrary, the opinion in *Croucher* requires an express limitation to prevent riparian rights from attaching to lots abutting a waterfront highway. [*Kempf* at 342.]

In *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976), reversed on other grounds, 404 Mich 89; 273 NW2d 3 (1978), the plat at issue was the First Addition to the Michigan Central Park Subdivisions. See **Exhibit F**. The plat created and dedicated the Michigan Central Park Boulevard to the public. That road runs along the lakeshore. The plat was also governed by the 1887 Plat Act since it was created in 1901. Plaintiffs owned front lots (*i.e.*, lots fronting on Michigan Central Park Boulevard). The Court of Appeals held in 1976 that the first tier lot owners (whose lots have frontage on the public road) had riparian rights while the backlot property owners do not. Interestingly, the Court of Appeals expressly referenced the 1887 Plat Act:

Who owns the riparian rights?

The plaintiff front lot owners also own the riparian rights in the boulevard frontage. That issue was resolved in their favor by three previous decisions of this Court, all of which involved Higgins Lake property. *Michigan Central Park Association v Roscommon County Road Commission*, 2 Mich App 192; 139 NW2d 333 (1966), *Sheridan Drive Association v Woodlawn Backproperty Owners Association*, 29 Mich App 64; 185 NW2d 107 (1970), and *Kempf v Ellixson*, 69 Mich App 33; 224 NW2d 476 (1976). Each of those cases relied on *Croucher v Wooster*, 271 Mich 337 ; 260 NW 739 (1935). The cited cases support the trial judge's ruling that only the plaintiffs have riparian rights in the boulevard frontage.

The defendants ask us to distinguish *Croucher* because the government in that case had only a highway easement, whereas Roscommon County is said to have a fee simple title to the boulevard property involved in this case under the terms of the plat act in effect when the subdivision plat was recorded. **1887 PA 309**. Actually, that statute provided that the government would take a fee 'in trust to and for the uses and purposes therein [the plat] designated, and for no other use or purpose whatever.' Even if a distinction is possible we will not adopt it. There are problems with the *Croucher* rule, but an exception vesting the riparian rights in the public would create problems of its own—including the need to precisely

define the underlying title in every case. *Croucher* at least offers uniformity, a more attractive feature than any offered by the defendants' proposed distinction. [*McCardel* at 564-565; footnotes omitted, emphasis added.]

The Court of Appeals' published opinion in *McCardel v Smolen* was appealed to the Michigan Supreme Court. This Court reversed part of the Court of Appeals' decision in *McCardel v Smolen*, but affirmed other parts. 404 Mich 89; 273 NW2d 3 (1978). It should be noted, however, that the above-cited quote (as well as the holding that first tier lots along Michigan Central Park Boulevard are riparian) was not appealed to the Michigan Supreme Court, such that that portion of the Court of Appeals' decision in *McCardel v Smolen* at 71 Mich App 560, 564-565 was not dealt with by the Michigan Supreme Court, was not reversed, and remains binding precedent.

In *Jonkers v Summit Twp*, 278 Mich App 263; 747 NW2d 901 (2008), the Gilbert's Addition to Bass Lake Park Plat was involved. See **Exhibit G**. The plat was created in 1896, such that the 1887 Plat Act applied. Bass Lake Boulevard, which ran parallel along the lakeshore in the original plat, was dedicated "to the use of the public." On the original plat, there was no intervening land between the public road and Bass Lake. The Court of Appeals recognized that plaintiffs, the owners of a "first tier" property, are riparians pursuant to the plat. The *Jonkers* Court stated:

In the absence of a clearly expressed contrary intention, 'the conveyance of a parcel of land bordering on a highway contiguous to a lake shore conveys the appurtenant riparian rights.' *Croucher v Wooster*, 271 Mich 337, 344; 260 NW 739 (1935). Given the absence of an explicit statement, the trial court properly relied on the unambiguous description of the property itself.... [*Jonkers* at 270.]

Ultimately, the *Jonkers* Court held that "the Wanzers' property extended all the way to the shore of Bass Lake." *Jonkers* at 271 and 277. It should be noted that *Jonkers* was decided twenty-three years after *Thies v Howland*.

In 2002, the Court of Appeals again recognized that the lake parallel platted public road case law was well-settled, such that the owners of the first tier of lots are the riparian landowners. The Court of Appeals stated:

In *McCardel v Smolen*, 71 Mich App 560, 562; 250 NW2d 496 (1976), aff'd in part and vacated in part, 404 Mich 89; 273 NW2d 3 (1978), this Court, addressing a dispute between the owners of front lots and back lots in a subdivision located on Higgins Lake, was presented with the following facts:

Lots in the subdivision are separated from the waters of Higgins Lake by a strip of land designated on the plat as Michigan Central Park Boulevard. The boulevard was dedicated to the county, ostensibly as a public street. But the 'boulevard' is actually nothing more than undeveloped beach property. We are asked to decide who owns the riparian rights in the boulevard frontage and to define those rights.

Roscommon County had a fee simple interest in the strip of land, and this Court held that the plaintiffs, owners of the lots directly abutting the 'boulevard,' held the riparian rights. *Id.* At 564; 250 NW2d 496. The determination that the plaintiffs held the riparian rights was not reviewed by our Supreme Court on leave granted. 404 Mich at 94-95; 273 NW2d 3. [*Dorothy A Oliver Revocable Trust v Denton Twp*, unpublished Michigan Court of Appeals decision issued August 13, 2002 (Docket No. 230765). **Exhibit H.**]

Furthermore, in the *Dorothy A Oliver Revocable Trust* case, the trial court below held that the riparian rights to the platted outlot at issue belonged to the county in fee simple and even that determination was reversed by the Court of Appeals.

Appellees seek to distinguish these five controlling decisions (*McCardel*, *Kempf*, *Michigan Central Park Association*, *Sheridan Drive Association* and *Jonkers*) by tortured readings of those cases and engaging in legal contortions. Appellees also simply ignore the *Dorothy A Oliver Revocable Trust* decision. (See **Exhibit H**). Appellees' attempts at downplaying those Michigan appellate decisions are totally unconvincing.

Even this Honorable Court in *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985) (a case that Appellees erroneously claim supports the decision of the Court of Appeals below)

stated principles that support *McCardel v Smolen* and progeny. For example, this Court in *Thies* stated:

Although *Croucher* and *Johnson v Grenell* discussed only land abutting public ways, the holding of these cases can be stated more broadly: Unless a contrary intention appears, owners of land abutting any right of way which is contiguous to the water are presumed to own the fee in the entire way, subject to the easement. Since the owner's property is deemed to run to the water, it is riparian property. *Id.*, p 345. See also *Meridian Twp v Palmer*, 279 Mich 586; 273 NW 277 (1937); *Plater & Maloney*, 46 U Det J Urb L 59-61. Thus, plaintiffs are presumed to own the fee in the walk running along the front of their lots unless the platters intended otherwise. [*Thies* at 293.]

This Honorable Court in both *Croucher* and *Thies* quoted approvingly from the New York decision in *Johnson v Grenell*, 118 NY 407 (81 NE 161, 13 LRA [NS] 551) . In *Thies*, this Court quoted from the syllabus of the *Grenell* case as listed in *Croucher*:

Where the owner of an island in a navigable river, which had been laid out into lots, with boulevards, streets and roads, according to a map upon which the lots were designated by numbers, sold a lot abutting upon a boulevard running along and extending to the waters of the river, the lot being conveyed as 'Lot numbered 34 as laid out on the map,' * * * and the deed contains no language from which it can be inferred that the grantor intended to reserve any interest in the fee of the boulevard itself or in the appurtenant riparian rights, the legal title to the whole of the boulevard in front of the lot in question, together with the riparian rights, passed to the grantee of the lot, subject only to the public easement or right of passage over the boulevard. [*Thies* at 292.]

It is also important to note that the *Grenell* case involved a road created by plat, not by deed or highway-by-user.

Unfortunately, the Court of Appeals below in this case also ignored its own recent published opinion in *Jonkers v Summit Twp*, 278 Mich App 263; 747 NW2d 901 (2008). In *Jonkers*, the Court of Appeals stated:

In the absence of a clearly-expressed contrary intent, 'the conveyance of a parcel of land bordering on a highway contiguous to a lake shore conveys the appurtenant riparian rights.' [*Jonkers* at 269 (citing *Croucher v Wooster*).]

Pre-2000 *Baum Family Trust*, the authoritative Michigan Land Title Standards (Fifth Edition) published by the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan stated in Comment B in Standard No. 24.5 as follows:

A parcel of land separated from a natural watercourse by a highway or walkway, where the highway or walkway is contiguous to the watercourse, is riparian, unless a contrary intention appears in the chain of title. *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935); *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985); *Meridian Twp v Palmer*, 279 Mich 586; 273 NW 277 (1937). Where a dedicated highway or walkway parallels and is contiguous to a natural watercourse, the rights (if any) of the public for access to and use of the watercourse from the highway or walkway are determined by the scope of the dedication. *McCardel v Smolen*, 404 Mich 89; 273 NW2d 3 (1978); *Thies, supra*; *Meridian, supra*. [Michigan Land Title Standards (5th Ed), Standard 24.5, Comment B.]

Defendant/Appellee Charlevoix County Road Commission even seeks to use John Cameron's treatise, *Michigan Real Property Law*, to bolster its assertion that first tier lots are not riparian. The Road Commission quotes the following from that treatise at pages 9-10 of its brief dated September 25, 2009 opposing leave to appeal (as well as its June 17, 2010 brief at pp 7-8):

An interesting question in these [dedication] cases is, What real property interest passes to the public or public authorities? The court in *People ex rel Dir of Dep't of Conservation v La Duc*, 329 Mich 716, 719; 46 NW2d 442 (1951), stated the old common-law principle, which seemingly still applies today: 'By the common law, the fee in the soil remains in the original owner, where a public road is established over it; but the use of the road is in the public. The owner parts with this use only' (citations omitted). *Accord United States Gypsum Co v Christenson*, 226 Mich 347; 197 NW 497 (1924); *Badeaux; Gunn v Delphi Township*, 8 Mich App 278, 282; 154 NW2d 598, 601 (1967); *Granader v Beverly Hills*, 4 Mich App 697; 145 NW2d 359 (1966). This rule still applies to common-law dedications and other common-law creations of public roads. Statutory dedications of public highways at present, however, normally pass the fee to the appropriate public entity to hold in trust for the benefit of the public. MCL 560.253. [Footnote 6: Thus, a common-law dedication is presumed to be the dedication of an easement. A statutory dedication, pursuant to the Land Division Act, MCL 560.101 et seq., is presumed to be a dedication of the fee¹⁰ (emphasis supplied; portion of footnote concerning unrelated issues concerning condemnation and minerals is omitted).] [Cameron, *Michigan Real Property Law* (3rd ed), § 25.12, p 1467; emphasis in original.]

¹⁰ It also appears the Cameron is only discussing post-1967 plats.

However, the Road Commission conveniently omits a more directly on point quotation from the 2009 supplement for the Cameron treatise which states:

Platted roads convey either a public easement or a ‘base fee’ that amounts to little more than nominal title and no beneficial ownership whatsoever. *Wanzer Jonkers v Summit Township*, 278 Mich App 363; 747 NW2d 901 (2008) (citing *Kalkaska v Shell Oil Co (After Remand)*, 433 Mich 348; 466 NW2d 91 (1989), discussed in this section in the main text). [Cameron, Michigan Real Property Law (3rd ed – 2009 supplement), § 25.19, p 193.]

Ironically, three of the very cases cited by the Michigan Court of Appeals in its 2000 *Baum Family Trust* opinion below actually undercut that decision by the Court of Appeals. Those cases are *Wayne County v Miller*, 31 Mich 447 (1875), *Bay County v Bradley*, 39 Mich 163 (1878), and *Backus v Detroit*. This Court in *Wayne County* held that an interest gained by a municipality in a road created by a plat in 1846 (under the 1839 plat statute, with language virtually identical to the 1887 Plat Act) was extremely limited. This Court noted:

It is not very clear what sort of title the act of 1839 designed to vest in the county, whether a fee simple, or only a conditional fee, or possibly a perpetual easement ... there are some questions which suggest themselves here which we should be quite indisposed to encounter until it *should become absolutely essential. Unquestionably, the purpose was to vest in the county such a title as would enable the public authorities to devote the lands to all the public uses contemplated in making the plan, and to charge them with corresponding obligations when the title should vest. It is very clear that no purpose existed to give title in the nature of a private ownership. This is all we deem it necessary to say on this point in the present case, and further questions must be dealt with when they arise. [*Wayne County* at 447-448; emphasis added.]

In *Bay County v Bradley*, this Court interpreted the plat statute of 1839 (which is virtually identical to the 1887 Plat Act). This Court even referred to the interest gained by the county in the public road as an “easement”:

Now what is the position of the county as respects a strip of land dedicated to public use as a street under the statute?

It acquires no beneficial ownership of the land, and exercises no volition about the transfer. Willing or unwilling, the law vests it with nominal title. It does not accept and cannot refuse. It cannot grant or otherwise dispose of the premises,

and has no voice concerning the use. It is powerless to shorten the continuance of the easement, but other agencies may at any time bring it to an end, and in case of that the law does not allow even this figment of ownership to remain. In such event, what was in the county vests in others. [*Bay County* at 166; emphasis added.]

Finally, in *Backus v Detroit*, this Court viewed a public road dedication under the platting statute of 1859 as granting something akin to a mere easement. *Backus* at 115.

C. The Attempts by Appellees and Amicus Curiae CRAM to Distinguish Away Existing Controlling Case Law are Unsuccessful

Appellees (including the Charlevoix County Road Commission and Charlevoix Township) assert that *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985), governs this situation and claim that *Thies* somehow overruled *McCardel v Smolen, Kempf, Sheridan Drive Assn, and Michigan Central Park Assn*.¹¹ The quotation in *Thies* upon which Appellees rely is as follows:

The relevant inquiry is not who may use the way, but whether the abutting land owner owns the fee in any way which separates his property from the water:

‘While there is some authority to the contrary, the majority of the courts have followed the rule that land which is separated from water by a highway or street the fee of which is in the public is not riparian land; but where the fee in the land covered by the highway or street is in the owner of the land, riparian rights remain in such owner.’ 78 Am Jur 2d, Waters, § 273, p. 716. See also, 79 Am Jur 2d, Wharves, § 5, p. 179; 1 Farnham, Water & Water Rights, § 144, pp. 666-667; Plager and Maloney, *Multiple interests in riparian land, subdivision platting, and the allocation of riparian rights*, 46 U Det Urb L. 41, 50 (1968). *Thies, supra*, p 290. [*Thies* at 290.]

Appellees twist the meaning of the above-quoted language. What this Court clearly meant in that *Thies* quotation is that where a property is located between a body of water and

¹¹ Although none of the parties below extensively dealt with *Jonkers v Summit Twp*, 278 Mich App 263; 747 NW2d 901 (2008), Appellees would presumably also argue that *Thies* somehow also overruled *Jonkers v Summit Twp*, although *Jonkers* was decided over two decades after *Thies*.

first tier lots and the common law fee simple absolute title to the intervening land rests with the municipality (or someone else), the first tier of lots are not riparian. In all other situations, *Thies* indicates that the first tier lots are riparian. This interpretation of *Thies* is consistent with the Court of Appeals' reasoning in *McCardel, Kempf, Sheridan Drive Assn, Michigan Central Park Assn, and Jonkers*.¹²

Thies merely stated a truism—where a strip of land is located between a platted road and the lake, and the strip of land is owned fee simple absolute by a party other than the owner of the adjacent “first tier” platted lot landward of the road, the first tier lot owner is not riparian. *Thies* did not directly discuss the 1887 Plat Act and the exact nature of the statutory fee it created, although the *Thies* Court did quote approvingly from *McCardel v Smolen* and progeny. Appellees mistakenly lift language of general applicability from *Thies* (and also out of context) and seek to apply such language to an unrelated situation.

It should be noted that while *Thies v Howland* (as well as the unpublished Court of Appeals decision in *Pentz v Schlimgen*, decided December 19, 2006 (Docket No. 258130) relied on by the Charlevoix County Road Commission at pp 18-20 of its brief dated June 17, 2010) did not specifically discuss the 1887 Plat Act, *McCardel v Smolen* did expressly discuss the 1887 Plat Act, and *Kempf, Sheridan Drive Assn, Michigan Central Park Assn, and Jonkers* discussed the specific issues present in the current case. Furthermore, even if *Thies v Howland* did somehow implicitly overrule *McCardel, Kempf, Sheridan Drive Assn, and Michigan Central Park Assn* (which it did not), *Thies v Howland* certainly did not overrule cases that were decided many years later, such as *Jonkers* and *Dorothy A Oliver Revocable Trust v Denton Twp.*

Exhibit H.

¹² One could say that Appellees are “barking up the wrong fee....”

The reliance by Appellees on *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985), is very misplaced for many additional reasons. In fact, *Thies v Howland* actually supports the position of the Plaintiffs/Appellants and Amicus Curiae MWA and HLPOA in this case. Of course, it should be noted that this Court itself in *Thies* cited both *Croucher v Wooster* and *McCardel v Smolen* approvingly. *Thies* at n 6 (p 288), 289, n 5 (p 289), 290-291, n 7 (p 293), 293, 295. *Thies* did not overturn *McCardel v Smolen* and progeny, either expressly or impliedly. And, in footnote 6 of *Thies*, this Honorable Court also even mentioned *Kempf, Sheridan Drive Assn, Michigan Central Park Assn*, and *McCardel*. *Thies* at 290 (n-6). It can hardly be argued that *Thies* implicitly overruled *Croucher*, or the published opinions in *McCardel*, *Kempf*, *Sheridan Drive Assn*, *Michigan Central Park Assn*, or *Jonkers* (decided over a decade after *Thies*).

Thies involved private platted walks parallel along the shore and private alleys or easements which ran perpendicular to the lake. Accordingly, the dedication in *Thies* was private and the dedication in the current case was public. *Thies* recognized that distinction, but also stated as follows:

The cases which have applied *Croucher* only involved ways dedicated to public use. Nevertheless, we believe that *Croucher* is equally applicable to ways dedicated to the private use of a finite number of persons. The relevant inquiry is not who may use the way, but whether the abutting land owner owns the fee in any way which separates his property from the water.

...

While there is some authority to the contrary, the majority of the courts have followed the rule that land which is separated from water by a highway or street the fee of which is in the public is not riparian land; but where the fee in the land covered by the highway

or street is in the owner of the land, riparian rights remain in such owner. 78 Am Jur 2d, Waters, § 273, p 716. (Footnote omitted.)¹³

See also 79 Am Jur 2d, Wharves, § 5, p 179; 1 Farnham, Water & Water Rights, § 144, pp 666-667; Plager & Maloney, *Multiple interests in riparian land, subdivision platting, and the allocation of riparian rights*, 46 U Det J Urb L 41, 50 (1968). [*Thies* at 291.]

The *Thies* Court went on to discuss *Croucher* approvingly:

Although there is conflicting authority in other jurisdictions, the issue was settled in this state by *Croucher*. There, the dedication of the plat described the plattors' land as lying south of a public highway that paralleled the lakeshore. The two lots at issue abutted the highway which, at those points, was in direct contact with the water. All of the deeds described the lots only by the lot numbers noted on the plat. The plattors conveyed each lot at issue twice. The question presented was whether the plattors had parted with all of their interest in each lot, including their riparian rights, under the first conveyance. This Court concluded that a fee interest in each lot, which included the adjoining portion of the highway and the appurtenant riparian rights, passed to the first grantees, subject to the public's use of the highway:

'Since lot 26 fronted upon the highway at a place where there was no land intervening between the lake and the opposite side of the highway, the conveyance of the lot on the south side carried with it, subject to express limitations appearing therein, the same riparian rights on the opposite side of the highway as it would had the lot itself been contiguous to the shore line.

“Where a highway is laid off entirely on the owner's land, running along the margin of his tract, and he afterwards conveys the land, the fee in the whole of the soil of the highway vests in his grantee. Likewise, where a street is laid out wholly on the owner's land and on the margin of his tract, so that he owns nothing beyond, the whole of the street opposite a lot bounded on the street passes to the grantee of the lot.” 8 Consent Judgment p 203. See note citing numerous cases, including *Johnson v Grenell*, 118 NY 407 (81 NE 161, 13 LRA [NS] 551).

'As bearing upon the acquisition of riparian rights on the opposite side of the highway, we quote from the syllabus of the *Grenell* Case:

¹³ It is this quote that Appellees seize upon and quote out of context. It is obvious that this Am Jur 2d quote means the common law “fee simple absolute” title when it mentions “the fee” in its third line.

“Where the owner of an island in a navigable river, which has been laid out into lots, with boulevards, streets and roads, according to a map upon which the lots were designated by numbers, sold a lot abutting upon a boulevard running along and extending to the waters of the river, the lot being conveyed as ‘Lot numbered 34 as laid out on the map.’ ... and the deed contains no language from which it can be inferred that the grantor intended to reserve any interest in the fee of the boulevard itself or in the appurtenant riparian rights, the legal title to the whole of the boulevard in front of the lot in question, together with the riparian rights, passed to the grantee of the lot, subject only to the public easement or right of passage over the boulevard.” *Johnson v Grenell, supra.* *Croucher*, 271 Mich 342-343; 260 NW 739. [*Thies* at 291-292.]

In footnote 7, the *Thies* Court noted:

The *Croucher* Court recognized that contrary conclusions had been reached in other jurisdictions. However, it distinguished many of these cases because there was land intervening between the highway and the shore. 271 Mich 344-345. Intervening land owned by another prevents the land on the opposite side of the highway from being deemed riparian. See also, *Fuller v Bilz*, 161 Mich 589; 126 NW 712 (1910); *Michigan Central Park Ass’n*, 2 Mich App 198; 139 NW2d 333.¹⁴ [*Thies* at 293.]

Finally, the *Thies* Court concluded the *Croucher* discussion with:

Although *Croucher* and *Johnson v Grenell* discussed only land abutting public ways, the holding of these cases can be stated more broadly: Unless a contrary intention appears, owners of land abutting any right of way which is contiguous to the water are presumed to own the fee in the entire way, subject to an easement. Since the owner’s property is deemed to run to the water, it is riparian property. *Id.*, p 345; 260 NW 738. See also, *Meridian Twp v Palmer*, 279 Mich 586; 273 NW 277 (1937); *Plager & Maloney*, 45 U Det J Urb L 59-61. Thus, plaintiffs are presumed to own the fee in the walk running along the front of their lots unless the plattors intended otherwise. [*Thies* at 293; emphasis added.]

To the extent that dicta in *Thies v Howland* can in any fashion be interpreted to indicate that first tier lots in a case such as this are not riparian, this Honorable Court should revisit the issue for two obvious reasons. First, important prior appellate case law should not be overruled

¹⁴ Please note that this Court cited *Michigan Central Park Assn* approvingly.

by implication or inference, but expressly. Second, *Thies* did not involve public ways or roads, but rather private walks and easements.

In its Brief on Appeal dated June 17, 2010 at pp 18-20, Appellee Charlevoix County Road Commission attempts to bolster its erroneous reading of *Thies v Howland* by citing the unpublished Court of Appeals decision in *Pentz v Schlimgen*, unpublished Michigan Court of Appeals decision issued December 19, 2006; 2006 WL 3733236 (Docket No. 258130). However, it is difficult to see how *Pentz v Schlimgen* has any applicability whatsoever to the current case. *Pentz* involved a private road (dedicated to the use of the lot owners within the plat) which was perpendicular to Pleasant Lake. See **Exhibit I** (the plat at issue). The Court of Appeals held that the backlot owners had only an easement in the private road end at the lake, not ownership of the private road. It is true that the Court of Appeals did discuss *Thies v Howland* and the difference between a property being separated from a lake by a mere easement versus a fee title, but once again, the reference is to a fee simple title (as it was in *Thies v Howland*), not the type of limited or modified statutory fee at issue in the current case. Notwithstanding the Charlevoix County Road Commission's assertion that *Pentz v Schlimgen* is applicable to the current case and somehow helps its position, it is not and does not.

D. The First Tier Lots are Riparian Even Though the Lots' Legal Descriptions do not Expressly Extend to the Water's Edge

Appellees use the very disingenuous argument that the first tier lots in this case cannot be riparian because the original legal descriptions of the lots do not extend to the water's edge and the original plat does not show the first tier lots extending to Lake Charlevoix. While that is true, it is not determinative of riparian status. In all of the relevant appellate cases (including *Thies v Howland*), first tier lots have been deemed riparian based on the longstanding common law and

by operation of law, rather than based on legal descriptions or original plat maps.¹⁵ In none of the following cases did the legal descriptions for the first tier lots run to the water's edge nor did the original plat show that the first tier lots extended to the water's edge, yet those first tier lots were still held to be riparian by operation of law:

Dobie v Morrison, 227 Mich App 536; 575 NW2d 817 (1998) (a narrow park)

Thies v Howland, 424 Mich 282; 380 NW2d 463 (1985) (walks and easements)

Croucher v Wooster, 271 Mich 337; 260 NW 739 (1935) (road or street)

Kempf v Ellixson, 69 Mich App 339; 244 NW2d 476 (1976) (road or street)

Sheridan Drive Assn v Woodlawn Back Property Owners Assn, 29 Mich App 64; 185 NW2d 107 (1970) (road or street)

Michigan Central Park Assn v Roscommon County Road Comm'n, 2 Mich App 192; 139 NW2d 333 (1966) (road or street)

McCardel v Smolen, 71 Mich App 560; 250 NW2d 496 (1976), reversed on other grounds, 404 Mich 89; 273 NW2d 3 (1978)

Jonkers v Summitt Twp, 278 Mich App 263; 747 NW2d 901 (2008)

While the Appellees love to cite selective quotations from this Court's decision in *Thies v Howland*, they fail to note that in *Thies*, this Court held that various boundary lines for platted lots extended under and through dedicated properties as a matter of law, even though such extensions of the lots were not evident in the legal descriptions for the lots nor shown on the original plat map. Also see **Exhibits C, D, E, F, and G** hereto (the plats themselves). The backlot property owners in *Thies v Howland* asserted that plaintiffs could not be riparians because their properties did not touch Gun Lake and were separated from Gun Lake by a walk. *Thies* at 289. This Court in *Thies* disagreed with the backlot property owners and noted:

Although *Croucher* and *Johnson v Grennel* discussed only land abutting public ways, the holding of these cases can be stated more broadly: Unless a contrary

¹⁵ This is a century-long exception to the general rule that riparians properties must have legal descriptions touching the water.

intention appears, owners of land abutting any right of way is contiguous to the water are presumed to own the fee in the entire way, subject to the easement. Since the owner's property is deemed to run to the water, it is riparian property. *Id.*, p 345. See also, *Meridian Twp v Palmer*, 279 Mich 586; 273 NW 277 (1937); *Plager & Maloney*, 46 U Det J Urb L 59-61. Thus, plaintiffs are presumed to own the fee in the walk running along the front of their lots unless the platters intended otherwise. [*Thies* at 293.]

Accordingly, the *Thies* Court "deemed" the first tier properties to run "through" the walk and to the water, even though that was not reflected on those lots' legal descriptions nor on the face of the plat. The riparian status of those first tier lots was "presumed" by the *Thies* Court. *Ibid.*

The Court of Appeals in *Dobie v Morrison*, 227 Mich App 536; 575 NW2d 817 (1998), found that a platted lot extended under and "through" a dedicated park to the water even though the legal description for the lot did not describe it as going to the lake and the plat itself did not describe or show the lot as going to the water's edge. The Court of Appeals noted initially that this Court, in both *Croucher v Wooster* and *Thies v Howland*, had extended lots that did not technically touch the water through highways, walks, or similar ways and deemed the first tier lots to be riparian:

Exclusive of the park, lot 17 does not include a natural watercourse and is not bounded by a natural watercourse. However, the Michigan Supreme Court found in *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935), that actual contact with the water is not necessarily required for riparian rights to exist. Specifically, the Court held that a lot separated from the water by a highway that is contiguous to the water is riparian land. *Id.* at 345; 260 NW 739. Although *Croucher* and its progeny involved ways dedicated to public use, the Court extended the holding to the effect that, with regard to a private right of way such as a walkway along the edge of a body of water, it is presumed that the owner of a lot separated from the water only by the right of way owns the land and, accordingly, has riparian rights, while others authorized to use the right of way have an easement. *Thies v Howland*, 424 Mich 282, 290-293; 380 NW2d 463 (1985). At the hearing regarding their motion for summary disposition, plaintiffs argued by analogy to *Thies* that the dedication of the park along the edge of Jordan Lake did not cut off their riparian rights, and the trial court agreed.

The facts in *Thies*, *supra* at 296; 380 NW2d 463, involved a dedication in a subdivision plat of a twelve-foot-wide 'walk' running along the lakeshore. *Id.* at 286; 380 NW2d 463. The plaintiffs, front lot owners, filed suit to enjoin the

defendants, back lot owners, from maintaining a dock in front of their property or anchoring their boats in the lake. *Id.* at 287; 380 NW2d 463. The Michigan Supreme Court held that the plaintiffs were presumed to own the fee in the walk running along the front of their lots. This holding was an extension of the rule that owners of land abutting a street are presumed to own the fee in the street to the center, subject to an easement. *Id.* at 291; 380 NW2d 463. [*Dobie* at 538-539.]

The *Dobie* Court did note the difference between the wider park in that case and the more narrow walk in *Thies v Howland*. Nevertheless, the *Dobie* Court still found that the park dedication simply created an easement and held that the platted lot at issue was deemed to extend under and “through” the park to the water’s edge, such that it is riparian. See *Dobie* at 849-540.

Both *Thies v Howland* and *Dobie v Morrison* stand for the proposition that riparian rights (and riparian status) may exist even where the property at issue does not actually touch the body of water involved, and even where neither that property’s legal description nor the original plat show the lot as extending to the water.

Contrary to Appellees’ assertion, the Appellants are not claiming riparian rights that have been “severed” from the lakefront due to an intervening public road. Rather, Appellants’ title goes under and “through” the platted public road to the water by operation of law. In that sense, the statutory fee created by the 1887 Plat Act does allow two estates in land to exist side-by-side.

E. The Law Allows Two Different Legal Interests to Occupy the Land Comprising Beach Drive at the Same Time—the Charlevoix County Road Commission’s Limited Statutory Base Fee and the First Tier Lot Owners’ Ownership of the Riparian Rights

The Charlevoix County Road Commission continues to assert that there can only be one fee interest with regard to a dedicated public road. The Road Commission claims that a fee cannot be “split.” The Road Commission keeps asserting that “a fee is a fee is a fee” and that there can only be one fee. For example, the Road Commission on page 12 of its brief dated September 25, 2009 opposing leave to appeal in this case cites *In Re McBride’s Estate*, 253 Mich

305, 306; 235 NW 166 (1931), for the proposition that “[t]here can exist but one estate in fee simple to a particular parcel of land.” See also, p 10 of the Road Commission’s June 17, 2010 Brief on Appeal. Of course, there can only be one common law fee simple absolute title as to a particular parcel of land. What we are dealing with in this case, however, is not a common law fee simple absolute ownership right or even a common law fee or fee simple ownership right, but a limited (and divisible) statutory fee right.¹⁶ And, the Michigan appellate courts have long held that the statutory base fee transferred to a municipality pursuant to the 1887 Plat Act is something more akin to a glorified easement than a common law fee simple absolute title. For example, the Court of Appeals itself observed most recently in *Jonkers v Summit Twp*, 278 Mich App, 263; 747 NW2d 901 (2008) that:

[P]latted public roads convey either a mere public easement or, at most, a ‘base fee’ that amounts to little more than nominal title and no beneficial ownership whatsoever. [*Jonkers* at 278; emphasis added]

See also, *Village of Kalkaska v Shell Oil Co*, and *Backus v City of Detroit*.

It is clear that the Michigan Legislature did not intend that the recordation of a plat under the 1887 Plat Act would constitute a conveyance to the municipality of a public roadway in fee simple absolute because the statute did not so say.¹⁷ The statutory conveyance or fee referred to in the 1887 Plat Act is the conveyance of a very limited statutory “base fee.” *Kirchen v Remenga*, 291 Mich 94, 112; 288 NW 344 (1939). It is a limited statutorily-created fee subject to qualification or a condition subsequent and is thereupon determinable. That condition or qualification is a requirement that the road be continued to be used as such and if such use be abandoned, the limited statutory fee interest in the municipality would terminate.

¹⁶ Given that many Michigan appellate courts have interpreted this limited statutory fee as being a glorified easement, Appellees’ quotation of dictionary and general case law definitions of a common law “fee” are inapplicable to plat dedications before 1967 in Michigan.

¹⁷ The Legislature changed the rules for plat dedications after 1967 when it added the word “simple” after “fee” in the Subdivision Control Act of 1967.

This Court in *Backus v City of Detroit*, 49 Mich 110; 13 NW 380 (1882), noted with regard to the 1887 Plat Act's predecessor statute that "[W]e attach no special importance to the fact that the title passed instead of a mere easement. The purpose of the statute is not to give the county the usual rights of a proprietor, but to preclude questions which might arise respecting the public uses, other than those of mere passage ..." (emphasis added). *Backus* at 115.

In its amicus curiae brief before the Court of Appeals below, amicus curiae party the County Road Association of Michigan ("CRAM") quoted from the Complaint in this case in which one paragraph alleges that the Plaintiffs as riparian owners "own the fee interest of the land lying between their property and Lake Charlevoix." CRAM went on to argue that "[i]f Appellants had claimed a fee, then under Michigan law the CCRC could have only an easement." CRAM's Amicus Curiae Brief in the Court of Appeals at 5-6. This repeats the erroneous argument that the statutorily-created base or determinable fee is actually a full fee or fee simple absolute title that defeats all other interests. *Jonkers v Summit Twp*, 263 Mich App, 278; 747 NW2d 901 (2008), and *Twp of Dalton v Muskegon County Bd of Road Comm'rs*, 223 Mich App 53; 565 NW2d 692 (1997), demonstrate that this is not the case. The 1887 Plat Act and the case law (holding that the dedication does not divest the first tier lot owners of their riparian rights) all treat the statutory base or determinable fee as "little more than nominal title and no beneficial ownership whatsoever." *Jonkers* at 278.

Perhaps at the common law, a fee or fee simple title could not be split, divisible, etc., such that no single property could have two fees. With a statutorily-created fee interest (such as a base or determinable road fee under the 1887 Plat Act), however, there is no such inherent limitation.

Appellees seek to distinguish *Village of Kalkaska v Shell Oil Co (After Remand)*, 433 Mich 348; 466 NW2d 81 (1989), from this case (by claiming that this Court's opinion in *Village*

of Kalkaska does not limit the statutory base or determinable fee granted to a municipality by the 1887 Plat Act). Appellees point out that *Village of Kalkaska* involved mineral rights (and hence, proprietary interests) and that mineral rights are frequently severed from the surface estate. Seemingly, Appellees believe that the *Village of Kalkaska* decision does not undercut their argument that two fees cannot occupy the same property. There are three flaws in Appellees' logic. First, if one carefully reads the entire written opinion in *Village of Kalkaska*, it is clear that it was not a simple severance of mineral interests case. Second, the decision indicates that roads can be used for travel purposes only. Finally, the language in *Village of Kalkaska* regarding the very limited statutory interest received by the local road authority via a plat dedication before 1967 is important and implies that the statutory-created fee is akin to an easement.

Even under Appellees' view of *Village of Kalkaska*, however, it does not mean that the first tier lot owners in this case cannot prevail. While full and complete riparian rights cannot be completely severed from the fee simple absolute title (title which the Charlevoix County Road Commission does not have here), something approaching full riparian rights can be granted or reserved by easement, license, etc. See *Little v Kin*, 249 Mich App 502; 644 NW2d 375 (2002); 468 Mich 699; 664 NW2d 749 (2003).¹⁸ Even if Plaintiffs/Appellants in the current case do not have full riparian rights to Lake Charlevoix, they certainly could have full and exclusive rights to permanent boat mooring, dockage, lounging, sunbathing, etc., even under Appellees' theory of the case.

¹⁸ Even though the newly-created canals at issue in *Thompson v Enz*, 379 Mich 667; 154 NW2d 473 (1967), were held not to confer riparian rights, they were allowed to remain and landowners on those canals could still use them for dockage and access to Gun Lake.

F. The Court of Appeals Improperly Expanded the Scope of Usage Rights for Public Roads

In its published opinion in *2000 Baum Family Trust*, the Court of Appeals indicated that where public roads are dedicated and created pursuant to the 1887 Plat Act, the land can be used by the local road commission or other municipality for virtually any purpose. In fact, the Court in *2000 Baum Family Trust* stated as follows:

There is no merit to plaintiffs' contrary argument that the alleys and streets must be used for the limited purpose of maintaining streets and alleys. Plaintiffs' interpretation of the dedicatory language reads a limited usage into the dedication that does not exist. In construing language, this Court will not inject additional requirements not included by the drafters. See *People v. Zujjko*, 282 Mich.App. 520, 523; --- NW2d --- (2009). Further, if we were to adopt plaintiffs' interpretation of the dedication, it would fail to have an effect consistent with its meaning, and as a result the dedication would be rendered nugatory. We decline to adopt such an interpretation. *Apsey v. Memorial Hosp*, 477 Mich. 120, 131; 730 NW2d 695 (2007). [Slip Op at 9.]

This dicta by the Court of Appeals flies in the face of over a century of controlling contrary Michigan case law, as well as the express wording of the 1887 Plat Act itself.¹⁹ See also *Backus v Detroit, Village of Kalkaska*, and *Jacobs v Lyon Twp*. Dedicated roads, highways, and streets can be used for travel only. *Id.*

G. The Scope of Usage Rights for Beach Drive are Limited on the Face of the Plat

Even if the Court of Appeals were correct in its assertion that pursuant to the 1887 Plat Act, publicly-dedicated roads could be used for any purpose (which, of course, is not true), that would not be applicable in the current case. The Court of Appeals panel in *2000 Baum Family Trust* appears to be under the mistaken notion that since the road dedication in the plat at issue did not contain any express elaborate limitation language (the dedication stated "that the streets and alleys as shown on said plat are hereby dedicated to the use of the public"), then it must

¹⁹ Even the Charlevoix County Road Commission itself backs away from this dicta by the Court of Appeals in its Brief on Appeal dated June 17, 2010 at pp 10, 15-16.

follow that the Charlevoix County Road Commission can use the public road right-of-way for any purpose whatsoever. There are, of course, two significant fallacies contained within that line of reasoning. First, it goes contrary to longstanding binding Michigan court precedent. See, *Jacobs v Lyon Twp, Village of Kalkaska*, and *Backus v Detroit*. Second, the other major error in that logic is the omission of the fact that there are not one but two use limiting items actually contained in the dedication for roads and streets in the North Charlevoix Plat in this case. The dedication paragraph itself states that “the streets and alleys as shown on said plat are hereby dedicated to the use of the public.” “Streets and alleys” indicate travel uses only. However, and furthermore, the roads and streets on the plat are themselves labeled as “drive” or “avenue.” The words “drive” and “avenue” are limitations which clearly indicate that the public road rights-of-way created via the plat can be used for road (*i.e.*, travel) purposes only. That is consistent with all of the prior Michigan case law. Therefore, the dedication is comprised of the dedication language plus the labeling on the map of the plat itself, both of which comprise the limitations on use.

H. This Case is of Sufficient Finality for this Court to Review and Reverse the Decision of the Court of Appeals Below

Appellees assert that this Court should not act on this appeal because the Charlevoix County Circuit Court is supposedly not finished with the case. However, the Court of Appeals’ decision has effectively made a portion of the case “final” for purposes of appellate review. We now have a published Michigan Court of Appeals decision (which applies statewide) that has thrown a significant portion of important, long-settled Michigan riparian, plat, road, and real property jurisprudence into turmoil. The Court of Appeals took an interlocutory appeal and has reached a “final decision” with regard to the legal issues it dealt with in this case. That certainly

makes the matter “ripe” for review by this Court. The matter at issue now in this case is a legal issue, not a factual one.

I. If the Decision of the Court of Appeals Below is not Reversed, Who Does Own the Riparian Rights Associated with the Public Road?

Neither the Court of Appeals nor the Charlevoix County Circuit Court below answered the key issue regarding who owns the riparian rights to Beach Drive if, in fact, such riparian rights are not owned by the first tier lot owners. There are several theoretical possibilities if the Court of Appeals’ decision below is not reversed. First, the riparian rights could reside with the Charlevoix County Road Commission. Second and alternately, the riparian rights could belong to Charlevoix Township. Third, those rights could rest with the state of Michigan. Fourth, the riparian rights could belong to the general public. Finally, the riparian rights could belong to all of the lot owners within the plat. This is just one example of how problematic the decision of the Court of Appeals below really is.

J. Even if *McCardel v Smolen* and Progeny were Wrongfully Decided, They Should Stand as Long-Settled Reasonable Court Precedent

In the area of real property, it is sometimes best to leave longstanding appellate case law alone, even if it is technically legally incorrect, than to reverse such long relied-upon law and throw basic real property principles into disarray throughout Michigan. Even if the Court of Appeals below was technically correct in its decision in this case (which MWA and HLPOA respectfully assert it was not), *McCardel v Smolen* and progeny should be allowed to stand given the reliance of countless property owners, realtors, lenders, etc., throughout Michigan on those prior appellate cases for many years. *Stare decisis* should govern. In fact, the Court of Appeals itself in *McCardel v Smolen* even hinted at the importance of leaving long-settled case law in the real property area alone when it stated as follows:

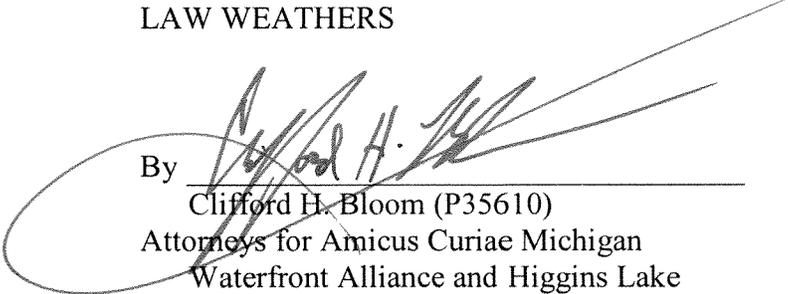
The defendants ask us to distinguish *Croucher* because the government in that case had only a highway easement, whereas Roscommon County is said to have a fee simple title to the boulevard property involved in this case under the terms of the plat act in effect when the subdivision plat was recorded. 1887 PA 309. Actually, that statute provided that the government would take a fee 'in trust to and for the uses and purposes therein [the plat] designated, and for no other use or purpose whatever.' Even if a distinction is possible we will not adopt it. There are problems with the *Croucher* rule, but an exception vesting the riparian rights in the public would create problems of its own—including the need to precisely define the underlying title in every case. *Croucher* at least offers uniformity, a more attractive feature than any offered by the defendants' proposed distinction. [71 Mich App 560, 565-566 (1976) .]

III. CONCLUSION

Amicus Curiae MWA and HLPOA respectfully request that this Court hold that the first tier of lots along Beach Drive are deemed riparian, that the undisturbed portion of the Court of Appeals' opinion in *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976) applies (as do its progeny cases), that Beach Drive can be used by the public for travel purposes only, and that the decisions of the Charlevoix County Circuit Court and the Court of Appeals below are reversed.

LAW WEATHERS

Dated: July 8, 2010

By 
Clifford H. Bloom (P35610)
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13181 (001) 507308.1

A

Court of Appeals, State of Michigan

ORDER

2000 BAUM FAMILY TRUST V WILLIAM BABEL

Docket No. 284547

LC No. 07-061121-CH

Karen M. Fort Hood
Presiding Judge

Mark J. Cavanagh

Kirsten Frank Kelly
Judges

The Court orders that the motion for reconsideration is DENIED.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

AUG 06 2009
Date

Sandra Schultz Mengel
Chief Clerk

B

Westlaw.

Page 1

Slip Copy, 24 Misc.3d 1241(A), 2009 WL 2619235 (N.Y.City Ct.), 2009 N.Y. Slip Op. 51838(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 2009 WL 2619235 (N.Y.City Ct.))

NOTE: THIS OPINION WILL NOT APPEAR IN
 A PRINTED VOLUME. THE DISPOSITION
 WILL APPEAR IN A REPORTER TABLE.

City Court, City of Ithaca.
 Sara JONASSEN, Plaintiff

v.

Judith KIRTLAND and Edward Kirtland, Defend-
 ant.

No. C09-40726.

Aug. 26, 2009.

JAMES KERRIGAN, J.

*1 Tenant Plaintiff in small claims court seeks the return of \$1800, prepaid two months rent and a security deposit on a leased apartment which she occupied for less than five days. The landlord's counterclaim seeks recovery of \$5,000, the small claims court jurisdictional maximum, Uniform City Court Act Section 1801, claiming that the lease provisions entitle the landlord to the full year's rent in the event of any breach by the tenant.

The facts are simple and straight-forward. After signing the landlord's 7-page lease drafted by the landlord's counsel, tenant took possession on May 1. The apartment is a recently renovated full floor unit of a ranch house. Paragraph 9 of the lease states that the tenant has inspected the premises and takes the premises "as is". The tenant moved in on May 2, the date that the landlord was applying sealant on newly installed tile. Tenant claimed that she could not tolerate the strong fumes and that she could not properly ventilate the apartment because a number of windows were either without screens or painted shut. The Court credits the landlord's testimony that although some of the windows may have been sticky they were easily opened. The tile sealant fumes did not rise to the level of being the dangerous or hazardous conditions detrimental to life, health or safety required as a predicate for New

York's Warranty of Habitability statute, Real Property Law § 235-b. Further, the Court credits the landlord's testimony that while some of the windows may have lacked screens and that some of the windows may have been sticky, it was relatively simple for the landlord to open the windows and ventilate the apartment. At most, the tenants would have been entitled to a few days reduction in the rent while the fumes dissipated. Tenant, after notice to the landlord, may make repairs and set off or deduct such expenses from the rent, a rent abatement, on these facts. (see *Park West Mgt Corp v. Mitchell*, 47 N.Y.2d 316 [1979], *Jangla Realty Company v. Gravagna*, 112 Misc2d 642 [NY City Civil Court, 1981]). On proof in this case, the Court finds the tenant to be entitled to three days rent abatement or \$70. Landlord is entitled to rent for the balance of May.

Turning to the counterclaim, the tenant signed a twelve month lease obligating her to pay \$8400 for the full year. She moved out after three days as a result of headaches from fumes which did not rise the level of inhabitability. With the benefit of hindsight perhaps she should have asked the landlord to open the stuck windows, or bought a fan, (there were at least two working ventilation fans in the apartment) or taken a hotel room until the fumes abated.

Instead, she moved into her car, lacking first month, last month, and a security deposit on a new rental. She testified she continued to reside in her car until the date of the trial. The Landlords, one of whom is a realtor, left the premises vacant and indicated that the premises could be re rented immediately at the same or a higher rent once the property was advertised. At the trial, some six weeks after the tenant moved out the Landlords testified they had made no efforts to rent the apartment. The legal question is whether a landlord can do nothing, take no steps to minimize the damages, and collect the full year's rent which they seek to do on their counterclaim, limited at this time to small claims

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court's monetary jurisdiction.

*2 The Court of Appeals in *Holy Properties Ltd v. Kenneth Cole* (87 N.Y.2d 130 [1995]) has held that a landlord has no obligation to mitigate damages: "Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect the full rent under the lease." (*Id.* at 134 [citations omitted]). This small claims court must apply the law applicable to a \$20,000 a month store front on West 57th Street, a block from Fifth Avenue, to an apartment in the hamlet of Brooktondale, New York formerly rented by a now homeless young woman. *Holy Properties* affirmed a judgment for \$781,000 based on the need for certainty in rules applicable to interests in real property dating to feudal times. This tenant is living in a car because she lacks the resources to rent another apartment for a few hundred dollars a month. An apartment in a county with a low vacancy rate sits empty and unused. Kenneth Cole Productions is a New York Stock Exchange listed company with a 2009 market capitalization, dramatically reduced by the current recession and stock market collapse, to a mere \$180 million dollars. Kenneth Cole Productions Ltd, represented by lawyers and brokers, negotiated and then made a conscious business decision to walk away from a commercial lease. This tenant signed a 7 page lease as drafted by the landlords attorney with no changes whatsoever. The Court of Appeals tells us: "In business transactions, particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the correct rule" (*Id.* at 134 [citation omitted]).

The Second Department, in *Rios v. Carrillo* (53 AD3d 311 [2008]), has held that the *Holy Properties* rule is applicable to residential leases and remanded that case to the trial court to examine other unresolved issues such as the landlord's acceptance of the surrender of the leasehold. This court is obligated to follow the rulings of the Court of Appeals and the Second Department even in seeking to do

substantial justice under our small claims statute. Uniform City Court Act § 1804. This court must follow the ruling of an Appellate Division, *People v. Brisotti*, 169 Misc.2d 672 (App.Term, 1st Dept, [1996]).

Although it is impossible to be sure how trial, housing and small claims courts are handling such claims daily, we are beginning to see in the few reported decisions that lower courts are straining to avoid the harshness of the *Holy Properties* and *Rios* rules when they find other rules to apply. In *88th Street Realty L.P. v. Maher* (21 Misc.3d 190 [2008]) the New York City Civil Court could not in good conscience award such damages where the landlord waited a couple of months to proceed. In *Saliva v. Dyer* (21 Misc.3d 140 A [S.Ct.App. Term, 9th & 10th Jud. Dists, 2008], [table, text at 2008 WL 5004312]), an unreported appellate decision of the Supreme Court, Appellate Term deferred to Small Claims Court's substantial justice rubric in affirming an award to tenant of the security deposit to be returned. Rochester City Court, *Hamblin v. Bachman* (23 Misc.3d 1116[A], [table, text at 2009 WL 1086779]) another reported unreported decision, found the landlord, by advertising the abandoned tenancy and making repairs, accepted a surrender of the premises. This landlord's lease has clauses in ¶ 20 D authorizing the landlord to re-let the premises and reduce this tenants obligations net of the costs of re-renting making the counterclaim premature..

*3 If and when the Legislature considers this question, (see Faleck, *Landlord's Duty to Mitigate: Cases Highlight Need for Legislative Action*, NYLJ June 30 2009, at 4. col 4, noting that 42 states and the District of Columbia have imposed a duty to mitigate upon landlords) this court must apply the law as it exists now. (see also Vaeth, *Landlord's Duty, on Tenants Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant*, or 75 ALR 5th 1 [2000]).

Feudal real property concepts are significant to

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seasoned real property lawyers negotiating a lease with brokers for commercial multi-million dollar parties, but are inappropriate to consumer lease rules where a tenant is homeless and a landlord can re let the property without effort in a tight market.

The landlord defendants are entitled to May rent, prepaid, and the tenant is entitled to Judgment for the three days abated, \$70, and the return of the \$400 pet deposit since no pet lives there and the return of the last month's rent. A years' rent for three days occupancy is unconscionable as a matter of law and fact. Real Property Law § 235-c; *Knudsen v. Lax*, 17 Misc.2d 350 (Watertown City Court, 2007). Judgment to Plaintiff for \$1,170.

N.Y.City Ct.,2009.

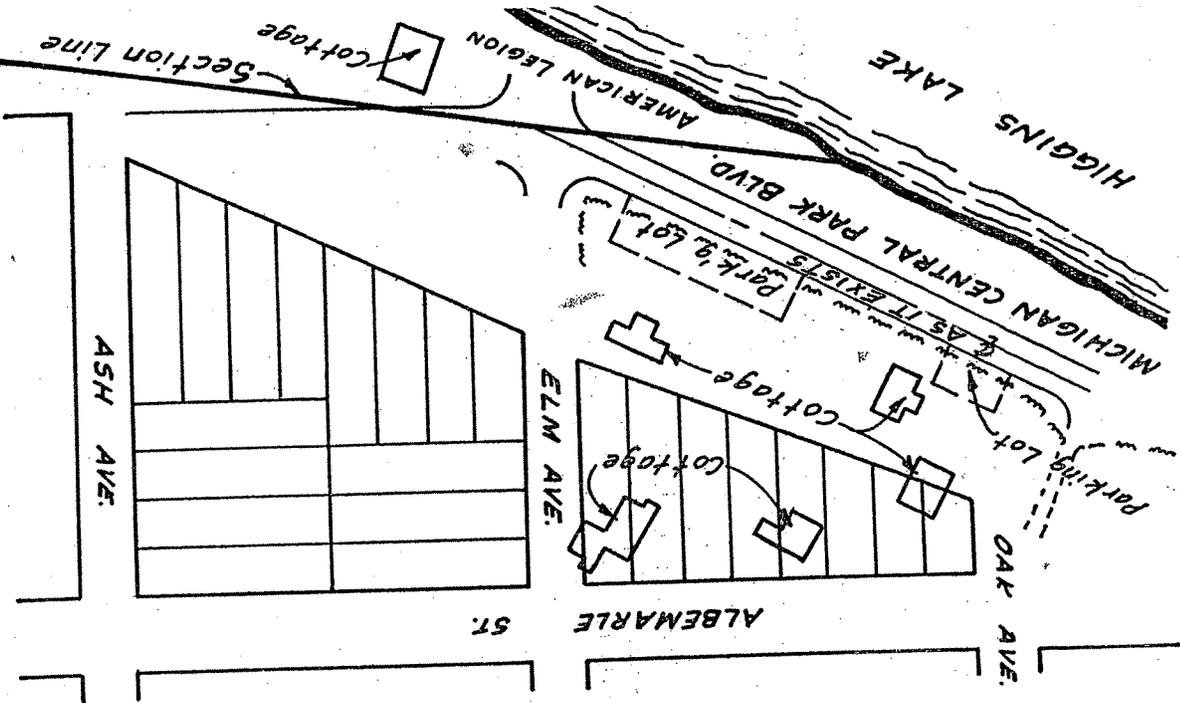
Jonassen v. Kirtland

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(N.Y.City Ct.), 2009 N.Y. Slip Op. 51838(U)

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1966] MICH. CENT. PARK ASSN. v. ROSCOMMON. 195
OPINION OF THE COURT.

and streets in the Michigan Central Park subdivisions and along the shore of the lake showed an irregular strip of shoreline as "Michigan Central Park Boulevard". The plats designated that all streets and alleys in the subdivisions concerned were dedicated to public use.

Down through the years, until the 1950's, there was no development made by the Roscommon county road commission of Michigan Central Park Boulevard. In some places, the area was wooded down to the lake. In 1953, the defendant Roscommon county road commission came in and cleared land on Michigan Central Park boulevard between Oak and Elm streets, two streets which ran to the lake. This was not graded or graveled, but apparently there was some vehicular traffic. There is evidence in the record that protest was made at that time of the traffic. There is also evidence in the record that other parts of Michigan Central Park boulevard, in the same subdivision, have been developed by the abutting owners as lawns down to the water's edge. Furthermore, in the area between Oak and Elm streets, and within the boulevard as surveyed and platted, there have been cottages built. This has also occurred in other areas.

Referring to the 1953 clearing by the road commission, the testimony shows that the public generally started coming down into the area after the clearing.

In 1957, a chancery action was started which preceded and ties in with this case. In it, the plaintiffs sought a temporary and permanent injunction against defendant Roscommon county road commission on the theory that the dedication of the boulevard to public use had been abandoned.

In July, 1958, a decree was filed by the Roscommon county circuit court which dismissed the bill of com-

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Albion Ave

White Avenue

Myrtle Avenue

Lewis Avenue

Michigan Central Park Boulevard

State of Michigan }
County of Macomb }
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with the original ...
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of the ...

It appears

James H. ...

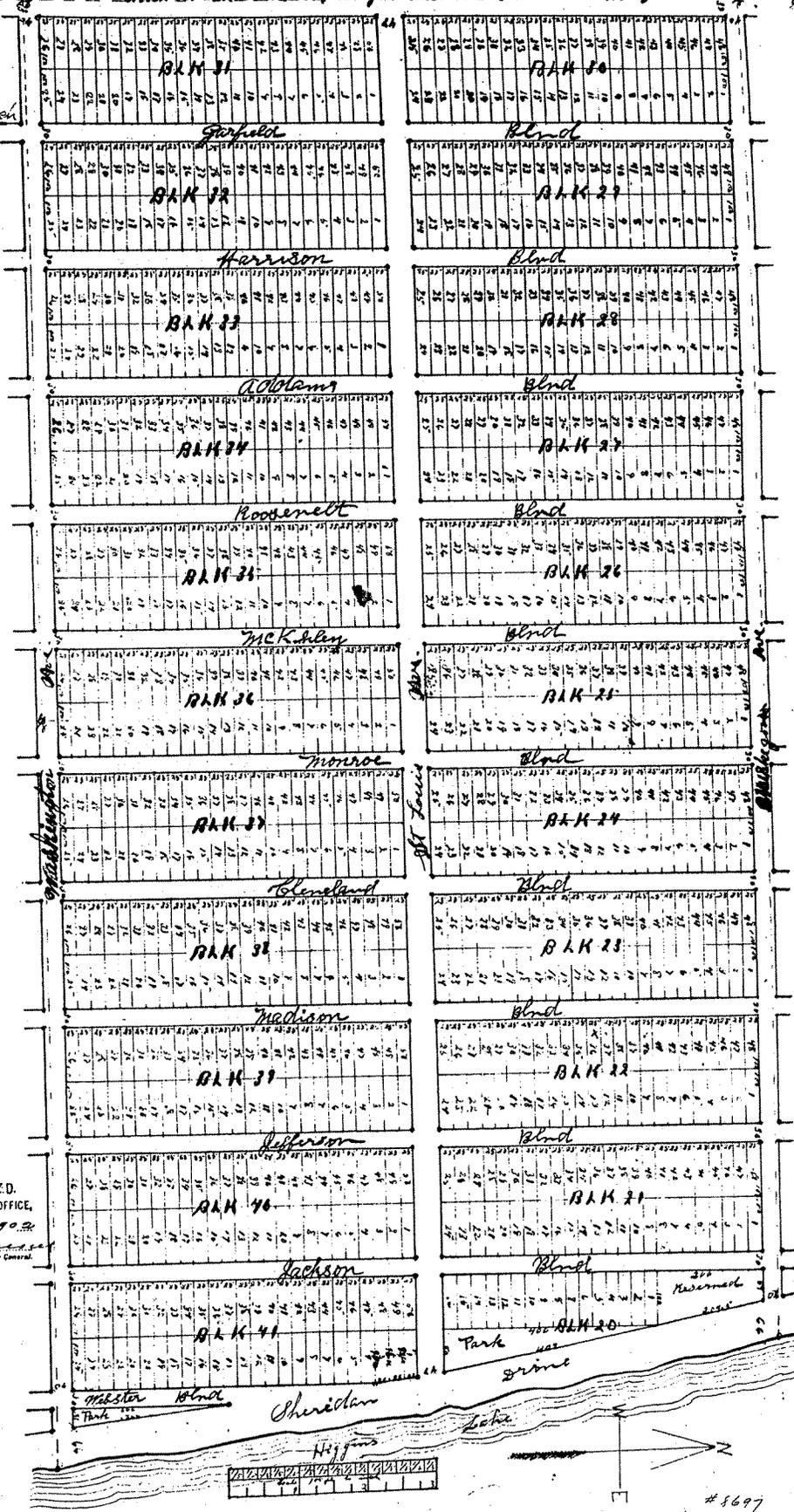
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A. C. Thompson

D

SHEET NO TWO
OF
WOODLAWN
Reasons for Mich

North on the Line Bet. Houghton Blvd. Sec 22x30 = 1200 feet



RECEIVED AND FILED
IN AUDITOR GENERAL'S OFFICE,
March 14 1902
C. W. ...
Deputy Auditor General.

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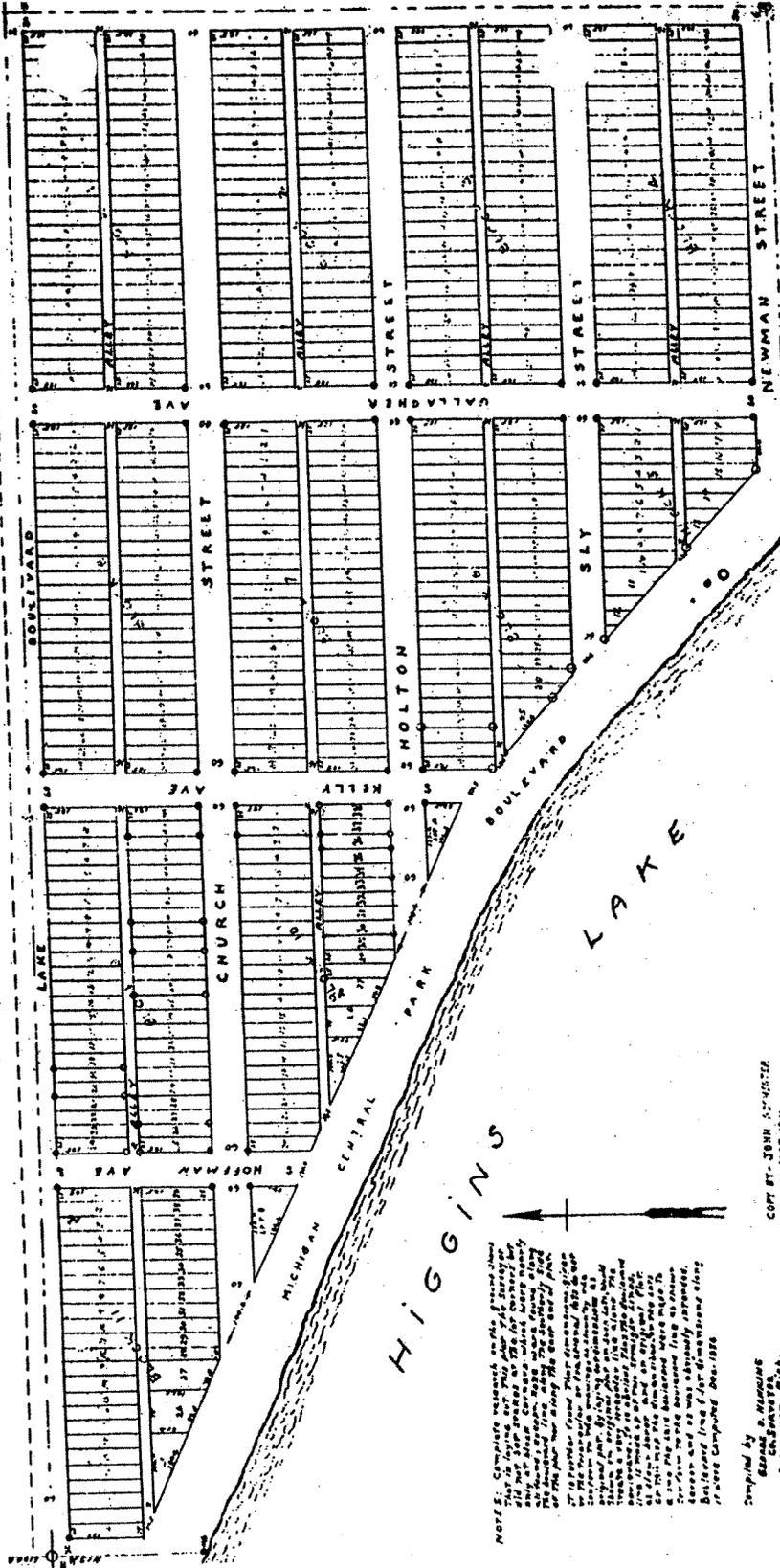
FIRST ADDITION MICHIGAN CENTRAL PARK

GOV'T. LOTS 5 & 6, SEC. 16, T24N R3W
GERRISH TOWNSHIP, ROSCOMMON COUNTY, MICHIGAN

SCALE 1"=100'

PLANTER - *George A. Williams*
SURVEYOR - *A. L. Newman*
MONUMENTATION - *Henry Adams* at all four corners.

Legend - Solid circles indicate original corner stakes found and further proved with 1/4" iron bars since 1898.
Open circles indicate original corner stakes found and further proved with 1/4" iron bars since 1898.
Dashed lines indicate original survey lines for various corners made in 1898 from bars since 1898.



NOTE: Complete record of the survey shown on this plat was made by the original surveyor, George A. Williams, in 1898. The original plat was filed in the office of the Register of Deeds for Roscommon County, Michigan, on the 15th day of August, 1898. The original plat was filed in the office of the Register of Deeds for Roscommon County, Michigan, on the 15th day of August, 1898. The original plat was filed in the office of the Register of Deeds for Roscommon County, Michigan, on the 15th day of August, 1898.

Prepared by
George A. Newman
Assistant, R.D.S.

COPY BY JOHN S. JONES
1925, 1928

5017

First Addition.
Michigan Central Park.
Provisional Co. Michigan.

Know all men by these Presents that as Proprietors have caused the land embraced in the Annexed Plot to be conveyed to the first addition to the Michigan Central Park on Higgins Lake and that the streets and allies as shown on said Plot are hereby dedicated to the use of the Public

In Presence of
In blackman
Emma Cinek
State of Illinois
County of Cook

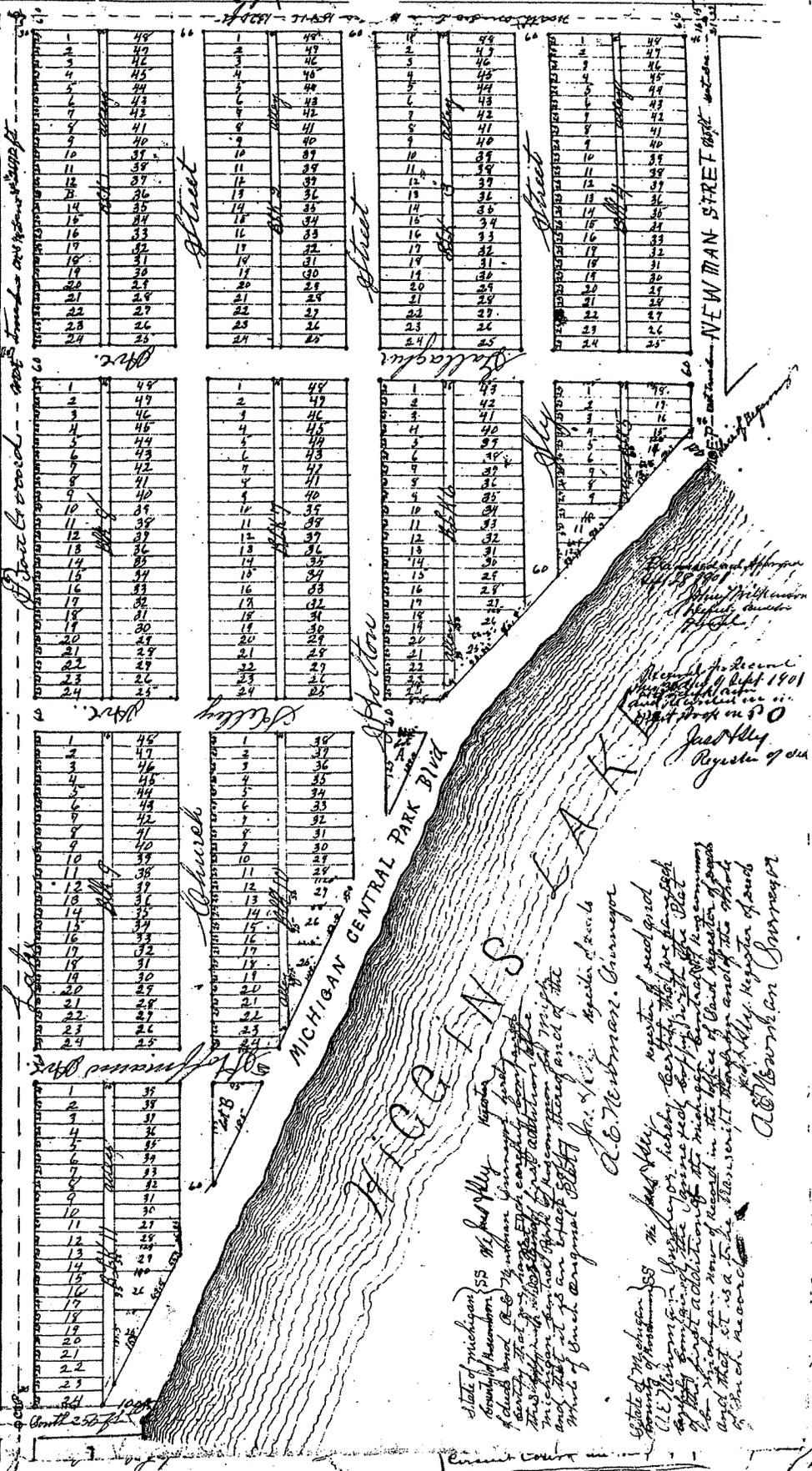
On this 28 day of August 1901 before me the Notary Public in and for said County Personally came the above named Edward P. Williams known to me to be the Person who executed the above Deed and acknowledge the same to be their free act & deed
Robert H. Smith
Notary Public

Description of Land Plotted
The land embraced in the annexed Plot of the first addition to the Michigan Central Park of Macomb Co Michigan is described as follows:
Commencing at the meander post on the east side Higgins Lake between Sec 16 & 21 Town of Macomb marked thus o then running east on Section line. Sec 16 & 21 = 880 feet to cor Sec 16 & 21 & 22 thence north on Sec line to Sec 16 & 16 = 1320 ft to S 1/4 22nd line West on S 1/4 line Sec 16 = 2640 ft to South 1/4 Post on north and South 1/4 line. Thence South on 1/4 line 255 feet to meander post on east Higgins Lake. Thence Southeast along the east side Higgins Lake on meander line 2175 feet to the place of beginning

Surveyors Certificate
I hereby certify that the Plot herein delineated is a lot or lots and that permanent monuments consisting of heavy cedar posts have been placed at points marked thus o as thereon shown at all angles on the boundary of the land Plotted and at all intersection of streets and allies

A. E. Newman
Surveyor

RECEIVED AND FILED.
IN AUDITOR GENERAL'S OFFICE,
September 6, 1901



State of Michigan
County of Macomb
I, J. H. Kelly, Notary Public in and for said County do hereby certify that the above described land is the property of the Michigan Central Park Co. and that it is a lot or lots and that it is a free act & deed of the said Michigan Central Park Co. and that it is a lot or lots and that it is a free act & deed of the said Michigan Central Park Co.

A. E. Newman, Surveyor

J. H. Kelly, Notary Public

G

GILBERT'S ADDITION, TO, BASS LAKE PARK.

KNOW ALL MEN BY THESE PRESENTS That as Wallace B Gilbert, proprietor of Anna M Gilbert his wife have caused the land embraced in the annexed Plat to be surveyed, laid out, & plotted, to be known as Gilbert's Addition to Bass Lake Park, & that no street is shown on said plat are hereby dedicated to the use of the Public, on this 19th day of May A.D. 1896
 W. B. Gilbert
 Anna M Gilbert
 John M. Winter.

STATE OF ILLINOIS } ss. On this 19th day of May A.D. 1896 before me John Price
 COUNTY OF COOK } a Notary Public in and for said County,
 personally appeared the above named Anna M Gilbert wife of Wallace B Gilbert personally known to me to be the person who executed the above dedication & acknowledged the same to be her free act & deed,
 John Price
 Notary Public

STATE OF MICHIGAN } ss. On this 18th day of May A.D. 1896 before me F. O. Gardner,
 COUNTY OF OCEANA } a Notary Public in and for said County, personally appeared the above named Wallace B Gilbert who is personally known to me to be the person who executed the above dedication & acknowledged the same to be his free act & deed.
 F. O. Gardner
 Notary Public for Wagon Co Mich

The land embraced in the annexed Plat of Gilbert's Addition to Bass Lake Park is described as follows, viz: Sec 26 T. 17. S. R. 18. W.

I hereby certify that the Plat herein delineated is a correct one, & that permanent monuments consisting of pieces of stone the size of a brick have been planted at points marked thereon & as shown shown at all angles in the boundaries of the land plotted, & at all intersections of streets.

H. A. Grant
 Surveyor.

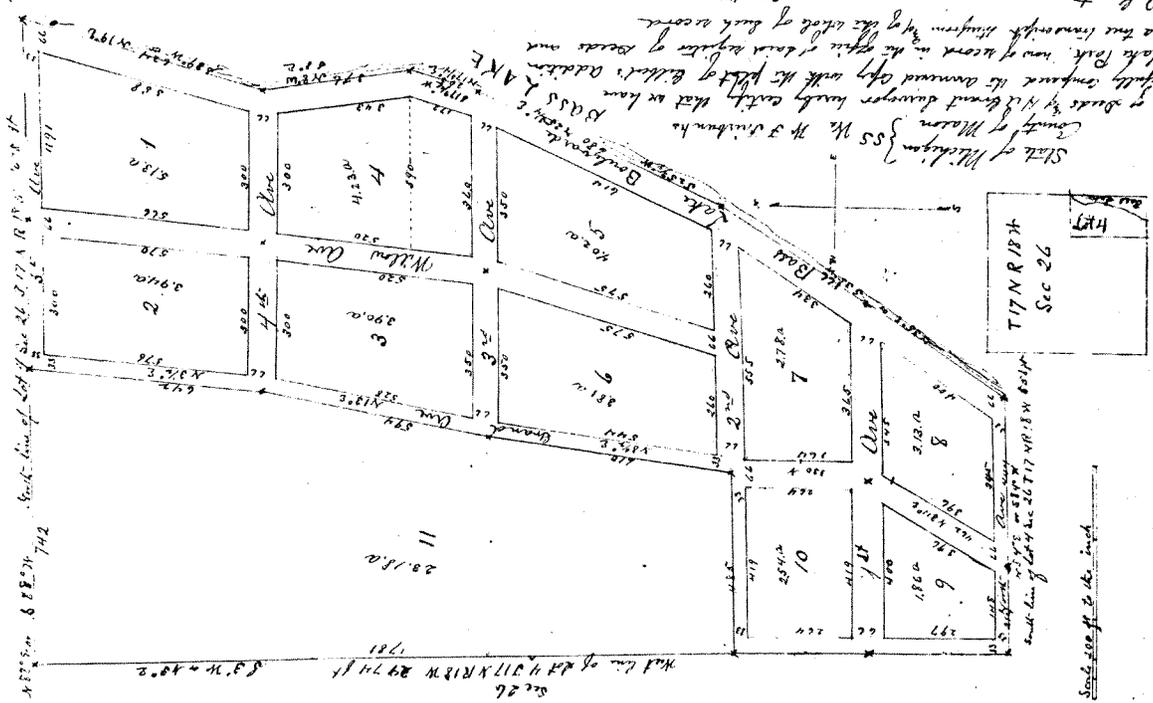
RECEIVED AND FILED
 IN AUDITOR GENERAL'S OFFICE
 June 10 1896
 J. B. Slinger
 Deputy Auditor General

State of Michigan } ss
 County of Mason }

Wm. H. Fairbanks (Surveyor of this and W. A. Lane's) Surveyor herein certify that we have had carefully compared this plat with the original plat of plat of Gilbert's Addition to Bass Lake Park that it is an exact copy thereof and of the whole of said original map on file.

H. A. Grant
 Surveyor

Examined and Approved
 June 13 1896
 J. B. Slinger
 Deputy Auditor General



MEASUREMENTS MADE BY
 JOHN WINTER
 Surveyor
 June 10 1896
 In the presence of
 J. B. Slinger
 Auditor General

6196

H

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHY A. OLIVER REVOCABLE
TRUST, by and through DOROTHY A.
OLIVER, Trustee,

Plaintiff-Appellant,

v

DENTON TOWNSHIP, ROSCOMMON
COUNTY ROAD COMMISSION,
ROSCOMMON COUNTY, DEPARTMENT OF
TREASURY, and DEPARTMENT OF
TRANSPORTATION,

and

Defendants-Appellees,

and

EARL WEBB, JOYCE WEBB, EARL C.
WEBB, JR., LAURA DUNSTAN, EDWARD
POSTOR, CHRISTOPHER LOESSER,
JILLAIN LOESSER, RICHARD GLESER,
DNJ ASSOCIATES, GERALD F. JANUZZI,
DIANE L. BOEHMER, TRAVERSE BAY
WOOLEN COMPANY, ROBERT SHEA,
LAURA J. SHEA, DOLORES W. JOHNSON,
JOSEPH L. SMITH, EAST BAY
DEVELOPMENT, KONNIE MCWILLIAMS,
JAMES L. MCWILLIAMS, DOROTHY M.
HOOPER, DUANE L. HOOPER, DAVID F.
GRESHOW, IRENE BREYER SMITH, GALE
C. MILLER, JUDITH R. PAXSON, ALFRED R.
PAXSON, WILLIAM L. HAMMOND,
WILLIAM F. MURRAY, FREDERICK K.
ULRICH, JON R. NUGENT, PATRICIA
ULRICH, WALTER L. LAMASTERS, D. J.
FOWLER, TERESA A. SPEARS, GERALD C.
TOMASEK, HELEN M. TOMASEK, DENISE
GLESSER, ROSCOMMON COUNTY DRAIN
COMMISSION,

UNPUBLISHED
August 13, 2002

No. 230765
Roscommon Circuit Court
LC No. 95-006890

Defendants,

and

D. J. FOWLER,

Third-Party Plaintiff,

v

DENTON TOWNSHIP, ROSCOMMON
COUNTY ROAD COMMISSION,
DEPARTMENT OF TREASURY,
DEPARTMENT OF TRANSPORTATION,
JUDITH R. PAXSON, ALFRED R. PAXSON,
JON R. NUGENT, WALTER L. LAMASTERS,
TERESA A. SPEARS, ROSCOMMON
COUNTY DRAIN COMMISSION, MICHELE
RESSA, DON RESSA, KRONNER
PHARMACY, GWENDOLYN SCHMALTZ,
ROBERTA BARAN, KING VENTURES, INC.,
WALTER MAIKE, SHERRIE DEMARCO,
LAWRANCE DEMARCO, ELDA E. STRATY,
JULIA E. DOULES, LAKESIDE
DEVELOPMENT, NBD BANK, NA, GEORGE
PAPPAS, ROBERT L. BRITTON, STANDARD
FEDERAL BANK, DAWN CARTER, ROY
RATHKA, DONALD SCHMALTZ, JULIE
ROULO, NEAL CARTER, and BETTY
RATHKA,

Third-Party Defendants.

Before: Murray, P.J., and Murphy and Kelly, JJ

PER CURIAM.

Plaintiff appeals as of right, following a bench trial, from a judgment denying plaintiff's request that portions of Outlot A, adjacent to parcels owned by plaintiff and located in the plat of Idlewild Resort on the south shore of Houghton Lake, be vacated with title being quieted in plaintiff's favor. Plaintiff also appeals the denial of its alternative request that the trial court

recognize plaintiff's riparian rights in the subaqueous lands of Houghton Lake adjacent to the relevant portions of Outlot A.¹ We affirm in part and reverse in part.

I. BASIC FACTS

We initially note that our review of the chain of title and history regarding Outlot A is somewhat limited because, although the parties cite to numerous facts and documents concerning the lot's history, the parties, inexplicably, did not place many of those facts and documents into evidence at trial. We additionally note that the trial court's ruling regarding Outlot A related to plaintiff's lots 187, 206, 228, and 252; however, plaintiff's appellate argument, as to both issues presented, only concerns lots 187 and 206, and our review will be so limited.

Plaintiff owns various lots in the Idlewild Resort Subdivision, which was platted in 1920. Outlot A, an arcing strip of land within the subdivision, lies directly between the lots at issue and the shore of Houghton Lake. Therefore, in order for plaintiff to directly access the lake from the lots, it is necessary to first pass over Outlot A.

The 1920 plat does not make any reference to a dedication by the developers of Outlot A, and the parties are in agreement that no dedication was made at that time with ownership of Outlot A being retained by the developers. From 1920 through 1936, Outlot A was allegedly transferred and mortgaged by several persons and entities; however, no evidence concerning these transactions was presented at trial, and we find it unnecessary to consider these transactions for purposes of our analysis. The record does include a 1936 quitclaim deed concerning, in part, Outlot A, which was prepared and executed pursuant to a circuit court order, and which indicated that the State Bank of Beaverton, by Ira Early, receiver, transferred any interests in the lot to the public for public purposes only. The quitclaim deed also indicated that all of the property transferred was only to be used for roads and a playground. The parties agree that the 1936 quitclaim deed concerned the relevant portions of Outlot A; however, plaintiff asserts that the deed was a dedication subject to acceptance, and defendants assert that it was not a dedication but simply a conveyance of a fee not subject to acceptance.

Although there is no direct evidence reflected in the trial record, apparently lots 187 and 206 were purchased by William Oliver, the husband of Dorothy Oliver, from the estate of Marian E. Vanderberg in 1978. The Olivers' son, William Oliver, II [hereinafter "Oliver"], testified that he lived in Houghton Lake since moving there with his family in 1967.² Oliver

¹ Plaintiff also sought to vacate and obtain quiet title in various roads in the plat, and there was a third-party complaint which concerned an attempt to vacate other portions of Outlot A; however, those matters are not before us. We also note that ownership of the relevant parcels of property is held by the Dorothy Oliver Revocable Trust, and that the trustee, Dorothy Oliver, based on the testimony of her son, died in 1992, which is three years before the instant litigation was filed. We cannot ascertain why or how the lawsuit was brought through Dorothy Oliver, but defendants apparently did not address the matter, and neither will this Court.

² The record is not clear whether Oliver's reference to "family" included his father and his mother, although that would appear to be the case. Additionally, we infer from the evidence that the Oliver family owned other lots in the subdivision commencing in 1967 but not lots 187 and 206.

further testified that located on Outlot A adjacent to lots 187 and 206 were a log cabin, a boathouse, a framed cottage, and a shed. Oliver asserted that those structures had been there since he moved to Houghton Lake in 1967, and that the structures appeared old in 1967, requiring repairs and maintenance. Oliver also testified that the relevant portions of Outlot A had suffered serious erosion that destroyed a seawall, that several trees were tipping towards the water because of the erosion, that he personally had several trees removed that had fallen in the water, that the county refused to remove any of the trees as requested, that he had never seen anyone maintain the area other than his family, and that he had never seen the general public use the area in the thirty-three years he lived in Houghton Lake.

Carl Gieger, a county commissioner, testified that when he was a youth, roughly from the late 1940s through the 1950s, he and other youths would use all of Outlot A for swimming and boating, and that no one forced them off the area. Gieger acknowledged on cross-examination that he could not specifically identify that portion of Outlot A adjacent to lots 187 and 206 as a place where he played as a youth, and that the area was much less populated at the time.

Gieger also testified that Outlot A was used extensively over which to transport equipment during a sewer project undertaken in Denton Township in the early 1970s, although, he had no knowledge of sewer lines actually being located on Outlot A. Gieger could not specifically state that equipment was ever placed on, or transported over, Outlot A adjacent to lots 187 and 206, and he admitted that said area was almost all trees.

Bill Faino, Denton Township supervisor, testified that most of the owners of lots along Outlot A had their own boat hoists, seawalls, docks, and boats, and that the township had not taken any action to stop such use. Faino's reference to a swimming beach maintained by the township is located in Outlot B.

In 1973, Marian VanderBerg, the owner of lots 187 and 206 at the time, commenced a lawsuit regarding those portions of Outlot A adjacent to the lots, naming the county and the township, among others, as the defendants. *VanderBerg v Johnson*, Roscommon Circuit Court, Docket No. 73-1225-CX. In 1975, a consent judgment was entered pursuant to which the relevant portions of Outlot A were to be held by VanderBerg and her assigns as essentially a leasehold estate for thirty-five years with legal title and the remainderman's interest after the estate expired being confirmed in the county and held in trust for the general public.

Pursuant to a warranty deed dated March 3, 1989, William and Dorothy Oliver transferred the lots at issue to the Dorothy Oliver Revocable Trust.

II. TRIAL COURT'S RULING

The trial court found that Outlot A had not been dedicated when the subdivision was platted in 1920, and that the fee ownership, therefore, was retained by the developers. The court further found that the 1936 quitclaim deed arising out of the receivership was not a dedication subject to acceptance, but rather a conveyance granting ownership of Outlot A to Roscommon County with the property being held in trust by the county for public purposes. The trial court ruled that the 1975 consent judgment entered in *VanderBerg v Johnson* confirmed the county's ownership, and although not res judicata for purposes of the present action, the county's participation in the case negated any possible claim that Outlot A had not been accepted by the

county. The court concluded that Roscommon County owned the relevant portions of Outlot A, and because the county was against vacating Outlot A, plaintiff's request for relief was denied.

Regarding riparian rights in the subaqueous lands of Houghton Lake adjacent to the relevant portions of Outlot A, the trial court ruled that the county owned Outlot A adjacent to lots 187 and 206 in fee simple; therefore, the county held any riparian rights. The court stated that if Outlot A was not a lot but a street or a boulevard, plaintiff's lots would be riparian under the law.

III. ANALYSIS AND CONCLUSION

Standard of Review

Equitable decisions are reviewed de novo. *Mitchell v Dahlberg*, 215 Mich App 718, 727; 440 NW2d 84 (1996). This Court reviews a trial court's findings of fact in a bench trial for clear error, and the court's conclusions of law are reviewed de novo. MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A finding is clearly erroneous where although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). An appellate court will give deference to the trial court's superior ability to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Rellinger v Bremmeyr*, 180 Mich App 661, 665; 448 NW2d 49 (1989).

Legal Rights in Relevant Portions of Outlot A

We find it unnecessary to address the arguments concerning the law of dedication and acceptance because the doctrine of res judicata barred plaintiff's request that the portion of Outlot A adjacent to lots 187 and 206 be vacated.

The applicability of res judicata is a question of law that is reviewed de novo. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001). "Res judicata bars relitigation of claims that are based on the same transaction or events as a prior suit." *Id.* at 577. Res judicata is applicable when (1) the prior action was decided on the merits, (2) the decree in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first. *Id.* at 576. Res judicata applies to consent judgments entered after a settlement. *Id.*³

Here, the 1975 consent judgment established legal title to the relevant portion of Outlot A in the county, while providing VanderBerg and her assigns with a leasehold estate for thirty-five years. *VanderBerg v Johnson*, Roscommon Circuit Court, Docket No. 73-1225-CX. Plaintiff is clearly a privy of VanderBerg after VanderBerg's estate conveyed lots 187 and 206 to William and Dorothy Oliver with the lots being subsequently transferred to the revocable trust. The 1973

³ In *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991), this Court stated that "[r]es judicata applies to default judgments and consent judgments as well as to judgments derived from contested trials." Citing *In re Cook Estate*, 155 Mich App 604, 609; 400 NW2d 695 (1986).

litigation involved the property interests in Outlot A adjacent to lots 187 and 206, and plaintiff could not relitigate the matter under the doctrine of res judicata. We affirm the trial court's judgment regarding the request to vacate the relevant portion of Outlot A, albeit for different reasons. *Gray v Pann*, 203 Mich App 461, 464; 513 NW2d 154 (1994).

Riparian Rights in the Subaqueous Lands of Houghton Lake

In the alternative, plaintiff requested that the trial court recognize plaintiff's riparian rights in the subaqueous lands of Houghton Lake adjacent to the relevant portions of Outlot A. As noted above, the trial court ruled that the riparian rights belonged to the county as the fee simple owner of Outlot A. We disagree.

In *McCardel v Smolen*, 71 Mich App 560, 562; 250 NW2d 496 (1976), aff'd in part and vacated in part, 404 Mich 89; 273 NW2d 3 (1978), this Court, addressing a dispute between the owners of front lots and back lots in a subdivision located on Higgins Lake, was presented with the following facts:

Lots in the subdivision are separated from the waters of Higgins Lake by a strip of land designated on the plat as Michigan Central Park Boulevard. The boulevard was dedicated to the county, ostensibly as a public street. But the "boulevard" is actually nothing more than undeveloped beach property. We are asked to decide who owns the riparian rights in the boulevard frontage and to define those rights.

Roscommon County had a fee simple interest in the strip of land, and this Court held that the plaintiffs, owners of the lots directly abutting the "boulevard," held the riparian rights. *Id.* at 564. The determination that the plaintiffs held the riparian rights was not reviewed by our Supreme Court on leave granted. 404 Mich at 94-95.

Here, Outlot A, deeded to the public for public use, was to be used for roads or a playground based on the language of the 1936 quitclaim deed, but like the facts in *McCardel*, the property is essentially undeveloped beach property.⁴ Accordingly, plaintiff holds the riparian rights to the lake frontage. However, it was made abundantly clear in the Supreme Court's review on leave granted of this Court's decision in *McCardel*, that the right of the public to

⁴ In *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm'n*, 236 Mich App 546, 554; 600 NW2d 698 (1999), this Court stated that a valid common-law dedication of land for public purposes requires (1) an intent by the owners of the property to offer land for public use, (2) an acceptance of the offer by public officials and maintenance of the road by public officials, and (3) general use by the public. We find that the 1936 quitclaim receivership deed was a common-law dedication. Although the 1936 deed was not the typical mechanism of dedicating property contained within a plat, nor done at the time the subdivision was platted, the deed constituted a dedication indicating an intent to offer private land for public use. To find that the deed was not subject to the law of dedication and acceptance would contravene the fundamental principle that private property cannot be forced on a public authority without its consent. *Kraus v Dep't of Commerce*, 451 Mich 420, 429; 547 NW2d 870 (1996).

access a lake from a public way is to be determined by the scope of the dedication. 404 Mich 97-101. The Supreme Court held that the ownership of riparian rights in lakefront property did not necessarily preclude access by the public to the lake by means of the property at the water's edge, which property was dedicated to public use, and that the scope of the dedication controlled the rights of the public to enter and leave the water. 404 Mich at 101-103.

Because there is presently no issue before us regarding the scope of the dedication as made through the 1936 quitclaim deed, and because there is no dispute as to the actual use of plaintiff's riparian rights, it is unnecessary to determine the rights of the public in the use of the lakefront in Outlot A adjacent to lots 187 and 206, and we simply hold that plaintiff does hold riparian rights as owner of those lots.

Affirmed in part and reversed in part.

/s/ Christopher M. Murray

/s/ William B. Murphy

/s/ Kirsten Frank Kelly

I

SUNSET SHORES

A SUBDIVISION SITUATED IN THE NORTHWEST FRACTIONAL 1/4 OF SECTION 16, TOWN 6 SOUTH, RANGE 12 WEST, FABIUS TOWNSHIP, ST. JOSEPH COUNTY, MICHIGAN.

DEDICATION

KNOW ALL MEN BY THESE PRESENTS, THAT WE, ERNEST STOLT, A SINGLE MAN, ALBERTA BROOKS, A MARRIED WOMAN, AND EDITH JOKS, A MARRIED WOMAN, ALL AS PROPRIETORS HAVE CAUSED THE LAND EMPRACED IN THE ANNEXED PART TO BE SURVEYED, Laid OUT, AND PLATTED, TO BE KNOWN AS SUNSET SHORES A SUBDIVISION SITUATED IN THE NORTHWEST FRACTIONAL 1/4 OF SECTION 16, TOWNSHIP 6 SOUTH, RANGE 12 WEST, FABIUS TOWNSHIP, ST. JOSEPH COUNTY, MICHIGAN, AND THAT PART OF SUNSET SHORES DRIVE AND THAT PART OF STOLT ROAD WITHIN THE BOUNDARIES OF SAID PLAT ARE HEREBY DEDICATED TO THE USE OF THE PUBLIC. PLEASANT SHORE LANE IS HEREBY DEDICATED TO THE LOT OWNERS WITHIN SAID PLAT, LOT 12 AND LOTS 14 THROUGH 30, INCLUSIVE, RUN TO THE WATERS EDGE.

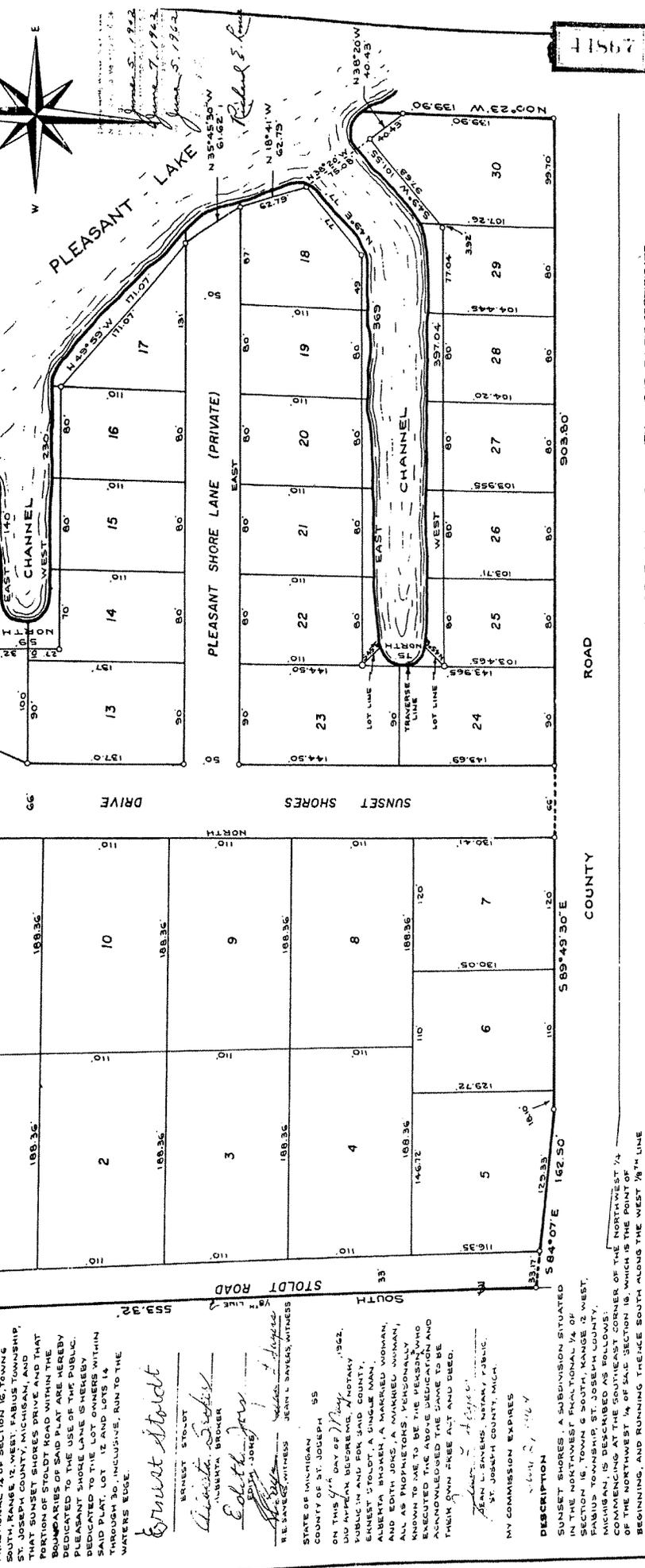
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Ernest Stolt

Alberta Brooks
Alberta Brooks

Edith Joks
Edith Joks

John L. Savers
John L. Savers, Notary Public

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CERTIFICATE OF APPROVAL BY COUNTY ROAD COMMISSION
 THIS PLAT WAS EXAMINED AND APPROVED AT A REGULAR MEETING OF THE ST. JOSEPH COUNTY ROAD COMMISSION HELD *May 24* 1962.

CERTIFICATE OF APPROVAL BY COUNTY PLAT BOARD
 THIS PLAT WAS APPROVED BY THE ST. JOSEPH COUNTY PLAT BOARD AT A MEETING HELD *May 27th* 1962.

CERTIFICATE OF MUNICIPAL APPROVAL
 THIS PLAT WAS APPROVED BY THE TOWNSHIP BOARD OF THE FABIUS TOWNSHIP, ST. JOSEPH COUNTY, MICHIGAN, AT A MEETING HELD *May 27th* 1962.

SURVEYOR'S CERTIFICATE
 I HEREBY CERTIFY THAT THE PLAT HEREON PLANNED IS A CORRECT ONE AND THAT PERMANENT METAL MONUMENTS CONSISTING OF BARS NOT LESS THAN ONE HALF INCH IN DIAMETER AND 36 INCHES IN LENGTH, ENCASED IN A CONCRETE CYLINDER AT LEAST A INCHES IN DIAMETER AND 36 INCHES IN DEPTH, HAVE BEEN PLACED AT ALL POINTS MARKED BOUNDARY OF THE LAND PLATTED, AT ALL THE INTERSECTIONS OF STREETS, AND AT THE INTERSECTIONS OF STREETS WITH THE BOUNDARY OF THE PLAT AS SHOWN ON SAID PLAT.

TAX CERTIFICATE
 I HEREBY CERTIFY THAT THERE ARE NO TAX LIENS OR TITLES ON THE LAND DESCRIBED HEREON, AND THAT THERE ARE NO TAX LIENS OR TITLES HELD BY INDIVIDUALS ON THE SAID LANDS FOR THE FIVE YEARS PRECEDING THE DATE OF THIS CERTIFICATE.

NOTARY PUBLIC
 JOHN L. SAVERS, NOTARY PUBLIC
 ST. JOSEPH COUNTY, MICH.

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