

IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO

STATE ex rel. ROBERT MERRILL, TRUSTEE <i>et al.</i>	)	CASE NO. 04CV001080
	)	
Plaintiffs-Relators	)	JUDGE EUGENE A. LUCCI
	)	
and	)	
	)	
HOMER S. TAFT <i>et al.</i>	)	
	)	
Intervening Plaintiffs	)	
and Plaintiffs-Relators, Pro Se	)	
	)	
vs.	)	
	)	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES <i>et al.</i>	)	
	)	
Defendants-Respondents	)	
and Counterclaimants	)	
	)	
and	)	
	)	
NATIONAL WILDLIFE FEDERATION <i>et al.</i>	)	
	)	
Intervening Defendants	)	
and Counterclaimants	)	
	)	

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NATIONAL WILDLIFE FEDERATION *et al.*'s RESPONSE TO  
PLAINTIFF OLG'S RENEWED AND SUPPLEMENTED  
MOTION FOR FEES

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INTRODUCTION

Plaintiffs (collectively "OLG") are misguided in asserting that they are the prevailing parties in this case. OLG is not a prevailing party, because it did not prevail on the primary substantive issue and therefore cannot obtain the relief it has sought.

The Ohio Supreme Court held that the natural shoreline, which is the line at which the water usually stands when free from disturbing causes, is the boundary between private property and the public trust in Lake Erie within the State of Ohio. *State ex rel. Merrill v. Ohio Dept. of Natural Resources* (“*Merrill III*”), 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, paragraph three of the syllabus, ¶¶4, 63. In so holding, the Supreme Court reversed the rulings of the Court of Appeals and this Court, making OLG ineligible for the relief it has sought. Consequently, OLG is not a prevailing party.

### ARGUMENT

#### **I. The Primary Substantive Issue In This Case Is The Location Of The Boundary Between The Territory Of Lake Erie Held In Public Trust And Private Property**

Whether a party prevails in litigation depends on how it fares on the issues in dispute, making the identification of those issues the first step in the analysis of entitlement to attorney fees. This case presented one primary substantive issue, which has been the same in this Court, the Court of Appeals, and the Supreme Court: the location of the boundary between the territory of Lake Erie held in public trust and private property upland of the territory.

This Court identified the issue as the primary issue of three issues common to the class: “What constitutes the furthest landward boundary of the ‘territory’ of Lake Erie as that term appears in R.C. 1506.10 and 1506.11.” *State ex rel. Merrill v. Ohio Dept. of Natural Resources* (“*Merrill I*”), Lake C.P. No. 04CV001080 (June 9, 2006) (order certifying class action at ¶4).<sup>1</sup> The Court of Appeals followed suit, beginning its opinion by stating “[t]he issue before us in this case is one of first impression, concerning title to lands below the ordinary high water mark of Lake Erie,” and ending it by holding “the waters and submerged bed of Lake Erie when under such waters is controlled by the state and held in public trust, while the littoral owner takes fee only to the water’s edge.” *State ex rel. Merrill v. Ohio Dept. of Natural Resources* (“*Merrill II*”), 11th Dist. No. 2008-L-0007, 2009-Ohio-4256, ¶1, 129.

Lastly, the Supreme Court “was asked to resolve \*\*\* whether the appellate court identified the proper boundary between property abutting Lake Erie owned by private individuals and the territory of Lake Erie held in trust by the state for all Ohioans.” *Merrill III* at ¶1. The Supreme Court reiterated that “[t]he substantive issue for our resolution concerns the territory of the public trust.” *Id.* at ¶46.

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<sup>1</sup> The other two issues common to the class were dependent upon and, therefore, subsidiary to this issue.

The courts have thus uniformly identified the boundary of the territory of the public trust in Lake Erie as the substantive issue in this case. Accordingly, the resolution of this issue by the Supreme Court is determinative of whether OLG is the prevailing party, and the high court's decision against OLG's position means it is not the prevailing party.

**II. The Supreme Court's Ruling On The Substantive Issue In This Case Is Determinative of Whether OLG Is The Prevailing Party**

Since the Supreme Court addressed and finally resolved the same issue that was before this Court and the Court of Appeals, this Court must look to the Supreme Court's holding on the issue in determining whether OLG is the prevailing party. Contrary to OLG's arguments, the holdings of this Court and the Court of Appeals on the issue are not relevant in making that determination. This is so because, as explained in the next section, the Supreme Court rejected the previous holdings on the location of the boundary of the territory of Lake Erie held in public trust.

A decision by the U.S. Court of Appeals for the Seventh Circuit is instructive. In that case, the court held that a plaintiff who receives the relief it requested from a trial court, but later has its judgment reversed by a court of appeals, is no longer a prevailing party and therefore is not entitled to attorney fees under the federal Equal Access to Justice Act. *Alliance to End Repression v. City of Chicago*, 119 F.3d 472, 477 (7th Cir. 1997). In *Alliance to End Repression*, the plaintiff brought an action against the FBI for unlawful infiltration, surveillance, and harassment in violation of a prior consent decree entered in favor of the plaintiff. *Id.* at 472. The district judge found in favor of the plaintiff and ordered the plaintiff's requested relief. *Id.* at 474. The court of appeals ultimately reversed the district court's ruling in favor of the defendant and remanded the case to the district court for an analysis under a newly-articulated standard. *Id.* at 477. As a result, the court of appeals vacated the previous award of attorney's fees because the plaintiff ceased to be the prevailing party. *Id.* at 477.

Similarly, although OLG may have received favorable rulings from this Court and the Court of Appeals, the Supreme Court's reversal of those rulings means OLG is not the prevailing party.

### **III. OLG Is Not The Prevailing Party In This Case.**

#### **A. The Supreme Court reversed the holdings of this Court and the Court of Appeals in OLG's favor on the substantive issue in this case**

The Supreme Court explicitly reversed both this Court and the Court of Appeals on the issue in this case, stating “we reverse [the Court of Appeals’] decision to affirm the trial court that the boundary of the public trust changes from moment to moment.” *Merrill III* at ¶65. The Supreme Court specifically stated that “[t]he boundary of the public trust does not \*\*\* change from moment to moment as the water rises and falls.” *Id.* at ¶57. The Supreme Court made these statements over the objection of OLG, who had claimed that the boundary “is the line at which the water meets the shore wherever that may be at any given time,” and who had urged the Supreme Court to affirm the Court of Appeals. *Id.* at ¶48.

The Supreme Court thus rejected the holdings that the boundary is the water’s edge, meaning the place where the water touches the land at any given time. *See Merrill II* at ¶250; *Merrill I* at ¶239. Rather than a moveable boundary determined by reference to the water’s edge, the Supreme Court held that the boundary is fixed at the natural shoreline: “the territory of Lake Erie, held in trust by the state of Ohio for the people of the state, extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes.” *Merrill III* at paragraph three of the syllabus, ¶¶4, 63.

#### **B. OLG cannot obtain the relief it requested in the First Amended Complaint**

Turning again for guidance to a decision construing a federal statute authorizing attorney fees, the U.S. Supreme Court has ruled that a civil rights plaintiff must “obtain at least some relief on the merits of his claim” to qualify as a prevailing party. *Farrar v. Hobby*, 506 U.S. 103, 111, 113 S.Ct. 566 (1992). In this case, OLG cannot obtain the relief it has sought. In the First Amended Complaint, OLG sought declaratory judgments relating to the boundary of the territory of Lake Erie. First, OLG requested a declaratory judgment that “Plaintiffs own fee title to the lands located between OHW [or the ordinary high-water mark] and the actual legal boundary of their properties, as defined by Ohio law (including the rules of accretion, avulsion, erosion and reliction), their deeds, and their original patent.” OLG First Am. Compl., Prayer for Relief, ¶2 (Jul. 2, 2004). Second, OLG requested a declaratory judgment that “The interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include non-submerged lands.” *Id.* Third, OLG requested a declaratory judgment that “Any current

submerged land lease between ODNR and any of Plaintiffs is declared void and invalid as to any land below OHW but owned by Plaintiffs.” *Id.*

The Supreme Court’s opinion necessitates a decisive rejection of these requests for relief. Not only did the Supreme Court hold that the boundary of the public trust in Lake Erie is constant, located at the natural shoreline, it re-affirmed that “[t]he littoral owners of the upland have no title beyond the natural shoreline; they have only the right of access and wharfing out to navigable waters.” *Merrill* at ¶62, quoting *State ex rel. Squire v. Cleveland*, 150 Ohio St. 303, 337, 82 N.E.2d 709 (1948).<sup>2</sup>

Taken together, these rulings mean that the OLG plaintiffs own fee title only to the natural shoreline, regardless of the boundaries described in their deeds or original patents, and that the public trust applies to lands below the natural shoreline, even when they are not actually covered by water.<sup>3</sup> This moots OLG’s request for a declaratory judgment that submerged land leases between the OLG plaintiffs and the Ohio Department of Natural Resources are void and invalid with respect to any land below the ordinary high-water mark.

Consequently, the OLG plaintiffs cannot obtain a declaratory judgment that they own fee title to the boundaries described in their deeds or original patents if those boundaries are lakeward of the natural shoreline. Nor can they obtain a declaratory judgment that the interest of the State as trustee over the public trust does not apply to or include “non-submerged” lands. Therefore, OLG is not a prevailing party.

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<sup>2</sup> The text of the Supreme Court’s opinion includes a statement that it does not “interfere[] with the presumptively valid deeds of the lakefront owners.” *Merrill III* at ¶ 62. This statement merely reflects the Supreme Court’s restraint in ruling on the validity of any particular deed, not a general determination that deeds describing boundaries below the natural shoreline are valid. However, to the extent the statement constitutes such a determination, the syllabus conflicts with this statement, because the syllabus holds that the natural shoreline is the boundary of the public trust, and the text of the opinion also contains the conflicting statement that a littoral owner has no property rights lakeward of the natural shoreline. *Merrill III* at paragraph three of the syllabus, ¶¶54, 62. The conflict, if any, must be resolved in favor of the syllabus, as Rule 1 of the Ohio Supreme Court Rules for the Reporting of Opinions expressly states:

(B)(1) The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes.

(2) *If there is disharmony between the syllabus of an opinion and its text or footnotes, the syllabus controls.*

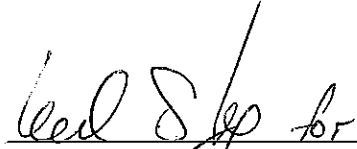
S.Ct.R.Rep.Op.(1)(B)(2) (emphasis added). Accordingly, any deed describing a boundary lakeward of the natural shoreline conveys no title to the owner of the deed.

<sup>3</sup> The rules of accretion, avulsion, erosion, and reliction were never in dispute in this case.

**CONCLUSION**

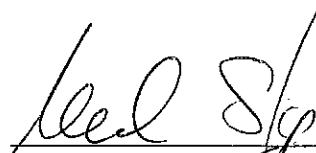
For the foregoing reasons, OLG is not a prevailing party under R.C. 2335.39.

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DATED: June 15, 2012

## CERTIFICATE OF SERVICE

I certify that on June 15, 2012, I sent by electronic mail and mailed by first class through the U.S. Postal Service, postage prepaid, the foregoing National Wildlife Federation *et al.*'s Response to Plaintiff OLG's Renewed and Supplemented Motion For Fees to the following:

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