In the Supreme Court
Appeal from the Court of Appeals
WHITBECK, P .J., and HOEKSTRA and GLEICHER, JJ.

DIANE NASH, Personal Representative of the
ESTATE OF CHANCE AARON NASH,

Plaintiff-Appellee,

v.

DUNCAN PARK COMMISSION,

Defendant-Appellant.
_______________________________________/

Docket No. 149168
COA: 309403
Ottawa CC: 10-002119-NO

DIANE NASH, Personal Representative of the
ESTATE OF CHANCE AARON NASH,

Plaintiff-Appellee,

v.

DUNCAN PARK TRUST and EDWARD
LYSTRA, RODNEY GRISWOLD, and JERRY
SCOTT, Individually and as Trustees of the
DUNCAN PARK TRUST,

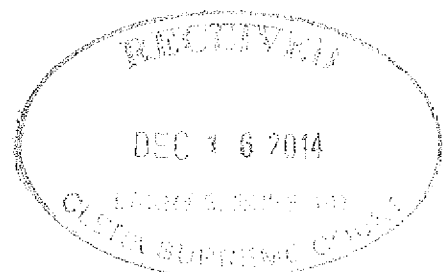
Defendants-Appellants
_______________________________________/

Docket No. 149169
COA: 314017
Ottawa CC: 12-002801-NO

BRIEF ON APPEAL OF DEFENDANTS-APPELLANTS

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

John J. Schutza (P26338)
Merry, Farnen & Ryan, P.C.
Attorneys for Defendants-Appellants
18303 Ten Mile Road, Suite 200
Roseville, MI 48066
(586) 776-6700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STATEMENT OF THE QUESTION PRESENTED

1.

DOES THE DUNCAN PARK COMMISSION, CONTRARY TO THE DECISION OF THE COURT OF APPEALS, CONSTITUTE "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."' M.C.L. 691.1401(e).?

The Trial Court says "Yes."

The Court of Appeals says "No."

Plaintiff-Appellee says "No."

Defendants-Appellants say "Yes."

STATEMENT REGARDING JURISDICTION

This Court has jurisdiction over appeals from decisions of the Court of Appeals. Const. 1963, Art. 6, § 4; MCR 7.301(A)(2). Defendants-Appellants appeal from the March 20, 2014 decision of the Court of Appeals. (App. pp. 239a-259a) That decision reversed the trial court's grants of summary decision to Defendants-Appellants. The Court granted Defendants-Appellants' Application for Leave to Appeal on October 24, 2014.

INTRODUCTION

These two wrongful death cases concern a fatal sledding accident that occurred on December 31, 2009 in Duncan Park, located in Grand Haven, Michigan.

By a "Trust Deed and Deed of Gift" ("Duncan Deed") given October 22, 1913, Martha Duncan transferred a parcel of land to three "trustees" for and in behalf of the people of the City of Grand Haven for use as a public park to be called "Duncan Park." The so-called "trustees" were the individuals comprising the first "Duncan Park Commission," an entity created by an ordinance enacted by the City of Grand Haven on October 20, 1913; two days before Martha Duncan executed the Duncan Deed.

Defendant DUNCAN PARK COMMISSION ("DPC") was granted summary disposition in Ottawa County Circuit Court Case No. 10-002119-NO on the basis that Nash's claims were barred because of immunity conferred on the DPC by the Governmental Tort Liability Act ("GTLA"), M.C.L. 691.1401 *et seq.*

In Ottawa County Circuit Court Case No. 12-002801-NO, summary disposition was granted to all defendants. Summary disposition was granted to the defendant DUNCAN PARK TRUST ("DPT") on the basis that a DPT never existed. The trial court granted summary disposition to defendants EDWARD LYSTRA, RODNEY GRISWOLD and JERRY SCOTT in their capacities as commissioners of the DPC, pursuant to M.C.L. 691.1407(5), since the commissioners were the "highest appointive executive officials" of the DPC. Summary disposition was also granted to Lystra, Griswold and Scott in their alleged capacities as "trustees," the trial judge reasoning that there can be no trustees for a non-existent trust. The trial court likewise granted summary disposition to Lystra, Scott and Griswold, to the extent they had

been sued in their individual, non-official capacities, finding that as individuals they owed no legal duty to plaintiff.[1]

The plaintiff estate appealed by right in both cases to the Court of Appeals. The cases were consolidated for disposition by the Court of Appeals. In its March 20, 2014 published opinion, the Court of Appeals reversed the grant of summary disposition in each case. In doing so, the Court of Appeals erroneously determined that the DPC is not entitled to invoke the protection of governmental immunity under the GTLA. Critical to this determination by the Court of Appeals was the flawed premise that the DPC is not a "board" or an "authority authorized by law" within the meaning of the GTLA. The Court of Appeals deemed it significant that M.C.L. 691.1401(e) does not use the word "commission." (App. p. 257a) The Court of Appeals concluded that the DPC was not given immunity under the GTLA notwithstanding that the DPC was created by an ordinance of the City of Grand Haven which, in the very first paragraph, refers to the creation of a "Park Board." The holding that the DPC is not entitled to the protection of governmental immunity was also based on the erroneous premise that a municipality may not, under Michigan's Constitution, create by ordinance an authority such as a municipal park commission, without an express and specific grant of power conferred by the Legislature. These erroneous determinations by the Court of Appeals necessarily served to invalidate the trial court's additional ruling that the individual Duncan Park Commissioners were entitled to absolute immunity under M.C.L. 691.1407(5). The holding of the Court of Appeals went astray of this Court's direction that governmental immunity is to be broadly applied. *Nawrocki v. Macomb Co. Rd. Comm.*, 463 Mich. 143, 156; 615 N.W.2d 702 (2000).

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[1] The estate never specifically challenged the propriety of the trial court's grant of summary disposition to the individual defendants in their capacities as Commissioners of the DPC or in their individual capacities.

Defendants request that this Honorable Court reverse the March 20, 2014 decision of the Court of Appeals and affirm the orders of the Ottawa County Circuit Court granting summary disposition to defendants.

STATEMENT OF RELEVANT FACTS AND PROCEEDINGS

A. Nature of the Case:

Two wrongful death cases were commenced in the Ottawa County Circuit Court by the Estate of Chance Aaron Nash arising from a fatal sledding accident that occurred on December 31, 2009 at Duncan Park, in Grand Haven, Michigan. Plaintiff alleged that eleven-year-old Chance Nash "was killed when he struck the dead branch of a dead tree which had fallen on or near the sledding hill." (App. pp. 30a, 75a, ¶ 5)

The first action brought by plaintiff in the Ottawa County Circuit Court (C.A. No. 10-02119-NO), was against the Duncan Park Commission ("DPC"). Plaintiff alleged that the death of plaintiff's decedent resulted from various negligent acts and omissions of the DPC. The DPC brought a motion for summary disposition which was granted on the basis of governmental immunity, and the action was dismissed pursuant to an order entered January 16, 2012. Thereafter, plaintiff filed an appeal of right to the Court of Appeals, Docket No. 309403.

Plaintiff alleged in the second action (C.A. No. 12-002801-NO) that the death of plaintiff's decedent proximately resulted from various negligent acts and/or omissions of the "Duncan Park Trust" ("DPT") and Ed Lystra, Rodney Griswold and Jerry Scott, in their individual capacities and in their capacities as "Trustees of the Duncan Park Trust" and as "Commissioners of the Duncan Park Commission." The allegations of negligence in the complaint are word-for-word identical to the negligence allegations of the prior action against the DPC. (App. p. 76a, ¶ 8) Plaintiff also alleged that the claimed actions and omissions of these

defendants constitute "gross negligence" and "willful and wanton misconduct." (App. p, 78a, ¶ 16) By order of December 17, 2012 plaintiff's motion for summary disposition was denied and summary disposition was granted to all defendants. Plaintiff thereafter appealed by right to the Court of Appeals in Docket No. 314017.

The appeals were consolidated by the Court of Appeals. In a March 20, 2014 published opinion, the Court of Appeals reversed the orders granting the defense motions for summary disposition. On October 24, 2014, this Court granted defendants' application for leave to appeal "limited to the issue whether the Duncan Park Commission constitutes '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.' M.C.L. 691.1401(e)."

B. Duncan Park and the Duncan Park Commission:

On or about October 13, 1913, by correspondence of that date, Martha H. Duncan submitted a proposed, unexecuted "Trust Deed and Deed of Gift" (*Minutes of 10/20/1913 City of Grand Haven Common Council Meeting,* App. p. 3a) to the Grand Haven Common Council "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 upon council's passage of a proposed ordinance, a copy of which was provided along with the deed.[2]

On October 20, 1913, the Common Council, pursuant to resolutions of Alderman DeYoung: (1) adopted the ordinance creating the Duncan Park Commission, and (2) the City of Grand Haven accepted the tract of land known as Duncan Park, pursuant to Martha M. Duncan's deed of gift, which dedicated the land for use as a public park. (App. p. 4a; *1913 Ordinance,* App. p. 6a)

[2] The minutes incorporate a complete, section-by-section statement of the proposed deed. (App. p. 3a)

The purpose of the ordinance that was adopted was "to create and establish a permanent commission, which commission shall have the power and authority at all times to manage and control … [Duncan Park]." (App. p. 6a, ¶ 5; *Trust Deed and Deed of Gift,* App. p. 13a, ¶ 8) Whenever a vacancy occurred in the DPC, the ordinance required the remaining commissioners to select a replacement, who would become a member of the DPC by appointment of the mayor. (App. p. 6a, ¶ 6; *Transcript of 07/06/2011 Deposition of Pat McInnis,* App. p. 47a, TR at 59:8-9)

The ordinance creating the DPC was enacted a second time in October 1994. (*1994 Ordinance*, App. p. 17a)[3]

By her "Trust Deed and Deed of Gift" of October 22, 1913, executed two days after the enactment of the ordinance creating the DPC, and the City's formal acceptance of the land by resolution, the land referred to as "Duncan Park" was transferred by Martha H. Duncan to three "trustees" for and in behalf of the people of the City of Grand Haven. (App. p. 10a, ¶ 3) Those "trustees" constituted the first "Duncan Park Commission." (App. p. 10a, ¶ 2; App. p.12a, ¶ 7)

The Duncan Deed also provides that if the parcel of land should cease to be used as a public park for the citizens of Grand Haven, then the "dedicated" premises would revert to Mrs. Duncan or her heirs:

> The above-described premises shall be at all times known and described as "DUNCAN PARK" and said described parcel of land shall always be held and occupied by said grantees for and in behalf of the Citizens of the City of Grand Haven as a public park, for the use and enjoyment of the citizens or inhabitants of Grand Haven, as a public park, and for no other purpose, and this gift and grant hereby made is subject to the express limitations and is on the express conditions

[3] An October 3, 1994 letter from the City Attorney to the Assistant City Manager confirms that the 1994 ordinance "is identical in all substantive respects to that adopted in 1913 … ." (*10/03/1994 Correspondence,* App. p. 15a) An October 4, 1994 memo from the Assistant City Manager to the City Manager explains that the 1913 ordinance was being reenacted because a copy of the 1913 resolution adopting the 1913 ordinance could not be located at that time. (*10/04/1994 Memo,* App. p. 16a) However, the minutes of the October 20, 1913 council meeting document the resolution by Alderman DeYoung to adopt the 1913 ordinance. (App. p. 4a)

> that such parcel of land shall always be held and used as a public park as aforesaid, and shall always be called "DUNCAN PARK", and should said parcel of land cease to be so held and used as a public park, and in case the Council or said Trustees shall neglect or refuse to carry out in good faith all of the terms and conditions herein specified, then the premises so dedicated as above, with all improvements, shall revert to the first party herein, her heirs, executors or assigns and become again vested in her, or her heirs, as fully as if such dedication had never been made; and she, her heirs, or executors, may then enter upon and take possession of said premises and thenceforward hold onto the same as fully as if this dedication had never been made. (App. p. 10a, ¶ 3)

Notwithstanding Martha Duncan's use of the word "trustees" in her "Trust Deed and Deed of Gift," the Chairman of the DPC averred in his affidavit, submitted in support of defendants' motion for summary disposition that no "Duncan Park Trust" entity existed. (*Affidavit of Edward H. Lystra,* App. p. 80a, ¶ 8)

The DPC has "entire control and supervision" of Duncan Park and the DPC has "the power and authority at all times to manage and control" Duncan Park. (App. p. 6a, ¶¶ 3, 5; App. p. 10a ¶ 2; App. p. 16a ¶¶ 3, 5)

C. The Proceedings Below:

On November 18, 2011, the DPC filed its motion for summary disposition in Case No. 10-002119-NO. The motion was brought under MCR 2.116(C)(7) and (C)(10). Three arguments provided the grounds for the motion. First, the DPC argued that as a government agency engaged in the discharge or exercise of a governmental function, it was immune from liability under the governmental tort liability act ("GTLA"), M.C.L. 691.1401 *et seq.* Next, the DPC argued that plaintiff's claims against it were barred by operation of the so-called "Recreational Use Act" M.C.L. 324.73301. Lastly, the DPC argued that the open and obvious doctrine provided a complete defense to plaintiff's claims.

On December 12, 2011, a hearing was held on the DPC's summary disposition motion. Counsel for the DPC presented arguments in support of the motion for summary disposition

corresponding with those contained in its motion and supporting brief. (*Transcript of 12/12/2011 Motion Hearing,* App. p. 50a) Because plaintiff's counsel complained that he had not been provided a copy of the 1913 ordinance during the course of discovery, the Court adjourned the hearing on DPC's motion, so that plaintiff could conduct additional discovery limited to the 1913 ordinance. (App. pp. 62a, 63a, TR at 21:12-25 – 25:1-24)

On January 16, 2012, the hearing on the DPC's motion for summary disposition resumed. (*Transcript of 01/16/2012 Motion Hearing,* App. p. 57a) Again, counsel for the DPC presented arguments in support of the motion for summary disposition, which were consistent with the three legal grounds presented in DPC's motion and supporting brief. (App. pp. 60a-62a, TR at 16:18-25 – 22:1-14) Counsel for plaintiff argued that the DPC did not have immunity under the GTLA because Duncan Park, though a public park, was owned privately by the DPC, not by the City of Grand Haven; because the DPC was not a governmental agency since it was not a board of the City of Grand Haven created and operating in conformity with § 7.14 of the City Charter; because the DPC was a separate entity from the City of Grand Haven; and because the City of Grand Haven did not have authority to create the DPC. (App. pp. 62a, 63a, TR at 23:12-25 - 28:1-19) Plaintiff's counsel also argued that the Recreational Use Act did not provide immunity because Duncan Park was a public park and because there was evidence of gross negligence by the DPC. (App. p. 64a, TR at 31:7-25) Plaintiff's counsel also asserted that it was a "jury question" whether any hazard posed by fallen trees would have been open and obvious to an eleven-year-old child. (App. p. 66a, TR at 38:2-12)

The trial judge, ruling from the bench, granted the DPC's motion for summary disposition pursuant to MCR 2.116(C)(7), finding plaintiff's claims were precluded by the broad grant of immunity conferred by the GTLA. The court specifically found that the DPC, having

been created, at the very latest in 1994 by ordinance, was, accordingly, a "political subdivision" and, thus, a "governmental agency" under the GTLA. The court further ruled that the DPC's operation of Duncan Park as a public park constituted the discharge of a governmental function. (App. pp. 66a, 67a, TR at 40:24-25 – 44:1-3)

The court's ruling granting summary disposition was embodied in an order of January 16, 2012 (App. 69a), Thereafter, in its March 6, 2012 Opinion and Order (App. p. 71a), the trial court denied plaintiff's motion for reconsideration of the summary disposition ruling, and also denied plaintiff's motion for leave to file a first amended complaint.

Before filing their answer to the complaint in the second case brought by the Nash Estate, defendants also filed a motion for summary disposition, under MCR 2.116(C)(7) (res judicata), MCR 2.116(C)(7) (governmental immunity), MCR 2.116(C)(10) (absence of legal duty), and MCR 2.116(C)(10) (the "open and obvious" doctrine). (*Defendants' Motion for Summary Disposition (without exhibits),* App. p. 82a)

In her written response, plaintiff opposed the motion for summary disposition, and presented an extensive brief discussing to why plaintiff maintained that a "Duncan Park Trust" existed. (*Plaintiff's Response to Defendants' Motion for Summary Disposition (without exhibits).* App. pp. 109a-112a)

A hearing on the motion was held on July 9, 2012. (*Transcript of July 9, 2012 Hearing,* App. p. 126a) In part, defendants argued that even if the Court were to find that a DPT existed, plaintiff's premises liability claim against the DPT and the purported "trustees" failed. It failed, defendants asserted, because under both the Deed of Gift and City of Grand Haven ordinance, it was the DPC and its commissioners that had the exclusive control and supervision of Duncan Park. (App. pp. 133a, 134a, TR at 8:11-20; 9:1-7) Counsel for the defendants presented

additional arguments in support of the motion for summary disposition, which were consistent with the legal grounds discussed in the defendants' motion and supporting brief. The trial court, the Honorable Jon Hulsing, "denied the motions (sic) without prejudice in large part due to the fact that discovery had not yet been commenced and factual issues, primarily related to the status of the trust, were in dispute." (*Opinion and Order of December 17, 2012,* App. p. 232a; see also App. p. 155a, TR at 30:7-22)

Thereafter, "[s]everal discovery motions were filed. Defendants claim[ed] that Defendant Duncan Park Trust (DPT), does not exist; therefore, it lacks the capacity to be sued and cannot comply with discovery requests." (App. p. 232a, p. 2) On November 5, 2012, plaintiff filed her "motion for summary disposition on the 'trust' issue." (*Plaintiff's Motion for Summary on the "Trust" Issue and Brief in Support (without exhibits)*, App. p. 178a) The motion sought a ruling from the trial court that the DPT and the DPT trustees were entities that actually existed. Plaintiff submitted a nine-page brief in support of her motion, presenting multiple arguments in support of a determination that the DPT was the entity to which Martha Duncan had transferred the parcel of property for use as Duncan Park.

Defendants filed a response to the summary disposition "trust issue" motion, with supporting brief. (*Defendants' Response to Plaintiff's Motion for Summary Disposition on the "Trust" Issue (without exhibits),* App. p. 189a) Defendants presented several arguments in opposition to plaintiff's assertions regarding the existence of a DPT. These included emphasizing that it was the DPC, a creation of City of Grand Haven ordinance, under obligations imposed by the ordinance creating the DPC, which had exclusive control and supervision of Duncan Park. (App. p. 192a) Defendants also contended that Martha Duncan's conveyance did not create a trust, but instead constituted a donation of the property by way of a "deed of gift" for the

perpetual use as a public park. Defendants further noted that the deed from Martha Duncan contained no mention of an entity referred to as the "Duncan Park Trust," as named by plaintiff in the complaint. Defendants also pointed out that the position advanced by plaintiff in this second lawsuit on the issue of a DPT was inconsistent with the position plaintiff had taken in the first lawsuit. (App. p. 193a) Defendant supported their motion response with a number of exhibits, including the affidavit of Edward Lystra, chairman of the DPC. (App. p. 79a)

On November 26, 2012, a hearing was held on plaintiff's motion. (*Transcript of November 26, 2012 Hearing,* App. p. 195a) At the hearing, plaintiff's counsel asserted that "[t]he owner of Duncan Park is the trustees" and that "if the trustees own Duncan Park, the City of Grand Haven does not own Duncan Park." (App. p. 200a, TR at 6:18; App. p. 204a, TR at 10:18-19) In support of this contention, plaintiff relied upon a November 20, 2012 "Property Profile Report" supplied by First American Title Insurance Company. (App. p. 200a, TR at 6:14-15) During the hearing, plaintiff's counsel repeatedly dismissed as without merit, any claim that the City of Grand Haven owned Duncan Park. (App. p. 217a, TR at 23:1-6) Nevertheless, plaintiff's counsel, in response to inquiry from the trial judge, agreed that under the terms of the 1913 ordinance, "the City of Grand Haven was accepting [Martha Duncan's] conditions and accepting the gift under the terms imposed by Mrs. Duncan." (App. p. 221a, TR at 27:1-3)

At the hearing, plaintiff's counsel conceded that he did not think that the name "Duncan Park Trust appeared anywhere and stated that "I call it the Duncan Park Trust because I didn't know what else to call it." (App. p. 203a, TR at 9:14-17)

In response to the trial judge's inquiry, plaintiff's counsel confirmed that plaintiff's "ultimate goal" in seeking a determination that the DPT owns Duncan Park, was to establish ownership in an entity that could not invoke the defense of governmental immunity as the DPC

had done successfully done in plaintiff's first lawsuit. (App. pp. 206a, 207a, TR at 12:2-25; 13:1-21)

Defendants argued at the hearing that the documentary evidence established that Martha Duncan, by letter of October 13, 1913 to the Grand Haven City Clerk, provided a copy of an unexecuted deed for the parcel of land to be used as Duncan Park, but conditioned the conveyance on the Common Council accepting it and on the Council's passage of an ordinance that would create the first DPC, and that would give the DPC the power and authority at all time to manage and control Duncan Park and that would confer on the DPC the exclusive supervision and control of Duncan Park. (App. pp. 208a-210a, TR at 14:22-25; 15:1-25; 16:1-3) Defendants' counsel emphasized that hornbook law regarding trusts provides that the intent to create a trust must be unequivocal. Counsel then noted that if it was Martha Duncan's intent by the terms of the Deed of Gift to create a DPT and "trustees," her insistence on the council's passage of an ordinance creating the DPC and empowering the DPC with the exclusive supervision and control of Duncan would be to require a series of effectively unnecessary additional steps before she executed the deed to the property. (App. pp. 210a, 211a, TR at 16:11-25; 17:1-3) Defendants' counsel asked the court to find that plaintiff had not met her burden of demonstrating a clear intent by Martha Duncan to create a trust and that instead that the available evidence established a clear intent to establish a DPC and commissioners. (App. p. 211a, TR at 17:12-15) Counsel noted that there was no mention in the deed, or in any document produced in the litigation, of an entity referred to as the "Duncan Park Trust." (App. p. 212a, TR at 18:2-6)[4] Counsel contended that "if you had a Duncan Park Trust in existence as a separate legal entity, you would've not

[4] Plaintiff's counsel agreed: "Counsel's right. The Trust Agreement does not reference a trust known as the Duncan Park Trust." (App. p. 223a, TR at 29:19-20)

needed the Duncan Park Commission or the Duncan Park Commissioners and that transaction would have been absolutely meaningless." (App. p. 214a, TR at 20:10-14)

The trial court did not rule from the bench regarding plaintiff's motion at the hearing, but took under advisement what the court described as a "[f]ascinating issue." (App. p. 229a, TR at 35:1-2)

By its eight-page Opinion and Order entered December 17, 2012, the trial court denied plaintiff's motion, finding that the DPT does not exist. (App. p. 231a) The court "determine[d] that the grantee is the governmental unit, the City of Grand Haven – the entity that accepted the gift of land." (App. p. 233a) In reaching this conclusion the trial court undertook its analysis of the six-page deed signed by Martha Duncan by looking "to the 'four corners of the written instrument to interpret the intent of the parties.'" (App. p. 233a)[5] The trial court, in its lengthy opinion, detailed the reasoning underlying its conclusions that: (1) the DPT does not exist and, (2) that the property comprising Duncan Park is owned by the City of Grand Haven. (App. p. 231a)

After concluding that there was no genuine issue of material fact that the DPT does not exist, the trial court also granted summary disposition in favor of the DPT on the basis that: (1) the DPT lacks the capacity to be sued, and that (2) the "Duncan Park Trust" was merely another name given by plaintiff to the Duncan Park Commission, and that summary disposition was, therefore, warranted under MCR 2.116(C)(7) since the Court had previously determined in the earlier suit that governmental immunity barred plaintiff's claims against the DPC because the DPC is a political subdivision engaged in a governmental function. Because no trustees could

[5] Quoting *Flajole v. Gallaher*, 354 Mich. 606, 609; 93 N.W.2d 249 (1958).

exist for a non-existent trust, summary disposition was granted to Lystra, Griswold and Scott, to the extent that they were sued in their purported capacities as "trustees." (App. p. 237a)

In its Opinion and Order, the trial court then proceeded to reconsider, *sua sponte*, defendants' motion for summary disposition which it had previously denied without prejudice in July 2012. In a footnote, the court recounted that "both parties briefed and argued this and the following issue in July 2012." (App. p. 237a, n. 22) Summary disposition was also granted to Lystra, Griswold and Scott in their capacities as Commissioners of the DPC, pursuant to MCR 2.116(C)(7), on the basis of governmental immunity, the court finding that the Commissioners are entitled to absolute immunity under the Governmental Tort Liability Act; M.C.L. 691.1407(5), as the highest, appointed executive officials of the DPC. Summary disposition was also granted to Lystra, Griswold and Scott in their individual capacities, the Court concluding that, as individuals, Lystra, Griswold and Scott owed no legal duty to plaintiff's decedent. (App. pp. 237a, 238a)[6]

The trial court did not rule on an additional argument for summary disposition made by the DPT and Lystra, Griswold and Scott - - that because of the trial court's order granting summary disposition to the DPC in plaintiff's first suit, the doctrine of res judicata barred plaintiff's claims against the DPT and against the individual defendants, as Commissioners of the DPC in this second suit. In granting summary disposition, the trial court also did not rule on the arguments by commissioners Lystra, Griswold and Scott that governmental immunity precluded plaintiff's action against them, as their alleged conduct did not constitute "gross negligence," and

[6] Before the Court of Appeals the estate did not challenge the propriety of the trial court's grant of summary disposition to the individual defendants in their capacities as Commissioners of the DPC or in their individual capacities. Plaintiff also failed to specifically raise the dismissal of the individual defendants in their individual capacities or as DPC commissioners in her statement of questions presented.

because their alleged conduct was not "the" proximate cause of the death of plaintiff's decedent. Finally, the trial court did not rule on defendants' arguments that the plaintiff's claims against the DPT, if a DPT were found to exist, should be dismissed on summary disposition because the DPT owed no legal duty to plaintiff's decedent but, even if the DPT did owe a duty, a premises liability action against the DPT was susceptible to dismissal on summary disposition by application of the "open and obvious" doctrine.

D. The Opinion of the Court of Appeals:

In its twenty-one page March 20, 2014 published opinion (Gleicher, J.), the Court of Appeals held that the DPC "is a unique construct of Martha Duncan's trust that is officially connected with the City of Grand Haven only in the sense that that mayor ratifies the Commission's choice of successor members." (App. p. 259a) The Court of Appeals found that the DPC is "a privately-appointed group of three trustees" [who] "controls private property without governmental oversight." (App. p. 259a)

The Court of Appeals determined that the Duncan Deed created a trust that conveyed legal ownership of the park land to three trustees rather than to the City of Grand Haven. The Court of Appeals, although agreeing with defendants that the "Duncan Deed, by its explicit terms, constituted a common-law 'dedication' of property for public use, held that the dedication did not convey title to the City and that title remained in the trustees. (App. p. 254a)

Of significance to this appeal, the Court of Appeals also held that the DPC is not an "authority authorized by law" under the GTLA, because Art. 7, § 27 of the Michigan Constitution "grants to the *Legislature* the power to create 'additional forms of government or authorities.'" (emphasis in original). The Court of Appeals ruled that "[n]either a statute or caselaw support that a city may create an 'authority' by ordinance absent an enabling 'law'

passed by the Legislature. Rather, the term 'authority authorized by law' refers to authorization by the Legislature." (App. p. 257a)

The Court of Appeals reversed "the circuit court's grant of summary disposition on the ground of governmental immunity, and remand[ed] for further proceedings." (App. p. 259a)

STANDARD OF REVIEW

Appellate review of a trial court's grant of summary disposition is reviewed de novo. *Hoffner v. Lanctoe,* 492 Mich. 450, 459; 821 N.W.2d 88 (2012). This Court reviews the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v. Auto-Owners Ins. Co.,* 458 Mich. 288, 294; 582 N.W.2d 776 (1998). "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Glancy v. City of Roseville,* 457 Mich. 580, 583; 577 N.W.2d 897 (1998). "When the material facts are not in dispute, this Court may decide whether a plaintiff's claim is barred by immunity as a matter of law." *Petipren v. Jaskowski,* 494 Mich. 190, 201; 833 N.W.2d 247 (2013). This Court reviews de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(7). *Washington v. Sinai Hosp.,* 478 Mich. 412, 417; 733 N.W.2d 755 (2007). Appellate review of issues of statutory interpretation is also de novo. *Driver v. Naini,* 490 Mich. 239, 246; 802 N.W.2d 311 (2011).

When reviewing an ordinance, this Court applies the same rules that govern construction of statutes. *Macenas v. Michiana,* 433 Mich. 380, 396; 446 N.W.2d 102 (1989). "'The goal of statutory construction, and thus of construction and interpretation of an ordinance, is to discern and give effect to the intent of the legislative body.'" *Bonner v. City of Brighton,* 298 Mich. App. 693, 704-705; 828 N.W.2d 408 (2012) [Citations omitted]. In construing a statute or

ordinance, this Court must presume that every word has some meaning or import and should avoid statutory constructions that render any part of a statute or ordinance surplusage. *Hoste v. Shanty Creek Management, Inc.*, 459 Mich. 561, 574; 592 N.W.2d 360 (1999). It is well established that this Court "give[s] undefined statutory terms their plain and ordinary meanings." *State Farm Fire & Cas. v. Old Republic Ins. Co.*, 466 Mich. 142, 146; 644 N.W.2d 715 (2002); M.C.L. 8.3a.

When construing the Michigan Constitution, this Court's "goal ... is to discern the original meaning attributed to the words of a constitutional provision by its ratifiers." *People v. Nutt*, 469 Mich. 565, 575; 677 N.W.2d 1 (2004). The rule of "common understanding" is applied in the analysis. *Id.* "In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.' " *Id.* at 573-574. Provisions of the Michigan Constitution and law regarding counties, townships, cities, and villages are to be liberally construed in favor of those municipalities. Const. 1963, Art. 7, § 34; *Detroit v. Walker*, 445 Mich. 682, 689; 520 N.W.2d 135 (1994).

ARGUMENT

I.

THE DUNCAN PARK COMMISSION, CONTRARY TO THE DECISION OF THE COURT OF APPEALS, CONSTITUTES "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." M.C.L. 691.1401(e).

The Court of Appeals rejected outright the trial court's ruling that the DPC was entitled to immunity under the GTLA:

> The Commission's entitlement to governmental immunity depends on whether it falls within the definition of "political subdivision" set forth in M.C.L. 691.1401(e). We reject the circuit court's determination that the Commission qualifies as a "political subdivision" because it "was authorized by a political subdivision of the State." The statutory definition of "political subdivision" does not include "commissions," nor does it include commissions "authorized by a city."
>
> Defendants contend that the Commission is an "authority authorized by law." Neither the trust nor the ordinance refers to the Commission as an "authority." ***Furthermore, a city lacks the power to unilaterally create an "authority;" only the Legislature may do so.***
>
> Article 7, § 27 of the Michigan Constitution states:
>
>> Notwithstanding any other provision of this constitution the legislature may establish in metropolitan areas additional form of government or authorities with powers, duties and jurisdictions as the legislature shall provide. Wherever possible, such additional forms of government or authorities shall be designed to perform multi-purpose functions rather than a single function.
>
> Thus, the Commission grants to the *Legislature* the power to create "additional forms of government or authorities." Neither a statute nor caselaw support that a city may create an "authority" by ordinance absent an enabling "law" passed by the Legislature. And defendants have not identified any statutory provision permitting the City of Grand Haven to form an "authority" involving only one park. Accordingly, the Commission is not an "authority authorized by law."

(App, pp. 256a, 257a; emboldened emphasis added, other emphasis in original) The Court of Appeals also determined that the DPC was not entitled to immunity as the "board" of a political subdivision. (App. pp. 257a, 258a) The analysis relied on by the Court of Appeals, in arriving at the conclusion that the DPC is not entitled to immunity from suit under the GTLA, is flawed on multiple grounds.

A. THE DPC IS A "BOARD" OF A POLITICAL SUBDIVISION, ENTITLED TO IMMUNITY UNDER THE GTLA.

A "governmental agency" afforded immunity by the GTLA is defined as "the state or a political subdivision." M.C.L. 691.1401(a). A "municipal corporation" is a "political subdivision." M.C.L. 691.1401(e). A city, such as Grand Haven, is a municipal corporation.

M.C.L. 691.1401(d). A "political subdivision" also is defined as a "board" of a political subdivision. M.C.L. 691.1401(e). If the DPC is deemed a "board" of a political subdivision, then suit against the DPC by the plaintiff estate, is barred by the GTLA.

The Court restated the principles controlling the interpretation of statutory language in *People v. Lowe,* 484 Mich. 718, 721-722; 773 N.W.2d 1 (2009):

> The Court's responsibility in interpreting a statute is to determine and give effect to the Legislature's intent. The statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute. Once the Court discerns the Legislature's intent, no further judicial construction is required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed. (quotation marks and citations omitted)

The word "board" is not defined in the GTLA. So, it should be given its ordinary meaning. M.C.L. 8.3a; *McCormick v. Carrier,* 487 Mich. 180, 192; 791 N.W.2d 517 (2010). In such a situation, this Court may properly consult dictionary definitions. *Macomb Co. Prosecutor v. Murphy,* 464 Mich. 149, 159; 627 N.W.2d 247 (2001). The DPC is easily understood as coming within the commonly-accepted definition of a "board." *Black's Law Dictionary,* (10th ed. 2014),[7] p. 208 says "board" means "[a] group of person having managerial, supervisory, or advisory powers ... ." This broad definition of "board" accurately states the power and functions of the DPC -- "entire control and supervision" of Duncan Park and "the power and authority at all times to manage and control" Duncan Park. (App. p. 6a, ¶¶ 3, 5; App. p. 10a. ¶ 2; App. p. 17a, ¶¶ 3, 5)

It is evident from the very language of the ordinance that when the Grand Haven Common Council adopted the ordinance creating the DPC, it regarded the terms "board" and

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[7] The Court routinely consults *Black's Law Dictionary* when interpreting statutory language. See *International Business Machines Corp. v. Dep't of Treasury,* 496 Mich. 642, 666; 852 N.W.2d 865 (2014); *Ford Motor Co. v. Dep't of Treasury,* 496 Mich. 382, 391; 852 N.W.2d 786 (2014).

"commission" as synonymous. Although the entity created by Grand Haven ordinance and given "the entire control and supervision of said 'Duncan Park'" is referred to as a "commission," the ordinance unambiguously recites in the opening paragraph that what is being created is a "Park Board." (App. pp. 6a, 17a)[8] The Court of Appeals downplayed the significance of this language of the ordinance, employing as it did the word "board," in deciding that the DPC was not entitled to immunity. The Court of Appeals offered the explanation that Grand Haven's charter does not recognize a "Duncan Park Board" as one of its "citizen boards" under the city charter. However, the Court of Appeals' opinion failed to adequately explain why the absence of the DPC from the section of the charter dealing with citizen boards, somehow allowed it to forego well-settled principles of construction, by ignoring the significance of the ordinance's use of the words "Park Board." In ruling as it did, the Court of Appeals failed to fulfill its duty to presume that every word of the ordinance has some meaning or import. Instead, the Court of Appeals rendered an interpretation of the ordinance that improperly caused the ordinance's use of the term "Park Board" to be regarded as mere surplusage. *Hoste v. Shanty Creek Management, Inc.*, 459 Mich. at 574.

Without the need for any strained interpretation whatsoever, the DPC fits within the commonly understood definition of a "board." The Court of Appeals erred when it concluded the DPC was not entitled to the protection of the GTLA as a board of a political subdivision, the City of Grand Haven, on the basis that the term "commission" is not expressly included in the definition of "political subdivision."

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[8] "That there be 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 … ." (emphasis added)

B. THE DPC IS AN "AUTHORITY AUTHORIZED BY LAW OR FORMED BY 1 OR MORE POLITICAL SUBDIVISIONS,"ENTITLED TO IMMUNITY UNDER THE GTLA.

The DPC is an "authority authorized by law or formed by 1 or more political subdivisions … ." M.C.L. 691.1401(e). The Michigan Constitution gives cities the broad authority to enact ordinances relating to municipal concerns. Const. 1963, Art. 7, § 22. Michigan cities, such as Grand Haven, are empowered to enact any ordinance deemed necessary to advance the interests of the city, as long as the enactment is not contrary to or preempted by the state constitution or state laws. *In re Wilcox,* 233 F.3d 899, 909, n. 5 (6th Cir. 2000) (citing *Rental Property Owners Ass'n of Kent Co. v. City of Grand Rapids,* 455 Mich. 246; 566 N.W.2d 514 (1997)). The Michigan Constitution also says that the "provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." Const. 1963, Art. 7, § 34.

The Court of Appeals, relying on Art. 7, § 27 of the Constitution, wrongly concluded that the City of Grand Haven lacked authority to enact an ordinance which created an "authority," such as the DPC. The Court of Appeals interpreted this section of the Constitution as giving the Legislature the *exclusive* authority to do so, "absent an enabling 'law' passed by the Legislature."[9] Contrary to the Court of Appeals' analysis, the plain language of Art. 7, § 27 of the Constitution does not support this conclusion. By it terms, Art. 7, § 27 only addresses *the power of the Legislature* to create "additional forms of government or authorities," and it does not address or govern or restrict the ability of a municipality to create an "authority" by enactment of an ordinance. Nowhere does Art. 7, § 27 state that the power to create an "authority," here a public park commission, is exclusively that of the Legislature.

[9] App. p. 257a.

The Court of Appeals' holding that the City of Grand Haven lacked authority to enact an ordinance creating the DPC is strikingly at odds with notions of municipal autonomy as embodied in both the 1908 and 1963 Michigan Constitutions and the Home Rule City Act[10], M.C.L. 117.1a, *et seq.* As explained in *Adams Outdoor Advertising, Inc. v. City of Holland,* 234 Mich. App. 681, 687-688; 600 N.W.2d 339 (1999), *aff'd* 463 Mich. 675 (2001):

> In *Detroit v. Walker,* 445 Mich. 682, 687-690; 520 N.W.2d 135 (1994), our Supreme Court traced the history of municipal home rule in Michigan. Before the Constitution of 1908, the autonomy of city governments was substantially limited and restricted. Propelled by the resentment of state interference with local matters, the 1908 Constitution granted home rule cities broad autonomy. Thereafter, the Home Rule City Act was enacted to implement the shift in constitutional power recognized in the 1908 Constitution.
>
> Our Constitution of 1963 continues the grant of broad power and authority to home rule cities. As recognized by the Supreme Court in *Walker,* at 689-690; 520 N.W.2d 135:
>
> The Michigan Constitution provides that "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." Const. 1963, art. 7, § 34. It also provides that "[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." Const. 1963, art. 7, § 22.
>
> Accordingly, *it is clear that home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied.* Home rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance. See Const. 1963, art. 7, § 22.
>
> Our municipal governance system has matured to one of general grant of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of granting enumerated rights and powers definitely specified. The convention comment to the most recent amendment of the Michigan Constitution announces best the current relationship between municipalities and the state. It provides that "a revision of Sec. 21, Article VIII, of the present [1908] constitution *reflects Michigan's successful experience with home rule."* [Emphasis in original.]

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[10] Grand Haven is a home rule city. See *City of Grand Haven v. Grocer's Co-op Dairy Co.,* 330 Mich. 694, 695; 48 N.W.2d 362 (1951).

The Michigan Constitution, at Art. 7, § 27 does not expressly deny to municipalities the power to enact ordinances creating municipal park commissions to manage and maintain public parks, such as the DPC.

Local governments have those 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, Inc.,* 442 Mich. 626 n. 5; 502 N.W.2d 638 (1993), quoting *Crain v. Gibson,* 73 Mich. App. 192, 200; 250 N.W.2d 792 (1977). The Michigan Constitution expressly authorizes local governments to establish and maintain public parks. Art. 7, § 23 says that "[a]ny city or village may acquire, own, establish and maintain, within or without its corporate limits, parks, boulevards, cemeteries, hospitals and all works which involve the public health or safety." This was also true under the 1908 Constitution. See *Royston v. City of Charlotte,* 278 Mich. 255, 257; 270 N.W. 288 (1936) (quoting trial court opinion referring to "the power to establish and maintain parks as granted by the Constitution of the State"). The Michigan Legislature expressly confers authority upon cities to acquire and maintain land for public recreational purposes. M.C.L. 123.51 ("Any city, village, county or township may operate a system of public recreation and playgrounds; acquire, equip and maintain land, buildings or other recreational facilities; ... ."). See *Richardson v. Jackson County,* 432 Mich. 377, 381; 443 N.W.2d 105 (1989). Defendants submit that under Art. 7, § 23 and M.C.L. 123.51, the power to create a three-member commission to operate and maintain a public park is a power expressly conferred upon the City of Grand Haven by both the Michigan Constitution and Legislature.

Should the Court disagree with the proposition that the power of a city to create a public park commission by ordinance is expressly conferred by the Constitution and Legislature, it is

nevertheless a power that was properly exercised by the City of Grand Haven. This is so because it is a power that is incident to the power expressly granted to establish a public park. In *Bowler v. Nagel,* 228 Mich. 434; 200 N.W. 258 (1924) the Court was called upon to decide whether the power conferred upon a city to create a civil service system also permitted the city to establish a pension retirement system for city employees. In holding that the provision of a pension retirement system was a power incident to the expressly granted power to create a civil service system, the Court relied upon authorities establishing that it is sufficient if a legislatively delegated power is "'fairly implied in or incident to the powers expressly granted'" in enacted legislation. *Bowler,* 228 Mich. at 440, quoting 1 *Dillon on Municipal Corporations* (5th ed.), § 237. See also *Toebe v. City of Munising,* 282 Mich. 1, 15-16; 275 N.W. 744 (1937) (identifying "those [powers] necessarily or fairly implied in or incident to the powers expressly granted" as among the powers that a municipal corporation possesses)

The power to create by ordinance a park commission or board to manage and control Duncan Park is "incident to" and "fairly implied in" the express power granted to the City of Grand Haven by both Michigan Constitution and statute to establish and maintain a public park, just as the power to create a pension retirement system was incident to the expressly granted authority to create a civil service employment system in *Bowler, supra.* The City of Grand Haven acted within its authority, under the Michigan Constitution and Michigan law, when it enacted the ordinance creating the DPC. Hence, the DPC is an "authority authorized by law or formed by 1 or more political subdivisions … ." M.C.L. 691.1401(e) and is entitled to immunity under the GTLA. See *People ex rel. Sweitzer v. City of Chicago,* 2 N.E.2d 330 (Ill. 1936) (express power given to city to create and regulate parks held to impliedly confer power on city to operate a nursery to supply needs of parks); *Flynn v. City of Cambridge,* 418 N.E.2d 335, 338

(Mass. 1981) ("'a grant of an express power carries with it all unexpressed, incidental powers necessary to carry it into effect.'" quoting 3 C. Sands, *Sutherland Statutory Construction* § 64.02 (4th ed. 1974))

As analyzed in the first issue presented in this brief, in reversing the trial court, the Court of Appeals found it significant that "[t]he statutory definition of 'political subdivision' does not include 'commissions,' nor does it include commissions 'authorized' by a city." (App. p. 257a) This analysis is faulty for an additional reason. It strays from one of the fundamental tenets of statutory construction; namely, that when arriving at the meaning to be ascribed to an undefined term in one section of a legislative act, a court "construes an act as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Macomb County Prosecutor v. Murphy,* 464 Mich. at 159. "[T]he interpretation to be given to a particular word in one section [is] arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v. Crocker,* 219 Mich. 178, 182-183; 189 N.W. 221 (1922); *People v. Cunningham,* 496 Mich. 145, 153-154; 852 N.W.2d 118 (2014). Another section of the GTLA, M.C.L. 691.1407(2) includes in its itemization of individuals entitled to immunity, under specified circumstances, "each member of a ... commission ... of a governmental agency ... ."[11] As noted by the Court of Appeals, the Legislature, in M.C.L.

[11] "(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

691.1401(e), included in the definition of "political subdivision" an "authority" that was "authorized by law," without specifically mentioning a "commission." In M.C.L. 691.1407(2) the Legislature identified members of a "commission" as individuals who may, under certain specified circumstances, invoke immunity under the GTLA. Harmonizing these sections of the GTLA permits a determination that the Legislature intended that a commission that is created by a political subdivision is an "authority" that is "authorized by law" and, thus, entitled to the immunity afforded by the GTLA. [12]

The Court of Appeals also found that the fact that "[t]he trustees ... take no guidance from the city of Grand Haven, and are not accountable for their actions to the City," served to further support its conclusion that the DPC is not a political subdivision cloaked with immunity under the GTLA. (App. p. 258a) However, this characterization of the relationship between the DPC and the City is simply not accurate. The ordinance creating the DPC provides that the DPC is prohibited from expending any city funds for the maintenance of Duncan Park without the money first being appropriated by the common council. The ordinance also requires the DPC to submit an annual report to the council detailing what amount of money is required, and the purpose for which the funds are to be used and that thereafter, the council rules on the

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(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage."

[12] Two panels of the Court of Appeals, albeit in unpublished opinions, have held that a municipal commission created by ordinance is entitled to immunity under the GTLA; *House v. Grand Rapids Housing Comm.,* 2004 WL 1057823 (Mich. App. May 11, 2004) (App. p. 21a) (holding that Grand Rapids Housing Commission "is a governmental agency created by ordinance ... ."); *Nunn v. Flint Housing Comm.,* 2006 WL 335850 (Mich. App. Feb. 14, 2006) (App. p. 25a) ("The formation of the Flint Housing Commission by a City of Flint resolution renders it a 'political subdivision' for purposes of the Act.") Although not binding authority, these cases are properly given persuasive value. *Vanderpool v. Pineview Estates, LLC,* 289 Mich. App. 119, 124 n. 2; 808 N.W.2d 227 (2010).

reasonableness of the DPC's request. (App. p. 6a, ¶ 4) The Court of Appeals' also incorrectly states that "[a]side from appointing the original three trustees to the Commission, the City plays no part in the ongoing management of Duncan Park." (App. p. 258a) To the contrary, the ordinance obliges "[t]he Common Council, or municipal body of the City of Grand Haven" to "provides means for the care and improvement of [Duncan Park]." (App. p. 6a, ¶ 2)

The Court of Appeals also reasoned that governmental immunity did not bar plaintiff's claims against the DPC because "'the definition of 'governmental agency' does not include, or remotely contemplate, joint ventures, partnerships, *arrangements between governmental agencies and private entities,* or any other combined state-private endeavors.'" (App. 258a, 259a, quoting *Vargo v. Sauer,* 457 Mich. 49, 68; 576 N.W.2d 656 (1998); [emphasis added by Court of Appeals]). This Court's quoted observations in *Vargo* do not support the Court of Appeals' conclusion that the DPC may not assert the defense of immunity under the GTLA.

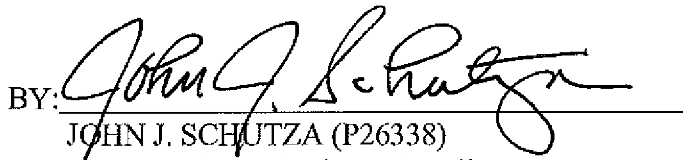
The DPC engages in a governmental function when it exercises control and supervision of Duncan Park. "In Michigan the operation of a recreational park is a governmental function." *Collison v. City of Saginaw,* 84 Mich. App. 325, 327; 269 N.W.2d 586 (1978), *rev'd on other grounds,* 406 Mich. 944 (1979), citing *Royston v. City of Charlotte,* 278 Mich. at 257-258; *Rohrabaugh v. Huron-Clinton Metropolitan Auth.,* 75 Mich. App. 677, 681; 256 N.W.2d 240 (1977) (observing that "Michigan courts have traditionally treated the operation of recreational parks as a governmental function."). The DPC's performance of this governmental function is only made possible by the enactment of the ordinance creating the DPC. As discussed above, the City's power to enact the ordinance creating the DPC is "incident to" and "fairly implied in" the express power granted to the City of Grand Haven by Michigan Constitution and statute to establish and maintain a public park. Thus, the DPC, created by a lawful city ordinance enacted

two days before Martha Duncan executed the Duncan Deed, was not, contrary to the ruling of the Court of Appeals, a "private entity" performing a governmental function and, thus, not entitled to immunity under the GTLA. *O'Neill v. Emma L. Bixby Hospital,* 182 Mich. App. 252, 257; 451 N.W.2d 594 (1990).

RELIEF SOUGHT

Defendants-Appellants, DUNCAN PARK COMMISSION, DUNCAN PARK TRUST, EDWARD LYSTRA, RODNEY GRISWOLD and JERRY SCOTT, request that the Court peremptorily reverse the March 20, 2014 decision of the Court of Appeals or reverse the decision after hearing argument on the merits.

MERRY, FARNEN & RYAN, P.C.



BY: ______________________________

JOHN J. SCHUTZA (P26338)
Attorneys for Defendants-Appellants
18303 Ten Mile Road, Suite 200
Roseville, Michigan 48066
(586) 776-6700

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