

IN THE MICHIGAN SUPREME COURT, Docket Nos. 149168 and 149169
Appeal from the Michigan Court of Appeals, Docket Nos. 309403 and 414017
Lower Court Docket Nos. 10-002119-NO and 12-002801-NO

THE ESTATE OF CHANCE AARON NASH,
Deceased, by his Personal Representative,
Diane Nash,

Plaintiff-Appellee,

v

DUNCAN PARK COMMISSION,

Defendant/Appellant.

Docket No. 149168

Court of Appeals No. 309403

Ottawa Circuit No. 10-02119-NO

149168-9
THE ESTATE OF CHANCE AARON NASH,
Deceased, by his Personal Representative,
Diane Nash,

Plaintiff-Appellee,

v

THE DUNCAN PARK TRUST and
ED LYSTRA, RODNEY GRISWOLD,
and JERRY SCOTT, Individually, as Trustees
of the Duncan Park Trust, and as Commissioners
of the Duncan Park Commission,

Defendants-Appellants.

Docket No. 149169

Court of Appeals No. 314017

Ottawa Circuit No. 12-02801-NO

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**PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO
DEFENDANTS-APPELLANTS' APPLICATION FOR
LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

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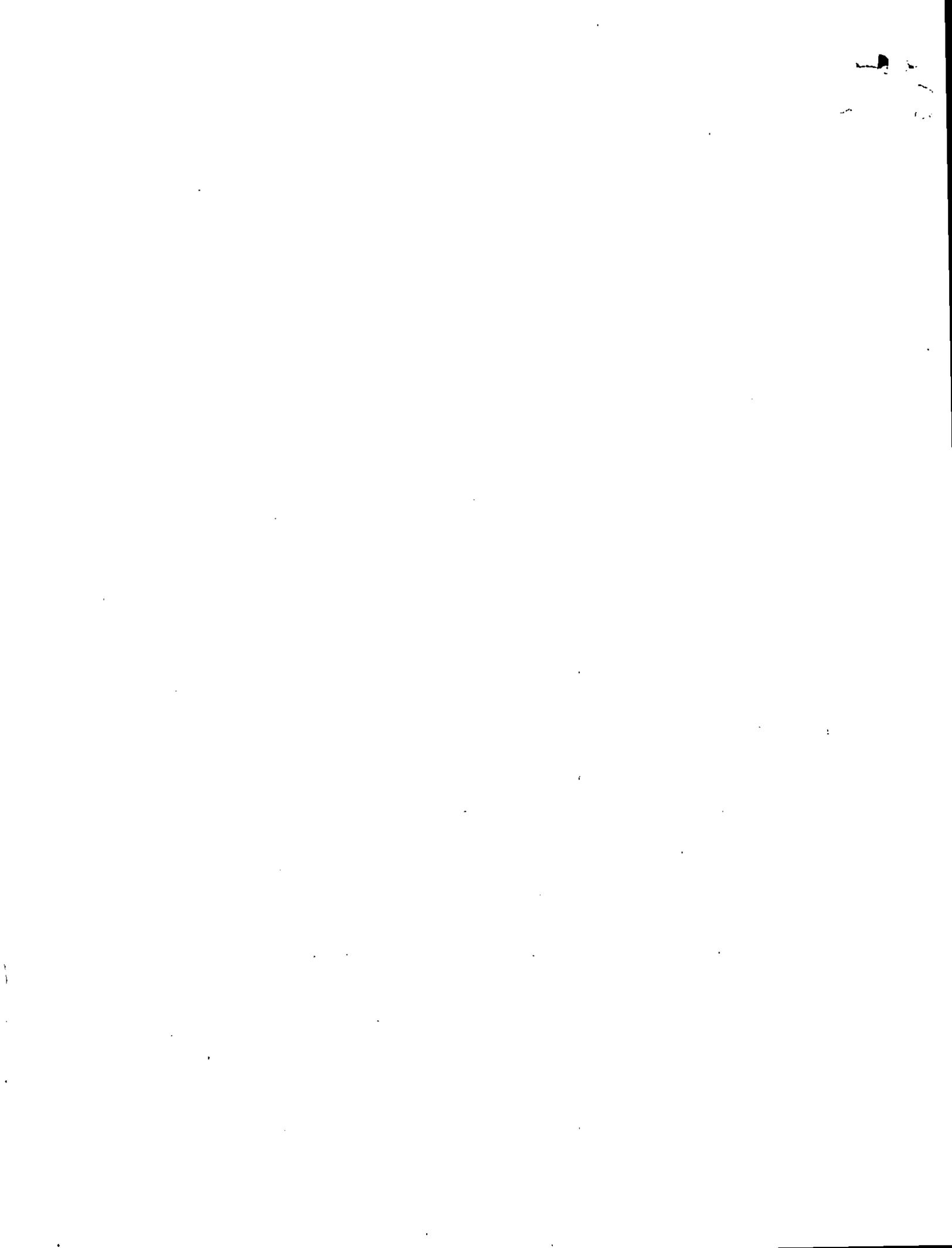


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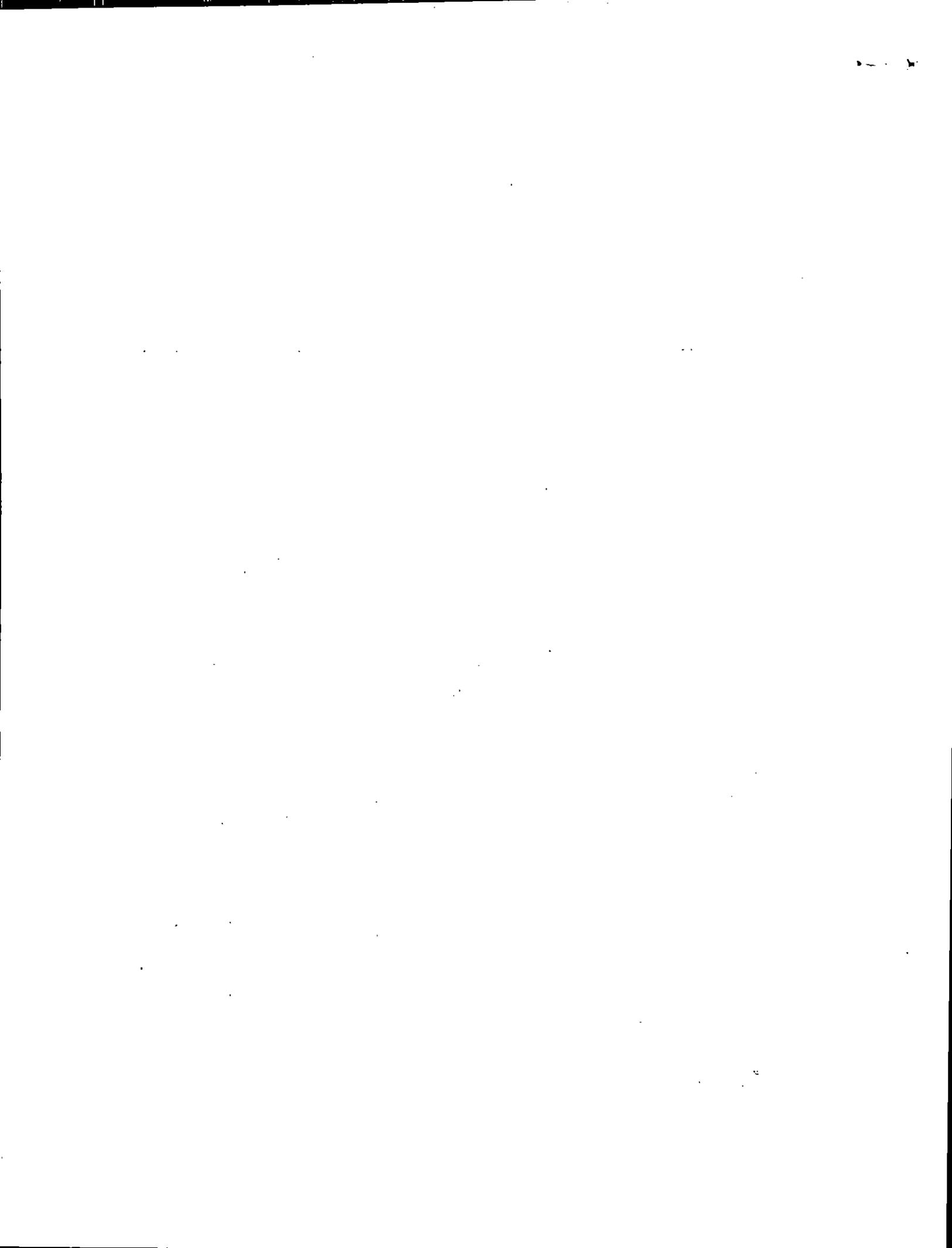
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STATEMENT OF JURISDICTION

Defendants-Appellants' seek leave to appeal the unanimous Court of Appeals decision of March 20, 2014, pursuant to MCR 7.301(A)(2). Defendants-Appellants' Application for Leave to Appeal is timely pursuant MCR 7.302(C)(2)(c).

However, Plaintiff-Appellee asks this Court to deny Defendants-Appellants' Application for Leave to Appeal because Defendants-Appellants have failed to meet the requirements of MCR 7.302(B) in that they have not shown the grounds required to warrant review by this Court. Not only is the unanimous Court of Appeals Opinion the correct result, Defendants-Appellants mistakenly argue that this case involves broad legal principles of major jurisprudence pursuant to MCR 7.302(B), "including whether a municipal commission created by ordinance is entitled to invoke the protection of the GTLA." Instead, the unanimous Court of Appeals Opinion held that this particular "Commission" (the Duncan Park Commission), is **not** a political subdivision of the City of Grand Haven and is **not** entitled to governmental immunity based on the **unique** facts and circumstances surrounding its creation and its tenuous relationship to the City of Grand Haven

In addition, Defendants-Appellants may not seek review by this Court of matters that were not properly raised in the trial court and the Court of Appeals.

RESTATEMENT OF QUESTIONS PRESENTED

- I. SHOULD THIS COURT DENY DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL THE UNANIMOUS COURT OF APPEALS RULING THAT CORRECTLY REVERSED THE TRIAL COURT BY HOLDING THAT THE DUNCAN PARK COMMISSION AND THE TRUSTESS WERE NOT ENTITLED TO GOVERNMENTAL IMMUNITY UNDER THE GOVERNMENTAL TORT LIABILITY ACT AND REVERSED THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION TO THE DUNCAN PARK COMMISSION?**

The Court of Appeals would answer, "Yes."

Plaintiff-Appellee would argue, "Yes."

Defendants-Appellants would argue, "No."

The trial court would answer, "No."

- II. SHOULD THIS COURT DENY DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL THE UNANIMOUS COURT OF APPEALS RULING THAT CORRECTLY REVERSED THE TRIAL COURT BY HOLDING THAT THE DUNCAN PARK TRUST DEED CREATED A TRUST AND TRANSFERRED OWNERSHIP OF DUNCAN PARK TO THE NAMED TRUSTEES?**

The Court of Appeals would answer, "Yes."

Plaintiff-Appellee would argue, "Yes."

Defendants-Appellants would argue, "No."

The trial court would answer, "No."

EXHIBITS

Nash v Duncan Park Commission and Nash v Duncan Park Trust, Court of Appeals published Opinion issued March 20, 2014, (Docket Nos. 309403 and 314017) **A**

Transcript of Deposition of Ed Lystra, May 19, 2011 **B**

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OPINION APPEALED AND
REQUEST TO DENY DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO
APPEAL

On December 31, 2009, eleven-year-old Chance Nash died as a result of injuries he sustained while sledding at Duncan Park when his sled ran into the cut-off branch of a dead tree that was lying on the ground, hidden under snow, in the middle of the trail at the bottom of the sledding hill. Thereafter, Plaintiff-Appellee filed the two wrongful death lawsuits currently before this Court against those who were negligent in failing to remove the dead tree from the sledding hill in Duncan Park.

The history of Duncan Park is important in this litigation. On October 13, 1913, Mrs. Martha Duncan offered to execute the "Trust Deed and Deed of Gift" to convey the land comprising Duncan Park, forever in fee, in trust, to three named trustees, "for and in behalf of the people of the City of Grand Haven ..." and dedicate the use of the land as a public park. Mrs. Duncan conditioned her conveyance on the City of Grand Haven's acceptance of the use of the park as evidenced by the city's adoption of an Ordinance drafted by Mrs. Duncan which recognized the trustees as commissioners of the "Duncan Park Commission," hereinafter the "DPC." On October 20, 1913, the City of Grand Haven accepted and enacted, verbatim, the Ordinance drafted by Mrs. Duncan. The 1913 Ordinance specifically recognized that the Duncan Park "plat of land" was "deeded to three trustees" by the Trust Deed. On October 22, 1913, Mrs. Duncan executed the "Trust Deed and Deed of Gift" hereinafter the "Trust Deed" which transferred the land to the trustees. The trustees and the DPC managed Duncan Park independently from the City of Grand Haven as required by the Trust Deed, and recognized in the Ordinance, for over 100 years.

Plaintiff-Appellee filed suit against the DPC on November 15, 2010 in the *Estate of Chance Aaron Nash v Duncan Commission*, Ottawa County Circuit Court, Docket No: 10-

02119-NO. That case was dismissed by the trial court on January 16, 2012, when the trial court concluded that the DPC was a political subdivision of the City of Grand Haven, entitled to governmental immunity under MCL 691.1401 and granted summary disposition pursuant to MCR 2.116(C)(7). Plaintiff appealed the trial court's decision in Court of Appeals Docket No. 309403.

On April 27, 2012, Plaintiff filed a second suit alleging negligence and gross negligence against the Duncan Park Trust, its trustees, and the Duncan Park Commissioners, individually, in *Estate of Chance Aaron Nash v Duncan Park Trust, et. al.*, Ottawa County Circuit Court, Docket No: 12-02801-NO. The second lawsuit was brought against the trust and the three trustees, Ed Lystra, Rodney Griswold, and Gerald Scott, who hold legal title to Duncan Park and also serve simultaneously as Duncan Park Commissioners. On December 17, 2012, the trial court issued an Opinion and Order denying Plaintiff's Motion for Summary Disposition on the "Trust" Issue based on its determination that "the Duncan Park Trust does not exist and lacks capacity to be sued." The trial court's Opinion and Order also found that the City of Grand Haven owned Duncan Park and granted summary disposition for the Defendants on grounds of governmental immunity pursuant to MCR 2.116(C)(7) and (C)(10), thereby dismissing Plaintiff's case. Plaintiff appealed the trial court's decision in Court of Appeals Docket No. 314017.

On January 17, 2013, the Court of Appeals issued an Order consolidating the two appeals.

On March 20, 2014, the Court of Appeals issued a published Opinion in *Nash v Duncan Park Commission* and *Nash v Duncan Park Trust*. **Exhibit A**, Court of Appeals Opinion of March 20, 2014. The Court of Appeals reversed the trial court's grant of summary disposition in both cases, holding that because Duncan Park is owned by three trustees who also comprise the DPC, a private organization that is empowered by the trust to manage the park independently and

without governmental oversight, Defendants-Appellants in the two consolidated wrongful death cases were not entitled to governmental immunity. The Court of Appeals opined:

This wrongful death case arises from a sledding accident that took the life of 11-year-old Chance Nash . The accident occurred at Duncan Park in Grand Haven. The questions presented in these consolidated appeals center on the ownership of Duncan Park and whether the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, bars plaintiff's claim.

To answer these questions we begin by interpreting a document drafted 100 years ago. The circuit court ruled that this instrument transferred the park property from Martha Duncan to the city of Grand Haven. We conclude that the document created a trust which conveyed legal ownership of the land to three trustees rather than to the City.

The more difficult issue is whether the Duncan Park Commission, which was established pursuant to Martha Duncan's trust, constitutes a "political subdivision" of the city of Grand Haven. Political subdivision status would cloak the trustees and the Commission with governmental immunity. Because the Commission is a private organization empowered by the trust to manage the park without any governmental oversight, we hold that it may not invoke governmental immunity to avoid liability for Chance's death. Accordingly, we reverse the circuit court's contrary decision and remand for further proceedings. [Emphasis added.] (Exhibit A, Court of Appeals Opinion of March 20, 2014, pp. 1-2)

Defendants-Appellants now seek leave to appeal the March 20, 2014 Opinion of the Court of Appeals.

Plaintiff-Appellee respectfully requests this Court to deny Defendants-Appellants' Application for Leave to Appeal and affirm the March 20, 2014 Opinion of the Court of Appeals. While Defendants-Appellants argue that this case involves legal principles of major jurisprudence pursuant to MCR 7.302(B), "including whether a municipal commission created by ordinance is entitled to invoke the protection of the GTLA," the Opinion of the Court of Appeals was specific to whether this particular "Commission" (DPC) is a political subdivision of

the City of Grand Haven entitled to governmental immunity given the unique facts and circumstances surrounding its creation and its tenuous relationship to the City of Grand Haven.

Further, the Court of Appeals did not err when it held that the “Trust Deed and Deed of Gift” of Martha Duncan “created a trust which conveyed legal ownership of the land to three trustees rather than to the City.” (Exhibit A, Court of Appeals Opinion of March 20, 2014, p. 1) This Court should also be aware that Defendants-Appellants have taken an entirely new position in their Application for Leave to Appeal regarding the ownership of Duncan Park and raised an entirely new argument: that by her Trust Deed, Martha Duncan gave up **possession** of the property, only, but retained ownership of Duncan Park. Not only was Defendants-Appellants’ argument never made to the circuit court or the Court of Appeals, it contradicts Defendants-Appellants’ position below and it is completely without merit. As explained by the Court of Appeals, the plain language of the Trust Deed clearly and unambiguously transferred ownership of land comprising Duncan Park, in fee, to the trustees and also evidenced a common-law dedication of the use of Duncan Park to the City of Grand Haven. The City of Grand Haven had to accept the proposed dedication, i.e. the **use of** Duncan Park with the conditions listed, by passing the Ordinance drafted by Mrs. Duncan, BEFORE she conveyed the use to the city and the ownership of the park property to the three named trustees.

In addition, the Court of Appeals did not err in holding that the Duncan Park Commission was not a “political subdivision” entitled to governmental immunity because it is, instead, a private organization, empowered by the Trust Deed to manage Duncan Park independently and without governmental oversight. The Court of Appeals correctly concluded that this “Commission” is not a political subdivision of the City of Grand Haven and is not entitled to governmental immunity based on the unique facts and circumstances surrounding its creation and its tenuous relationship to the City of Grand Haven. The Court of Appeals explained:

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. (**Exhibit A**, Court of Appeals Opinion of March 20, 2014, p. 21)

RELEVANT FACTS AND PROCEEDINGS

Plaintiff-Appellant adopts the facts as stated in the Court of Appeals Opinion of March 20, 2014.

STANDARDS OF REVIEW

Plaintiff-Appellant agrees that the applicable standards of review are correctly set forth in the Court of Appeals Opinion of March 20, 2014, as follows:

This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). We also review de novo the interpretation of written instruments as a matter of law, *Woodbury v Res-Care Premier, Inc.*, 295 Mich App 232, 243; 814 NW2d 308 (2012), and consider de novo issues of statutory interpretation. *Lenawee Co v Wagley*, 301 Mich App 134, 167; 836 NW2d 193 (2013). (**Exhibit A**, Court of Appeals Opinion of March 20, 2014, p. 7)

LAW AND ARGUMENT

Defendants-Appellants' Application should be denied because the March 20, 2014 unanimous Opinion of the Court of Appeals (**Exhibit A**) is correct: the opinion is based on undisputed facts, well-established law, and a straight-forward reading of the plain language of the governing documents. On the other hand, Defendant-Appellants' ever-changing legal and factual positions have led this wrongful death case to the position it occupies now – an argument on appeal about 19th century real estate law. Defendants-Appellants have desperately tried to avoid the real issue in this case: Was the death of Chance Nash caused by the negligence of Defendants-Appellants?

This Court should note at the outset that Defendants-Appellants' current position, as expressed in their Application, includes the following anomalies and other deficiencies:

A. Defendants-Appellants Do Not Argue That The Trial Court Was Correct.

Defendants-Appellants do not argue here, and did not argue in the Court of Appeals, that any part of the analysis, reasoning, or result (except for the dismissal of Plaintiff-Appellants' lawsuit against Defendants-Appellants) reached by the trial court should be upheld.

B. Defendants-Appellants Argue For The First Time, To This Court, That Ownership Of Duncan Park Is Irrelevant, But Also That Martha Duncan's Heirs Own Duncan Park. Defendants-Appellants argue to this Court, for the first time during the lengthy and protracted litigation involved in these two cases, that the "bedrock question" addressed by the Court of Appeals, i.e. "who owns Duncan Park?" (**Exhibit A**, Court of Appeals Opinion of March 20, 2014, p. 7) is "unnecessary" and "irrelevant." Defendants-Appellants' Application For Leave to Appeal of 4/24/14, p. 33. However, it was Defendants-Appellants, themselves, who first raised the issue of park ownership in their Motion for Summary Disposition in the first

lawsuit, *Estate of Chance Aaron Nash v Duncan Commission*, Ottawa County Circuit Court, Docket No. 10-02119-NO, arguing that they were entitled to the protection of governmental immunity because the park was owned by the City of Grand Haven.

In fact, as this litigation has progressed, Defendants-Appellants have asserted the following regarding ownership of Duncan Park:

- **That the City of Grand Haven owns Duncan Park.** Defendants' Summary Disposition Brief of 11/10/2011 (#10-02119), claimed: "Duncan Park is the property of the City of Grand Haven."
- **That the City of Grand Haven does not own Duncan Park.** Defendants' Appeal Brief of 10/30/2012, p.16 (#309403), stated: "the property comprising Duncan Park is not owned by the City of Grand Haven, but by the Duncan Park Commissioners." Defendants' Appeal Brief of 10/30/12, p 16 (#309403).
- **That the City of Grand Haven does own Duncan Park, after all.** Defendants' Appeal Brief of 07/08/2013, pp. 30-33 (#314017). Once the trial court ruled in the second case that the City owned Duncan Park, Defendants-Appellants then took the position that the City of Grand Haven owns Duncan Park by virtue of "common law dedication."
- **That the Duncan Park Commissioners own Duncan Park.** As quoted above from Defendants' Appeal Brief of 10/30/2012, p.16 (#309403).

- **That the Duncan Park Commissioners do not own Duncan Park.**

This is implied by Defendants' argument that the City owns Duncan Park. Defendants' Appeal Brief of 07/08/2013, pp. 30-33 (#314017).

- **That the Duncan Park Commission owns Duncan Park.**

Transcript of Trial Court Hearing of 11/26/12, p 14, where the trial court posed this question to defense counsel:

THE COURT: Mr. Schutza, who owns this piece of land?
What entity or entities?

MR. SCHUTZA: I believe as best as I can determine, your Honor, it's the Duncan Park Commission. And I believe to that end, the chronology of events here is very important.

See also Transcript of Trial Court Hearing of 11/26/12, p 17.

- **That the Duncan Park Commission does not own Duncan Park.**

This is implied by Defendants' argument that the City owns Duncan Park. Defendants' Appeal Brief of 7/8/13, pp. 30-33 (#314017).

- **That Martha Duncan's heirs own Duncan Park.** Now, for the first time, in their Application to this Court, Defendants-Appellants assert that Martha Duncan's heirs are the true owners of Duncan Park while at the same time arguing that a determination of ownership is "irrelevant and unnecessary" to a resolution of the case. Defendants-Appellants' Application For Leave to Appeal of 4/24/14, pp. 33, 37-39.

Having at last exhausted the incorrect possibilities of ownership of the park with the claim that Martha Duncan's heirs are the owners, it is fortunate for Defendants-Appellants that they also have exhausted their possibilities of appeal; after all, the only choice remaining to Defendants-Appellants that has not already been selected and rejected, is the correct choice, as

found by the Court of Appeals, that Duncan Park is owned by the three (3) named trustees, who also serve as the DPC.

Defendants-Appellants have offered no explanation for, or even acknowledgement of, their head-spinning, elastic, and ever-changing positions regarding the basic fact of ownership of Duncan Park.

C. After Admitting the Existence of A Trust and Trustees, Defendants-Appellants Now Deny Their Existence.

Although Defendants-Appellants argue now that there is no trust or trustees, Defendant, Edward Lystra, an attorney and former mayor of the City of Grand Haven, testified in his deposition in Case #10-02119, before the trust and trustees were sued, that there is a trust and he is a trustee:

"I look at this [trust deed] primarily for what it is, namely a trust, and I believe that trustees, such as myself are ultimately responsible to the beneficiaries. In this case, that's going to be the citizens of the City of Grand Haven." (**Exhibit B**, Transcript of Deposition of Ed Lystra, May 19, 2011, p. 20.)

D. Defendants-Appellants May Not Argue New Issues on Appeal.

In their Application for Leave to Appeal, Defendants-Appellants raise and argue many issues that were not presented or ruled upon below, including:

1. Defendants-Appellants' argument that they are entitled to governmental immunity under the GTLA as a "board." Defendants-Appellants' Application For Leave to Appeal of 4/24/14, p. 30. This issue was not raised or briefed by Defendants-Appellants in the trial court or in the Court of Appeals. However, it should be noted that the Court of Appeals specifically found that Defendants-Appellants were not a "board". **Exhibit A**, Court of Appeals Opinion of March 20, 2014, pp. 19-20.

2. Defendants-Appellants' argument that a determination of ownership of Duncan Park is now "irrelevant and unnecessary". Defendants-Appellants' Application For Leave to Appeal of 4/24/14, p. 33. As stated previously, this is a brand new argument that contradicts Defendants-Appellants' position below.

3. Defendants-Appellants' argument that Martha Duncan's heirs own Duncan Park. Defendants-Appellants' Application For Leave to Appeal of 4/24/14, pp. 37-39. This is also an entirely new argument that contradicts Defendants-Appellants' position below.

Defendants-Appellants may not raise issues in this Court that were not raised in the pleadings, nor argued below. *Booth Newspapers, Inc. v Univ. of Michigan Bd. of Regents*, 444 Mich 211, 234 n. 23, 507 NW2d 422 (1993); *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117, 662 NW2d 387 (2003), 662 NW2d 387; *Lantz v Southfield City Clerk*, 245 Mich App 621, 627 n. 4, 628 NW2d 583 (2001); *Head v Phillips Camper Sales & Rental, Inc.*, 234 Mich App 94, 110, 593 NW2d 595 (1999).

E. The Opinion of the Court of Appeals Was Based on the Unique Facts of This Case And Therefore Does Not Involve Legal Principles of Major Significance to the State's Jurisprudence.

In their attempt to prompt this Court to act, Defendants-Appellants misconstrue the unanimous Opinion of the Court of Appeals. Defendants-Appellants argue that the Court of Appeals has called into question the ability of "a municipal commission created by ordinance [to] . . . invoke the protection of the GTLA" thereby implicating "legal principles of major significance to the state's jurisprudence."

Defendants-Appellants are mistaken. The opinion of the Court of Appeals was driven by the one-of-a-kind facts in this case, including the 100 year old trust deed of Mrs. Duncan that transferred ownership of the land to three (3) trustees to be held in trust for use as a park for the benefit of the people of the City of Grand Haven. The trust deed also required adoption of a city

ordinance (dictated by Mrs. Duncan) that created the Duncan Park Commission, comprised of the three (3) trustees, who were to have exclusive control and supervision of the park. These unique facts led the Court of Appeals to conclude that

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. The ordinance provides:

[S]aid 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," . . . 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.

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. (**Exhibit A**, Court of Appeal Opinion of March 20, 2014, p. 20, footnote omitted.)

In other words, Defendants-Appellants are mistaken. The Court of Appeals opinion is, necessarily, limited by the unique facts of this case. There is nothing in the opinion that would prevent a proper authority authorized by law, a board, or another political subdivision, properly created in accordance with the laws of the State of Michigan, from invoking governmental immunity under the GTLA.

I. THIS COURT SHOULD DENY DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL THE UNANIMOUS COURT OF APPEALS RULING THAT CORRECTLY REVERSED THE TRIAL COURT BY HOLDING THAT THE DUNCAN PARK COMMISSION AND THE TRUSTEES WERE NOT ENTITLED TO GOVERNMENTAL IMMUNITY UNDER THE GOVERNMENTAL TORT LIABILITY ACT AND REVERSED THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION TO THE DUNCAN PARK COMMISSION

Defendants-Appellants' Application to this court fails to address a fundamental problem with Defendants-Appellants' claim of governmental immunity as a political subdivision of the City of Grand Haven: Defendants-Appellants are not part of the government and have no substantial connection to the government. The undisputed facts establish that Defendants-Appellants have nothing more than the most tenuous connection with the City of Grand Haven, and that tenuous connection exists solely by means of the ordinance drafted by Mrs. Duncan over one hundred years ago.

The trial court found that Defendant Duncan Park Commission is "autonomous" and completely "separate" from the City of Grand Haven, that the Duncan Park Commission has "exclusive control over Duncan Park and operates independently from the City of Grand Haven", and that Defendant Duncan Park Commission "answers to no one," no person or entity. **Exhibit C**, Trial Court Opinion and Order of 12/17/12, p. 8.

The Court of Appeals concurred as follows:

The Commission is a private body accountable only to itself, not to the city of Grand Haven. The Commission manages Duncan Park without oversight, direction, or financial contribution from the City. Its sole connection with the City derives from the ordinance's requirement that the mayor ratify the Commission's choice of its own commissioners. Whether viewed as the Commission or as three individual trustees, defendants are not a "political subdivision" of the city of Grand Haven and therefore may not invoke the defense of governmental immunity.

Exhibit A, Court of Appeals Opinion of March 20, 2014, p. 18.

Defendants-Appellants do not challenge these factual findings by the lower courts, nor do Defendants-Appellants attempt to explain how it was possible for the City of Grand Haven to create a unit of government completely separate and independent, autonomous, and answerable to no one, akin to a kingdom. Certainly, neither the Grand Haven City Charter, nor the law of the State of Michigan grant any such authority.

Defendants-Appellants argue that the Court of Appeals erred by finding that Defendants-Appellants are not entitled to governmental immunity pursuant to the GTLA. Defendants-Appellants focus on a portion of the Court of Appeals opinion (p. 18-19 of the Opinion) and attempt to quote it at p. 25 and 26 of their Brief.

Although Defendants-Appellants' Application inexplicably omits portions of the "quote" and makes other errors (including substituting "Commission" for "Constitution" and omitting, without notation, the sentence, "[R]ather, the term 'authority authorized by law' refers to authorization by the Legislature.") it appears that Defendants-Appellants take issue with the explanation of the Court of Appeals regarding why the DPC is not an "authority authorized by law". In choosing to focus on this portion of the Court of Appeals analysis of the GTLA, Defendants-Appellants ignore the obvious reason that they are not entitled to governmental immunity; namely, that they are separate and apart from any recognized governmental unit.

The Court of Appeals explains that neither the DPC, nor the trustees, fit within the statutory definition of "authority authorized by law" because the City of Grand Haven lacked the legal authority to create the DPC as an entity that, on the one hand is entitled to governmental immunity, while on the other hand is not ". . . an instrumentality or "political subdivision" of Grand Haven [but is, instead] "an independent, autonomous, private body that administered privately-held land . . . acts solely on its own behalf . . . conducts no public business . . . [and]

independently manages land outside the City's control." **Exhibit A**, Court of Appeals Opinion of March 20, 2014, p. 20.

Likewise, Defendants-Appellants are not a "board" within the meaning of the GTLA: "[d]esignating the DPC a "board" does not transform a private group into a political subdivision." **Exhibit A**, Court of Appeals Opinion of March 20, 2014, p. 20. Very plainly, the Court of Appeals is correct: the DPC and the trustees are not entitled to governmental immunity.

II. THIS COURT SHOULD DENY DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL THE UNANIMOUS COURT OF APPEALS RULING THAT CORRECTLY REVERSED THE TRIAL COURT BY HOLDING THAT THE DUNCAN PARK TRUST DEED CREATED A TRUST AND TRANSFERRED OWNERSHIP OF DUNCAN PARK TO THE NAMED TRUSTEES

Defendants-Appellants also argue that the Court of Appeals erred by finding that Martha Duncan's Trust Deed (a) established a trust, with trustees; (b) transferred ownership of the land to the trustees; and (c) transferred the use of the land to the people of the City of Grand Haven by means of a common law dedication. Defendants-Appellants' Application For Leave to Appeal of 4/24/14, pp. 33-39.

Defendants-Appellants are mistaken.

The Trust Deed accomplished all three of these purposes by the means described in the Court of Appeals Opinion. Although Defendants-Appellants argue that a transfer of ownership to a third party (here, the trustees) "cannot be reconciled" with a simultaneous common law dedication, there is no authority for Defendants-Appellants' position. Also, as noted by the Court of Appeals (**Exhibit A**, Court of Appeals Opinion of March 20, 2014, p. 16):

. . . common law dedication did not vest fee simple title in the City of Grand Haven, rather, fee simple title remained in the trustees.

In accordance with *2000 Baum Family Trust v. Babel*, 488 Mich 136, 793 NW2d 633 (2010), Martha Duncan's common law dedication of the use did not also transfer title to the City, but title was transferred by Mrs. Duncan to the trustees, by the same instrument, the Trust Deed, at the time the Trust Deed was executed by Mrs. Duncan on 10/22/1913. Defendants-Appellants' arguments to the contrary are without support.

Defendants-Appellants also argue in this Court, for the first time, that ownership of Duncan Park is irrelevant and unnecessary because the DPC, but not the trustees, had possession and control of the park under the Ordinance and the Trust Deed, and as a political subdivision, the DPC was entitled to immunity. Defendants-Appellants' Application For Leave to Appeal of 4/24/14, pp. 33-39.

Defendants-Appellants' circular reasoning for this new argument not only relies on the false assumption that the DPC is entitled to immunity, it ignores the fact that the DPC and the trustees are one and the same persons, and it references sections of the 1913 Ordinance and Trust Deed taken out of context, while ignoring other sections, in an attempt to convince this Court that the DPC, but not the trustees, had exclusive control over the land comprising Duncan Park. Sections of these documents ignored or misconstrued by Defendants-Appellants include:

1. Ordinance.

A review of the 1913 Ordinance reveals that it specifically states that the land comprising Duncan Park was transferred to three (3) trustees and those trustees were to comprise the DPC, as follows:

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 the commission shall, in the first instance, be those trustees to whom the said plat of land was transferred** by Mrs. Martha M.H. Duncan. . . . (Exhibit D, emphasis added.)

In other words, the trustees and the DPC, are one and the same persons.

Section 5 of the Ordinance, recognizes that any power or authority given to the DPC to manage the land owned by the trustees must be **in accordance with the mandates of the Trust**

Deed:

Section 5. Purpose. 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 3 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.** (Exhibit E, emphasis added.)

2. Trust Deed.

Defendants-Appellants' Application for Leave to Appeal, p. 33, quotes the Second condition and Seventh condition of the Trust Deed (Exhibit E) in support of their argument that the Trust Deed:

provides that . . . the "The Duncan Park Commission" "shall have the entire control and supervision of said Duncan Park" and that the DPC "shall have the exclusive supervision, management and control" of Duncan Park.

A review of the Second condition of the Trust Deed (Exhibit E) reveals that while it requires the City to create 'THE DUNCAN PARK COMMISSION' it also **requires that the DPC consist of the trustees to whom Mrs. Duncan transferred the property, and no one else**; therefore, the trustees and the DPC, who are one and the same persons, jointly enjoy control and supervision of the park.

Likewise, the Seventh condition of the Trust Deed (Exhibit E) provides:

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 had 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. [Emphasis added.]

The operative words in the Seventh condition that establish who has control are "**they and their,**" which refer to "said trustees" and "THE DUNCAN PARK COMMISSION." That is, both the trustees and the DPC **jointly and simultaneously** exercise exclusive supervision, management and control over Duncan Park. If the Trust Deed had been referring to the DPC, only, the operative word would have been the singular "it," and not the plural "they" and "their". Very plainly, the Seventh condition of the trust deed, establishes that there are trustees, a board of trustees, and a Duncan Park Commission, all of whom are the same three people who **jointly and simultaneously** have the exclusive supervision, management, and control of Duncan Park.

The argument of Defendants-Appellants also completely fails to address the Fifth condition of the Trust Deed (**Exhibit E**) which states:

But it shall be the right and duty of the said TRUSTEES [**not the DPC**] to remove all dead, dying, or unsightly trees, to thin out the undergrowth, wherever necessary, to remove dead branches...."

The Court of Appeals concluded that this condition created an active trust by giving the trustees "well-defined duties ["to remove all dead, dying, or unsightly trees".] **Exhibit A**, Court of Appeals Opinion of March 20, 2014, pp. 10-11. The Trust Deed imposed these duties upon the trustees, only. The failure of Defendants-Appellants' Application to address this duty of the

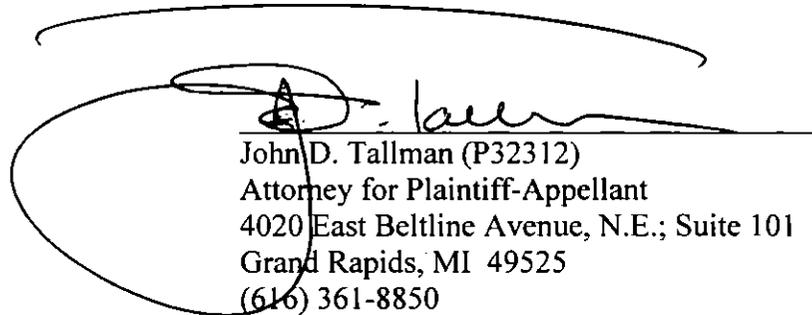
trustees also ignores the fact that the breach of this duty by the trustees is the primary basis of Plaintiff-Appellant's claim against Defendants-Appellants. Defendants-Appellants' argument that the DPC had exclusive control and supervision of Duncan Park to the exclusion of the trustees is without merit.

CONCLUSION

The unanimous Opinion of the Court of Appeals was determined by the peculiar facts in this case. Defendants-Appellants, while not disagreeing with the facts found by both the trial court and the Court of Appeals, argue in this Court for a different result that favors them. Given the undisputed facts, not only is the Opinion of the Court of Appeals correct, its Opinion clearly does not implicate "legal principles of major significance to the state's jurisprudence" given that it is based on, and applicable to, the unique, underlying one-of-a-kind facts of this case. Defendants-Appellants' Application for Leave to Appeal should be denied.

Respectfully submitted,

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