STATE OF MICHIGAN

IN THE SUPREME COURT

DIANE NASH, Personal Representative of the ESTATE OF CHANCE AARON NASH,	**Supreme Court No. 149168**
Plaintiff-Appellee,	**Court of Appeals No. 309403**
-vs-	**Ottawa County Circuit Court No. 10-002119-NO**
DUNCAN PARK COMMISSION,	
Defendant-Appellant.	

_____/

DIANE NASH, Personal Representative of the ESTATE OF CHANCE AARON NASH,	**Supreme Court No. 149169**
Plaintiff-Appellee,	**Court of Appeals No. 314017**
-vs-	**Ottawa County Circuit Court No. 12-002801-NO**
DUNCAN PARK TRUST and EDWARD LYSTRA, RODNEY GRISWOLD, and JERRY SCOTT, individually and as Trustees of the DUNCAN PARK TRUST,	
Defendants-Appellants.	

_____/

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

CERTIFICATE OF SERVICE

***** ORAL ARGUMENT REQUESTED *****

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I. DID THE COURT OF APPEALS PROPERLY CONCLUDE THAT THE DUNCAN PARK COMMISSION WAS NOT ENTITLED TO CLAIM IMMUNITY UNDER THE GOVERNMENTAL TORT LIABILITY ACT, MCL 691.1401, *et seq*?

Plaintiff-Appellant says "Yes."

Defendant-Appellee says "No."

STATEMENT OF FACTS

On December 31, 2009, eleven-year old Chance Nash died as a result of injuries he sustained while sledding at Duncan Park in the City of Grand Haven. The accident that claimed Chance Nash's life occurred when the sled he was riding ran into the cut-off branch of a dead tree lying on the ground hidden under snow.

Since Chance Nash's death, his estate has filed two wrongful death suits in the Ottawa County Circuit Court. Both cases focused on legal issues associated with the history and status of Duncan Park.

A. The History Of Duncan Park

The land comprising Duncan Park was originally owed by Robert and Martha Duncan. Following her husband's death, Martha Duncan inherited the land as her sole property.

Some time before October 13, 1913, Martha Duncan's attorney prepared a trust deed. (App. 8a-14a). That document identified Mrs. Duncan as "Party of the First Part" and it identified three individuals, Elbert Lynn, Edward Hofma and William H. Loutit, as "Parties of the Second Part." (App 8a). The first paragraph of the trust deed identified these three individuals as "trustees for and in behalf of the people of the City of Grand Haven." (*Id*).

The trust deed indicated that, to perpetuate the name of her deceased husband, Mrs. Duncan conveyed to the three trustees and their successors a parcel of property to be designated as Duncan Park. The trust deed specified that this parcel was to be held by the trustees "as a public park for the use and enjoyment of the citizens or inhabitants of Grand Haven, and for no other purpose." (App. 9a-10a).

Mrs. Duncan's trust deed further indicated that the three trustees would constitute "The

Duncan Park Commission" (App. 12a). That document granted the three trustees exclusive and final authority as to the supervision of Duncan Park and it also provided how successive trustees were to be selected:

> Seventh: The said Trustees, above-named, shall constitute "THE DUNCAN PARK COMMISSION", as aforesaid, and shall select their own successors to office, and they and their successors shall have the exclusive supervision, management and control of said 'DUNCAN PARK" and their action in regard to the management, supervision and control of said 'DUNCAN PARK" shall be final; and the successor of any member vacating office upon said Board of Trustees, who has been selected by the remaining members of said 'DUNCAN PARK COMMISSION', and no other person, shall be appointed upon the DUNCAN PARK COMMISSION, by the Mayor of the City of Grand Haven, and each and every member of said Commission must be a resident of the City of Grand Haven.

(App. 12a).

Mrs. Duncan's grant of property to the trustees for the use as a public park was conditioned on the City of Grand Haven adopting an ordinance that was satisfactory to Mrs. Duncan. Under the terms of the trust deed, that ordinance would create a Duncan Park Commission:

> Eighth: This Deed is given on the express condition that the Common Council of the City of Grand Haven shall, on the acceptance thereof, pass an Ordinance satisfactory to the Grantor, creating a "DUNCAN PARK COMMISSION" as herein provided, and providing for its perpetuation in the manner herein specified; also providing for the care and maintenance of said DUNCAN PARK. The repeal of said Ordinance, or any part thereof, at any future time, shall render this Deed null and void and make the same of no effect.

(App. 12a-13a).

As prescribed by Mrs. Duncan's trust deed, the action to be taken by the City of Grand Haven also had to guarantee that the trustee/commission would be allowed to "make its own rules and regulations . . . and shall have entire control and supervision of said Duncan Park":

> Second: That the Common Counsel or controlling body of the City of Grand Haven shall immediately, after the acceptance of this grant, create a Park Board to be known

> as "THE DUNCAN PARK COMMISSION", which Commission shall, in the first instance, consist of the Trustees hereinbefore named and of no others, who shall serve upon said Commission without pay; and further, said Commission shall make its own rules and regulations and be governed thereby, and shall have entire control and supervision of said Duncan Park, a majority vote of said Commission shall be sufficient to adopt any measure brought before said Commission. Said Commission shall also have power to adopt rules and regulations governing the duties of its members and each of its officers and employees, and shall have authority to engage and discharge its own employees.
>
> (App. 10a).

The trust deed indicated that City of Grand Haven was to provide "means for the care and improvement of said park." (App. 11a). But, the trust deed specifically imposed on the trustees "the right and duty . . . to remove all dead, dying, or unsightly trees, to thin out the undergrowth, wherever necessary, to remove dead branches, noxious weeds, or other rubbish and in short, keep said part in as neat and trim a condition as the means at their command allow." (App. 11a-12a).

On October 13, 1913, Mrs. Duncan sent a letter to the Grand Haven City Clerk. Included with that letter was an unexecuted copy of the trust deed as well as a copy of a proposed ordinance that Mrs. Duncan had approved. In her October 13, 1913 letter, Mrs. Duncan wrote:

> Dear Sir: I enclose a copy of a deed conveying land for a park to three trustees for and in behalf of the people of the city of Grand Haven, conditioned upon its acceptance by the common council, and the passage by said council of an ordinance, a copy of which is also enclosed.
>
> I hereby agree that whenever I am officially notified that these conditions have been complied with, I will immediately sign and execute the original deed, of which this is an exact copy, and deliver the same to the proper authorities.
>
> (App. 3a).

According to Grand Haven City Council meeting minutes of October 20, 1913, that body enacted the ordinance exactly as Mrs. Duncan had submitted it. That ordinance provided in relevant

part:

> Section 1. That thereby and hereby is, created in the City of Grand Haven, a Park Board, to be known as "The Duncan Park Commission," to consist of three members, who shall be appointed by the mayor of the City of Grand Haven, in accordance with the deed of gift of "Duncan Park," wherein and whereby the plat of land known as "Duncan Park" was transferred to three (3) trustees for and in behalf of the citizens of the City of Grand Haven, Michigan. The members of said commission shall, in the first instance, be those trustees to whom the said plat of land known as "Duncan Park" was transferred by Mrs. Martha M. H. Duncan. The members of said commission shall serve without pay.
>
> * * *
>
> Section 3. That said commission shall make its own rules and regulations and shall be governed thereby and shall have the entire control and supervision of said "Duncan Park." A majority vote of such commission shall be sufficient to adopt any measure before said commission. Said commission shall also have power to adopt rules and regulations governing the duties of its members and each of its officers and employees, and shall have the authority to engage and discharge its own employees.
>
> * * *
>
> Section 5. It is the definite purpose of this ordinance to create and establish a permanent commission, which commission shall have the power and authority at all times to manage and control that plat of land deeded to the three trustees before mentioned for and in behalf of the citizens of the City of Grand Haven, by Mrs. Martha M. H. Duncan, for public park purposes, in accordance with the Deed of Gift of said Park.
>
> Section 6. Whenever a vacancy occurs in the membership of "Duncan Park Commission" by reason of the death, resignation or removal from the city of any member thereof, it shall be the duty of the remaining members of said Commission to select some suitable person to fill such vacancy. They shall report their choice to the Common Council and the mayor shall thereupon immediately appoint such person to be a member of said "Duncan Park Commission." He shall in no case appoint any other person, than the one so selected.

(App. 6a-7a).

Thus, to satisfy the conditions set in Mrs. Duncan's trust deed, the 1913 ordinance named the three trustees she had designated as members of the Duncan Park Commission. Also in

conformity with Mrs. Duncan's trust deed, the ordinance decreed that this Commission would be completely autonomous; it was to "make its own rules and regulations . . . and shall have the entire control and supervision of said 'Duncan Park.'" (App. 6a).

The ordinance also assumed that Mrs. Duncan's desires would be honored as to how successor trustees were to be named. Thus, the ordinance specified that where a vacancy occurred, the remaining two trustees would select a replacement. That replacement was to be reported to Grand Haven's mayor, who had to immediately appoint that person to the Commission. (App. 6a-7a).

Two days after the Grand Haven City Council adopted this ordinance, Mrs. Duncan executed the trust deed.

In 1994, Grand Haven's liability insurer indicated that because the City's residents were using Duncan Park, the city could obtain liability insurance for both the park and the Duncan Park Commission. (App. 16a). Before obtaining this insurance coverage, the city had to enter into a licensing agreement with the Duncan Park Commission. Because city employees were unable to locate a copy of the ordinance adopted in 1913, the city also decided to adopt the ordinance that Martha Duncan had original drafted.

The Duncan Park Commission and the City of Grand Haven signed a Licensing Agreement on October 11, 1994. (App. 1b-3b). That Agreement indicated that the Commission granted the City of Grand Haven use of Duncan Park. The Licensing Agreement specified that this was only a license for the use of the property, "and does not constitute any legal or promissory interest in the property." (App. 2b).

B. The History Of This Litigation

On November 15, 2010, Diane Nash, as the personal representative of the Estate of Chance Nash, filed suit in the Ottawa County Circuit Court. (App. 29a-32a). The sole defendant named in Ms. Nash's compliant was the Duncan Park Commission. For ease of reference, this 2010 case will be referred to in this brief as *Nash I*.

In the discovery that followed, Ms. Nash took the deposition of Pat McGinnis, the City Manager of Grand Haven. In his deposition, Mr. McGinnis confirmed that the Duncan Park Commission was an entirely autonomous body. Mr. McGinnis was shown the documents forming the Duncan Park Commission, and he was asked the following question:

> Q. It's my understanding that those documents create the Duncan Park Commission as an autonomous body that has the sole supervisory control of Duncan Park. Is that your understanding, too?
>
> * * *
>
> A. Essentially I agree with your statement.

(App. 46a).

Another person deposed in the case was Ed Lystra, one of the three trustees. Mr. Lystra testified that Duncan Park was funded through a community foundation, not the City of Grand Haven. (App. 31b).

Approximately one year after *Nash I* was filed, the Duncan Park Commission filed a motion for summary disposition. (App. 14b - 29b). In that motion, the Commission raised several arguments in support of the dismissal of Ms. Nash's claims. Included in those arguments was the claim that the Commission was immune from suit under Michigan's Governmental Tort Liability Act (GTLA), MCL 691.1401, *et seq*. (App. 19b - 23b). The Commission contended in its motion

that it was entitled to immunity because it was a "political subdivision" under MCL 691.1401(e) since it is an "authority authorized by law" under that subsection of the GTLA. (App. 20b).

In response to the Commission's motion, plaintiff argued that it was not entitled to governmental immunity because it did not meet any of the definitions of "political subdivision" found in MCL 691.1401(e). Ms. Nash argued that the Duncan Park Commission was a "hybrid", established by a private trust document, charged with overseeing what was private property.

The circuit court conducted two hearings on the Commission's motion for summary disposition. At the second of those two hearings held on January 16, 2012, the circuit court orally ruled in favor of the Commission. (App. 66a-67a). The circuit court ruled that "[t]he Duncan Park Commission was authorized by a political subdivision of the State. . . Thus, the Duncan Park Commission is a political subdivision." (App. 67a). In reaching this result, the circuit court rejected Mrs. Nash's contention that Duncan Park was private property. (*Id*).

An order granting the Commission summary disposition was signed on January 16, 2012. (App. 69a-70a). Ms. Nash moved for reconsideration and further requested the opportunity to amend her complaint to add additional parties. The circuit court denied both reconsideration and the request to amend in an order dated March 6, 2012. (App. 71a-73a).

On March 23, 2012, Ms. Nash filed a Claim of Appeal from the circuit court's dismissal of *Nash I*. *Nash v Duncan Park Commission,* Court of Appeals No. 309403.

The following month, Diane Nash filed a second wrongful death action in the Ottawa County Circuit Court. (App. 74a - 78a). This case will be referred to here as *Nash II*. In this second case, Mrs. Nash named as defendants the Duncan Park Trust and the three present trustees of that trust, Ed Lystra, Rodney Griswold and Jerry Scott.

Prior to filing their answer in *Nash II*, the defendants moved for summary disposition. (App. 82a-105A). Among the issues raised in that motion was that the defendants were immune under the GTLA.

The hearing on defendants' motion for summary disposition in *Nash II* was held on July 9, 2012. At that hearing, the circuit court denied the motion without prejudice. Citing the fact that it was unclear whether a Duncan Park Trust even existed, the circuit court denied the motion as premature. (App. 155a). An order to that effect was entered on July 19, 2012.

Defendants filed their answer and affirmative defenses. Among the affirmative defenses that defendants raised was that no entity known as the Duncan Park Trust existed. In an attempt to resolve the preliminary question as to the status of the Duncan Park Trust, Ms. Nash filed a motion which she styled as a Motion for Summary Disposition on the 'Trust' Issue. In that motion, Ms. Nash analyzed why, under Michigan trust law, Martha Duncan's October 1913 trust deed created a valid trust.

At the hearing held on Ms. Nash's motion for summary disposition on the trust question, the circuit court acknowledged that "by your suing the trust and the trustees, if they exist independently and if they owned this piece of land . . . that would provide you with an opportunity to go forward because governmental immunity does not apply." (App. 207a).

The circuit court issued a written opinion in *Nash II* on December 17, 2012. (App. 231a-238a). The court held in that opinion that the Duncan Park Trust "does not exist and lacks the capacity to be sued." (App. 232a). The court ruled that, reading the October 1913 trust deed as a whole, Mrs. Duncan did not create a trust, but conveyed the property to the City of Grand Haven. (App. 236a).

On the basis of that ruling, the circuit court ordered the dismissal of the Duncan Park Trust because, in its view, that entity never existed. (App. 237a). The circuit court further held that because "there can be no trustees for a non-existent trust," Ms. Nash's claims against Lystra, Griswold and Scott as trustees of the Duncan Park Trust were also to be dismissed. (*Id*).

Ms. Nash on December 20, 2012, filed a Claim of Appeal from the circuit court's ruling granting summary disposition. *Nash v Duncan Park Trust*, Court of Appeals No. 314017. Ms. Nash's two appeals were ordered administratively consolidated.

A panel of the Court of Appeals issued its decision on March 20, 2014. *Nash v Duncan Park Commission*, 304 Mich App 599; 848 NW2d 435 (2012). After setting out the history of Duncan Park and the procedural history of the two cases that Ms. Nash filed, the Court of Appeals began its analysis of the legal issues presented with what it described as the "bedrock" question presented in the case: "who owns Duncan Park." 304 Mich App at 613.

On this question, the panel reversed the circuit court's determination in *Nash II* as it found that "the trust deed did, in fact, create a trust, and that the trust holds fee simple title to the park." *Id*. In reaching this conclusion, the Court of Appeals examined Michigan trust law and the language of Mrs. Duncan's trust deed and found that it created a valid trust. *Id*., at 614-624. The Court of Appeals further ruled that, because the trust deed created a valid trust, the three trustees are the owners of Duncan Park. *Id*., at 624-626.

After determining the trust-related issues raised in the case, the Court of Appeals turned to the question of governmental immunity. The panel concluded that the Duncan Park Commission does not fall within the definition of "governmental agency" under MCL 691.1401(d) because it does not constitute a "political subdivision" as that term is defined in MCL 691.1401(e). The Court of

Appeals rejected the Commission's argument that it constituted an "authority authorized by law" under §1401(e). 304 Mich App at 632-633. For good measure, the Court of Appeals also considered and rejected an argument that the Commission had not raised on appeal - whether it was a "board" for purposes of §1401(e). 304 Mich App at 633-634.

The Court of Appeals concluded its analysis of the immunity questions presented in the case with the following observation:

> The Commission is a unique construct of Martha Duncan's trust that is officially connected with the city of Grand Haven only in the sense that the mayor ratifies the Commission's choice of successor members. Otherwise, the city has undertaken no official activities relative to Duncan Park. It does not make the rules for the park, supervise the park, maintain the park, direct the park's use, or expend any funds to maintain the park. Rather, the Commission, a privately appointed group of three trustees, controls private property without governmental oversight. The commissioners act on behalf of the trust, not on behalf of the city. Accordingly, the Commission is not immune from suit as a political subdivision of the city of Grand Haven.
>
> 304 Mich App at 636.

The defendants filed an application for leave to appeal in this Court. In that application, the defendants raised two issues for this Court's review:

> 1. DID THE COURT OF APPEALS ERR WHEN IT REVERSED THE TRIAL COURT'S RULING GRANTING SUMMARY DISPOSITION TO THE DUNCAN PARK COMMISSION ON THE BASIS THAT PLAINTIFF'S CLAIMS AGAINST THE DUNCAN PARK COMMISSION WERE BARRED BY THE GOVERNMENTAL TORT LIABILITY ACT?
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> * * *
>
> 2. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE DUNCAN DEED CREATED A TRUST AND THAT THE DUNCAN DEED TRANSFERRED OWNERSHIP OF THE PART PROPERTY TO THREE PRIVATELY APPOINTED TRUSTEES?
>
> Defendants' Application for Leave,

Statement of Questions Presented

On October 24, 2014, this Court issued an order granting the defendants' application, "limited to the issue of whether the Duncan Park Commission constitutes 'a district or authority authorized by law or formed by one or more political subdivisions; or an agency, department, court, board, or council of a political subdivision." *Nash v Duncan Park Commission*, 497 Mich 884; 854 NW2d 721 (2014).[1]

[1]In applying for leave to appeal, defendants raised only one issue involving governmental immunity - whether *the Commission* is entitled to immunity. This Court's grant of leave was limited solely to that question. This means that the trust-related issues raised in this case and addressed at length in the Court of Appeals March 20, 2014 opinion are not issues that are presently before the Court. It also means that, since the Commission was named as a defendant only in *Nash I*, any immunity issues that may have been raised in *Nash II*, with respect to Mrs. Nash's claims against the Duncan Park Trust or the three trustees individually are also not before the Court. Since there is only one defendant, the Commission, involved in this appeal at this juncture, this brief will use the singular in referring to this defendant.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE DUNCAN PARK COMMISSION IS NOT ENTITLED TO GOVERNMENTAL IMMUNITY.

The sole issue presented in this case is whether, under the highly unique facts of this case, the entity known as the Duncan Park Commission is entitled to immunity under the GTLA. Immunity under that Act extends to any "governmental agency . . . engaged in the exercise or discharge of a governmental function." MCL 691.1407(1).

A "governmental agency" for purposes of the GTLA is defined as "the state or a political subdivision." MCL 691.1401(a). That latter term is defined in MCL 691.1401(e):

> (e) "Political subdivision" means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision.

The Commission offers two arguments as to why it falls within this definition of "political subdivision." It contends that it should be designated either as a "board" or as an "authority authorized by law." The Court of Appeals properly rejected both of these arguments.

A. The Commission Is Not A Board For Purposes Of MCL 691.1401(e).

What is initially noteworthy about the Commission's argument that it is entitled to immunity because it is a "board" for purposes of §1401(e) is that this happens to be the first court in which it has decided to try out this particular argument. In moving for summary disposition in *Nash I*, the Commission did not assert that it was entitled to immunity because it was a board. (App. 19b-22b). Similarly, in defending the circuit court's grant of summary disposition in *Nash I* based on

governmental immunity, the Commission did not contend in the Court of Appeals that it qualified as a "political subdivision" under §1401(e) because it was a board.[2]

The Commission's reluctance to offer this argument in either the circuit court or the Court of Appeals is probably due to the fact that not even the City of Grand Haven is of the view that the Duncan Park Commission is a "board." So much is clear from Grand Haven's city charter. Section 7.14(a) of that charter provides:

> To afford citizen participation in the affairs of the city government for the purpose of determining community needs and means of meeting such needs through the government of the city, the following citizens boards are established:
>
> (1) An airport board:
>
> (2) A cemetery board;
>
> (3) A Community Center board;
>
> (4) A harbor board;
>
> (5) A library board;
>
> (6) A parks and recreation board.

(App. 5b).

This charter provision goes on to describe the character of the "boards" that exist as part of the City of Grand Haven's government. Such boards are to be comprised of five residents of Grand Haven who serve five year terms. Charter, §7.14(b). (App. 5b). The charter further specifies that

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[2]While the failure to brief an issue either in the lower court or on appeal normally forecloses appellate review, *Gorman v American Honda Motor Co., Inc.*, 302 Mich App 113, 128; 839 NW2d 223 (2013), *Booth Newspapers, Inc. v University of Michigan Bd of Regents*, 444 Mich 211, 234, n. 23; 507 NW2d 422 (1993), the Court of Appeals in its March 2014 opinion decided to decide this issue anyway. On its own initiative, the Court of Appeals took up the question of whether the Commission was a board and it found this (unoffered) contention was without merit. 304 Mich App at 633-634.

the term of each board member is limited to five years and no person may serve more than two five-year terms. *Id*. The appointment of the members of these boards is to be made by the mayor subject to the confirmation of the city council. As provided in the Grand Haven city charter, each Grand Haven governmental board must hold at least one monthly meeting, *id*, §7.14(c), and members of these boards may be removed either because of failure to attend board meetings or the city council may remove them for "malfeasance, misfeasance or nonfeasance." *Id*., §7.14(c). (App. 5b).

Not only is the Duncan Park Commission not identified in the Grand Haven city charter as one of its governmental boards, that Commission does not share any of the characteristics of the boards identified in the charter. According to the ordinance that Mrs. Duncan drafted and the city council passed in 1913, the Duncan Park Commission is to consist of only three people whose terms are not limited to any number of years. Unlike the boards established by the City of Grand Haven, there is no requirement that the members of the Duncan Park Commission be residents of that city or that they possess the "qualifications required by this charter for elective officers of the city." (App. 5b). Moreover, when a vacancy on that body occurs, the remaining members are to select the person to fill that vacancy and report that choice to the city mayor, "who shall in no case appoint any other person than the one selected." (App. 7a).

Unlike the boards that are part of Grand Haven government, the Duncan Park Commission does not meet once per month. According to the deposition testimony of Ed Lystra, one of the three trustees of the Duncan Park Trust, the Duncan Park Commission *tries* to meet once per year. (App. 31b).

The Duncan Park Commission was identified as a commission, not a board.[3] Moreover, the Grand Haven city charter identified the governmental boards that would fit within §1401(e)'s use of that term as well as the general characteristics of these boards. The Duncan Park Commission was neither on that list nor did it come close to sharing the characteristics of one of the duty-established governmental boards in Grand Haven. The fact that the Commission is not one of the boards identified in the Grand Haven city charter means that the 1913 ordinance cannot be construed as having established it as a "board." *Cf Thiesen v Parker*, 320 Mich 446, 451; 31 NW2d 806 (1948) ("The [defendant] is a home rule city. It cannot pass ordinances that are contrary to the charter of the city.")

There is, therefore, a very good reason why the Commission did not even bother to argue that it was a "board" in either the circuit court or the Court of Appeals. That argument completely is without merit.

B. The Commission Is Not An "Authority Authorized By Law" For Purposes of MCL 691.1401(e).

MCL 691.1401(e) also includes within its definition of a "political subdivision," a "district or authority authorized by law." As its second argument in support of its claim for governmental immunity, the Commission contends that it should be deemed an "authority" and, on that basis, found to be immune. The Commission's argument seriously misconstrues this particular language in the GTLA.

An authority is a unit of government. As the Court of Appeals correctly noted, such

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[3]Moreover, as will be discussed in the next section of this brief, what this body was identified as - a commission - would not qualify it for immunity under §1401(e) since a municipal commission does not meet the definition of "political subdivision" provided in that subsection.

authorities are associated with legislation passed by the state government. The Michigan Legislature has created a variety of different governmental authorities. *See e.g.* MCL 120.101, *et seq* (Hertel-Stopczynski Port Authority Act); MCL 125.1651, *et seq* (the Downtown Development Authority Act); MCL 125.2911, *et seq* (Neighborhood Improvement Authority Act); MCL 254.301 *et seq* (Mackinac Bridge Authority); MCL 119.51, *et seq* (Huron-Clinton Metropolitan Authority); MCL 125.2651, *et seq* (Brownfield Redevelopment Financing Act, allowing for the establishment of brownfield redevelopment authorities); MCL 125.2841, *et seq*., (Historical Neighborhood Tax Improvement Finance Authority Act); MCL 123.1161 (Zoological Authorities Act); MCL 121.1, *et seq* (Charter Water Authority Act); MCL 123.671, *et seq* (Market Authority Act).

The authorities established by the Michigan Legislature assume two general forms. One of these forms consists of the creation of a single authority that is an arm of the state government. *See e.g.* MCL 254.221, *et seq*; MCL 16.458 (creating the International Bridge Authority under the control of the Michigan Department of Transportation); MCL 254.301, MCL 16.457 (creating the Mackinac Bridge Authority under the control of the Michigan Department of Transportation). More often, however, the Michigan Legislature has passed laws creating the concept of a single or multiple purpose governmental authority and allowing local governments to decide whether they wish to adopt such authorities as their own. *See e.g.* MCL 125.1652 (allowing municipalities to establish a downtown development authority); MCL 124.404 (allowing counties to establish regional transportation authorities); MCL 124.282 (authorizing two or more municipalities to incorporate an authority for the purpose of operating a sewage disposal system, water supply system or solid waste management system.)

In its March 20, 2014 opinion, the Court of Appeals ruled that the Duncan Park Commission

could not be deemed an "authority" for purposes of §1401(e) because "a city lacks the power to unilaterally create an 'authority'; only the Legislature may do so." 304 Mich App at 632. The Court of Appeals reached this conclusion on the basis of art. 7, §27 of the Michigan Constitution, which provides:

> Notwithstanding any other provision of this constitution the legislature may establish in metropolitan areas additional forms of government or authorities with powers, duties and jurisdictions as the legislature shall provide. Wherever possible, such additional forms or government or authorities shall be designed to perform multipurpose functions rather than a single function.

The Commission contends that this aspect of the Court of Appeals ruling was wrong According to the Commission, the Court of Appeals determination that art. 7, §27, vests the Michigan Legislature with the exclusive power to establish authorities offends "notions of municipal autonomy." Def's Brief, at 21. The Commission relies extensively on the Court of Appeals decision in *Adams Outdoor Advertising, Inc. v City of Holland*, 234 Mich App 681; 600 NW2d 339 (1999), and its construction of the scope of the Home Rule City Act, MCL 117.1, *et seq*, as providing for such broad municipal autonomy.

The Commission fails to point out that the *Adams Advertising* case was appealed to this Court, which found the Home Rule City Act to be of only "limited relevance" to the issue presented in that case. *Adams Outdoor Advertising, Inc. v City of Holland*, 463 Mich 675, 682; 625 NW2d 377 (2001). More importantly, the Commission's paean to local autonomy is directly at odds with the observations of this Court in *City of Taylor v The Detroit Edison Company*, 475 Mich 109; 715 NW2d 28 (2006). In that case, this Court described the power of local governments under Michigan's Constitution as follows:

> Article 7 of the Constitution of 1963 enumerates the general authority and limits on

> the authority of local governments, such as counties, townships, cities, and villages. Subject to authority specifically granted in the Constitution, local governments derive their authority from the Legislature. We have held that
>
> > "[local governments] have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant.
> >
> > *Id*. at 115, *quoting City of Kalamazoo v Titus*, 208 Mich 252, 262; 175 NW2d 480 (1919).

Contrary to the position advocated by the Commission, local governments have the limited powers "expressly conferred upon them by the constitution of the State of Michigan, by acts of the Legislature, or necessarily implied therefrom." *City of Lansing v Edward Rose Realty*, 442 Mich 626, 632 n. 5; 502 NW2d 638 (1993); *cf McNeil v Charlevoix County*, 484 Mich 69, 107; 772 NW2d 18 (2009) (Opinion by J. Markman) ("Local governments . . . have no inherent authority to enact laws or to promulgate regulations because they are governments of limited powers acting pursuant to delegated authority.").

The Commission makes no claim that municipalities like Grand Haven have been delegated either by the constitution or by law the power to unilaterally create a governmental authority. Thus, under this Court's decisions in such cases as *City of Taylor* and *City of Lansing,* the Court of Appeals did not err in concluding that the City of Grand Haven could not create an "authority authorized by law" as §1401(e) provides.

However, even if the Commission's view of broad municipal autonomy were correct, it still

would not call for reversal of the Court of Appeals interpretation of art. 7, §27. Under the Michigan constitution, "[e]ach such city and village shall have the power to adopt resolutions and ordinances related to its municipal concerns, property and government, *subject to the constitution and law.*" Const. 1963, art 7, §22 (emphasis added). Thus, even under the most expansive view of local government power advocated by the defendant, what is clear is that a municipality cannot pass a regulation or ordinance on a subject that is reserved by the constitution or state law for the state government.

That is precisely what Cont. 1963, art 7, §27 does. It reserves for the Michigan Legislature the ability to establish "additional forms of government or authorities . . ." The Commission's argument that a city can on its own initiative establish "additional forms of government or authorities" in spite of the language of art. 7, §27 overlooks the obvious significance of where that provision has been placed in the Michigan Constitution. That provision is part of article 7 of the Constitution, the section of the Constitution applicable to local governments. It is this article of the constitution on which the Commission relies in support of its view of broad local autonomy. *See* Const 1963, art. 7, §22 ("[n]o enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.)

Yet, imbedded in this article of the Constitution which (according to defendant) establishes the broad powers that may be exercised by cities and villages is a provision, art. 7, §27, that expressly declares that it is the role of the Michigan Legislature to establish "additional forms of government or authorities," in metropolitan areas. The fact that this delegation of authority to the Michigan Legislature is contained in article 7 of the constitution underscores the fact that art 7, §27 did precisely what the Court of Appeals said it did - it withdrew from the local units of government

the ability to create governmental authorities.[4]

In its brief to this Court, defendant claims that the City of Grand Haven was expressly authorized to establish the Duncan Park Commission under a statute, MCL 123.51, which allows a city to "operate a system of public recreation and playgrounds," or under art 7, §23 of the Constitution, which allows a city or village to "acquire, own, establish and maintain . . . parks." This argument, however, misses the point for purposes of the immunity defense being raised in this case.

The question presented in this appeal is not whether the City of Grand Haven may create and maintain a park system for the use of its citizens.[5] The question for purposes of §1401(e), instead, is whether the City of Grand Haven can create a specific type of governmental entity - *an authority* - to oversee those parks. The Court of Appeals correctly ruled that under art 7, §27 of the Constitution, Grand Haven could not unilaterally create such an authority. For that reason alone, the argument that the Commission is an "authority" for purposes of §1401(e) must be rejected.

Quite apart from art 7, §27, the Commission's argument must be rejected because, even if the City of Grand Haven has the power to create an "authority" that fits within the language of

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[4]There is also support for the Court of Appeals interpretation of art 7, §27 in the unlikeliest of places, Grand Haven's city charter. Chapter 5 of that Charter addresses the role of the Grand Haven city council. Included in that Chapter is §5.7, which addresses restrictions of what the city council may do. (App. 4b). The final sentence of §5.7 indicates: "The council chall not create any policy determining or [*sic*] administrative board or commission *except that it may create such as are specifically authorized by statute*." Charter, §5.7 (App. 4b) (emphasis added). While not exactly a model of clarity, this final sentence of §5.7 of the Grand Haven city charter could well be seen as local recognition of the effect of art 7, §27 - the city required statutory authorization to create any type of policy-making authority.

[5]Another essential element of a claim of immunity under the GTLA is that the governmental agency be "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). This has never been an issue in this case. Plaintiff has never contended that immunity does not exist because the operation of a park is not a governmental function. The precise question is whether the Commission is a "political subdivision" under the GTLA.

§1401(e), it did not do so when it passed the ordinance that Martha Duncan drafted in 1913.

First, it is not even clear if the word "authority" as a type of governmental unit was even in the legal lexicon as of 1913 when the Duncan Park Commission was created. Unlike the 1963 constitution, the 1908 constitution, which was in effect at the time Mrs. Duncan's trust deed was prepared, did not use the word governmental "authority". Through a 1927 amendment, the 1908 constitution added language allowing the Legislature to create "metropolitan districts" in which two or more cities or villages could join to acquire, own and operate, *inter alia,* "parks or public utilities." Const. 1908, art 8, §31.[6] But, the 1908 constitution did not use the term "authority" to describe any form of governmental unit.

It is also worth noting that the City of Grand Haven has created at least one "authority" that would appear to fall within §1401(e). Based on legislation adopted by the Michigan Legislature in 1975, MCL 125.1651, *et seq*, the Grand Haven Council has formed a Main Street Downtown Development Authority. Grand Haven Ordinances, §12-11 - §12-13. (App. 10b-13b). Obviously, the terminology used when the City of Grand Haven took the steps necessary to create this legislatively-sanctioned authority was not duplicated when Mrs. Duncan's ordinance was passed in 1913.

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[6]It would appear that the authority to create multi-municipal districts that was added to the Michigan Constitution by amendment in 1927 provided the constitutional basis for a 1939 law forming the Huron-Clinton Metropolitan Authority. MCL 119.51, *et seq*. While plaintiff's counsel does not necessarily wish to guarantee the exhaustiveness of his research on this subject, this 1939 act represents the earliest statute the plaintiff's counsel has been able to find using the word "authority" as a governmental unit. *See Huron-Clinton Metropolitan Authority v Boards of Supervisors of Five Counties*, 300 Mich 1, 20; 1 NW2d 430 (1942) (describing the power of the Legislature "to create specific and supplemental governmental agencies designed to function in a limited sphere in the accomplishment of public purposes for which existing municipal corporations either singly or in designated groups were not suited.")

The 1913 ordinance passed by the Grand Haven city council established a commission; it did not establish an "authority." It is of more than passing interest that the word "commission" does not appear in the definition of "political subdivision" provided in §1401(e). *Nash*, 304 Mich App at 632. The Commission argues, however, that this omission is of no significance. Def's Brief, at 24-25. It contends that this Court can read the GTLA "as a whole" and find a way to read into §1401(e) the word "commission." This Court's consistent approach to the interpretation of statutory language demands precisely the opposite conclusion; it cannot add to §1401(e) a word that the Michigan Legislature did not put there.

The definitional section of the GTLA, §1401, defines the word "state" to include the State of Michigan as well as its "agencies, departments, *commissions*, courts, boards, councils and statutorily created task forces . . ." MCL 691.1401(g) (emphasis added). Yet, in defining "political subdivision," the Legislature specified that this term means a municipal corporation, a county, a county road commission, a district or authority authorized by law, or "an agency, department, court, board or council of a political subdivision." MCL 691.1401(e).

Thus, in defining the "state" and the "political subdivisions" of the state, the Legislature used several words that were identical: agencies, departments, courts, boards and councils. But, the Legislature, while including "commissions" of the State of Michigan within the definition of the "state" in §1401(g) left the word "commissions" out of its definition of "political subdivision" in §1401(e).

Contrary to the Commission's contentions, this difference between the two definitions provided in §1401 *must* be accorded significance. This Court has emphasized that statutes are to be interpreted as written and that "this Court may not assume that the Legislature inadvertently made

use of one word or phrase instead of another." *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000); *People v Williams*, 491 Mich 164, 175; 814 NW2d 270 (2012). Moreover, this Court has also counseled against assuming "that the Legislature inadvertently omitted from one statute the language that it placed in another statute and, on the basis of that assumption, apply what is not there." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011); *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993); *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006). That is precisely what the Commission advocates here when it urges this Court to "harmonize" the definitional sections of the GTLA by taking a word, "commissions", that is in §1401(g) and transferring that word to a place that the Legislature did not put it, in §1401(e).

Contrary to the defendant's argument, this Court cannot assume that the Michigan Legislature inadvertently left the word "commission" out of the definition of "political subdivision" in §1401(e). Nor can the Court, acting on an assumption of legislative inadvertence, judicially rewrite §1401(e) so as to incorporate "commissions" into the definition of "political subdivision."

For all of these reasons, the Commission's argument that it is entitled to governmental immunity because it is an "authority authorized by law" must be rejected.

C. The Additional Reasons Why Governmental Immunity Does Not Apply To These Facts.

An immunity defense can be successfully claimed in this case only if the defendant could meet the definition of "political subdivision" contained in §1401(e). Since the Duncan Park Commission is neither a "board" nor an "authority authorized by law," it does not qualify as a "political subdivision" under that subsection and, on that basis, its claim of governmental immunity must be rejected. The Court of Appeals, however, offered another reason why the Commission

could not claim governmental immunity under the particular facts of this case.

In its March 20, 2014 opinion, the Court of Appeals rejected the circuit court's determination that Duncan Park was owned by the City of Grand Haven. The Court of Appeals found instead that Duncan Park is privately owned property, belonging to the three trustees who were identified in Martha Duncan's 1913 trust deed and their successors.[7]

The trust deed that Mrs. Duncan prepared called for the creation of the Duncan Park Commission and it further provided that this Commission was to operate autonomously. According to the trust deed, the three trustees and their self-selected successors would constitute the Duncan Park Commission, and in that role they would have "the exclusive supervision, management and control of said 'Duncan Park' and their action in regard to the management, supervision and control of said 'Duncan Park' shall be final." (App. 12a). This Commission, according to the terms of the trust deed "shall make its own rules and regulations and be governed thereby . . ." (App. 10a).

One of the conditions that Mrs. Duncan set for the transfer of the property to the trustees was the City's agreement to adopt an ordinance that was acceptable to her. (App. 12a). Mrs. Duncan drafted such an ordinance, submitted it to the Grand Haven City Council which passed the ordinance exactly as she wrote it.

As Mrs. Duncan's trust deed had decreed, that ordinance provided that the Duncan Park Commission would operate independently of the City of Grand Haven. (App. 6a-7a). The ordinance provided that the commission "shall make its own rules and regulations and shall be governed thereby, and shall have the entire control and supervision of said 'Duncan Park.'" (App. 6a).

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[7]Defendants applied for leave to appeal from this aspect of the Court of Appeals ruling. This Court did not grant that application; it limited review solely to the immunity issues presented in the case. Thus, this aspect of the Court of Appeals ruling remains intact.

The city's sole involvement in this Commission was limited to the mayor rubber-stamping the appointment of a replacement when a vacancy on the Commission occurred. In the event of such a vacancy, the two remaining members would submit the name of a replacement to the mayor who was then duty-bound to name that person to the commission. (App. 6a). According to the terms of the ordinance, where the two remaining members make their selection, the mayor had to appoint the person they selected: "he shall in no case appoint any other person than the one so selected." (App. 7a).

Taking all of these facts, the Court of Appeals properly summarized the relationship between the Commission and the City of Grand Haven in its March 20, 2014 opinion:

> Whether labeled a board or an authority, the Commission and its trustees exercise their powers without municipal oversight. The trustees do not report to any elected official, take no guidance from the city of Grand Haven, and are not accountable for their actions to the city.
>
> * * *
>
> Aside from appointing the original three trustees to the Commission, the city plays no part in the ongoing management of Duncan Park. Rather than serving as an instrumentality or "political subdivision" of Grand Haven, the Commission is an independent, autonomous, private body that administers privately held land. While agencies, boards, or authorities act on behalf of cities or towns, the Commission acts solely on its own behalf. Rather than serving as an adjunct in the administration of city government, the Commission conducts no public business; it independently manages land outside the city's control. Designating the Commission a "board" does not transform a private group into a political subdivision.
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> 304 Mich App at 634-635.

Thus, the Commission is an entity that owes its existence to a 100 year old trust deed drafted by a private citizen. That Commission's sole function is to oversee *private* property. And, in performing this single function, the Commission does so without any being accountable to the City

of Grand Haven. As the Court of Appeals concluded, the City of Grant Haven "does not make the rules for the park, supervise the park, maintain the park, direct the park's use, or expend any funds to maintain the park." 304 Mich App at 636.[8] The City of Grand Haven's lack of involvement in Duncan Park was aptly summarized in the deposition testimony provided by Pat McGinnis, the City Manager who is responsible for the day-to-day administration of the City. (App. 30b). Mr. McGinnis was asked about his duties associated with Duncan Park. He replied: "Really none other than being aware of its existence I guess." (*Id.*)[9]

Under §1401(e), even if the Duncan Park Commission could be classified as a "board" or an "authority authorized by law," it would still meet the definition of "political subdisivion" only if it were a "board" or "authority authorized by law" formed by "one or more political subdivisions." Where, as here, the Commission was formed by the trust deed and an ordinance drafted by Mrs. Duncan, and where that Commission's sole role is to oversee what is purely private property while operating with complete independence from the City of Grand Haven, it cannot satisfy this requirement of §1401(e) either.[10]

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[8]The Court of Appeals was not alone in recognizing that the Commission operated autonomously, without interference from the City of Grand Haven. The circuit court in his December 17, 2012 opinion granting summary disposition in *Nash II*, observed that "[t]he DPC answers to no one or entity . . . Defendants have entire and exclusive supervision, management and control of Duncan Park." (App. 238a).

[9]Further evidence of the arms-length relationship that exists between the Commission and the City of Gand Haven is reflected in the License Agreement that the two entered into in 1994 (App 1b -3b). In order to allow Grand Haven to have a license to use the park, it had to sign an agreement with an entity, the Commission, that defendant now claims to be a part of the government of Grand Haven. It is difficult to understand why a licensing agreement would be necessary if, in fact, the Commission were part of the city government.

[10]Further support for the fact that the Commission is *not* a City of Grand Haven Commission can be found in the city ordinances pertaining to all boards and commissions.

The unique facts of this case, therefore, cast doubt on any governmental involvement in the Duncan Park Commission, But, even if the Court were to find some tenuous relationship between the Commission and a public body, the fact is that this commission is at best some sort of public/private hybrid. This Court addressed the immunity implications of such hybrid status in *Vargo v Sauer*, 457 Mich 49; 576 NW2d 650 (1998). In *Vargo*, the Court emphasized that a "governmental agency" under §1401(1), "does not include, or remotely contemplate joint ventures, partnerships, arrangements between governmental agencies and private entities, or any other combined state-private endeavors." *Id*., at 68; *see also Jackson v New Center Mental Health Services*, 158 Mich App 25, 35; 404 NW2d 688 (1987); *O'Neill v Emma Bixby Hospital*, 182 Mich App 252, 257; 451 NW2d 594 (1990).

The Court of Appeals recognized that "[t]he Commission is a unique construct of Martha Duncan's trust" whose only connection to the City of Grand Haven is that its mayor fills vacancies through the pro forma appointment of an individual selected by two trustees. 304 Mich at 636. That limited connection is insufficient to give rise to a claim of immunity even if the Commission were found to be a "board" or an "authority authorized by law" as §1401(e) provides.

Section 2-75 of Grand Haven's ordinances specifies that its provisions "shall apply to *all* boards and commissions created by the city." (App. 8b) (emphasis added). That section goes on to describe that *all* Grand Haven boards and commissions are to be filled by appointment of the mayor "subject to confirmation by the city council." Sec. 2-76. (App. 8b). All of these appointments "shall be made at the first meeting of the city council in June of each year for such terms as required by this Code and all terms shall commence on the first day of July . . ." (App. 9b). Significantly, these appointment procedures, which are applicable to *all* of Grand Haven's boards and commissions, do not apply to the Duncan Park Commission, reinforcing the fact that this particular Commission has a unique status that is outside of the Grand Haven city government.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellee, Diane Nash, Personal Representative of the Estate of Chance Aaron Nash, respectfully requests that this Court affirm the Court of Appeals March 20, 2014 decision in its entirety.

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