

SUPREME COURT DOCKET NO. _____
COA DOCKET NOS. 309403; 314017
LOWER COURT NOS. 10-002119-NO; 12-002801-NO

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

Plaintiff-Appellant, et

v

DUNCAN PARK COMMISSION,

Defendant-Appellee

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March 20, 2014
9:00 a.m.

No. 309403
Ottawa Circuit
LC No. 10-002119-NO

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

Plaintiff-Appellant, et

v

DUNCAN PARK TRUST and EDWARD
LYSTRA, RODNEY GRISWOLD, and JERRY
SCOTT, individually and as Trustees of the
Duncan Park Trust,

Defendant-Appellees. *ants*

No. 314017
Ottawa Circuit
LC No. 12-002801-NO

DUNCAN PARK TRUST and EDWARD LYSTRA, RODNEY GRISWOLD,
and JERRY SCOTT, individually and as Trustees of the Duncan Park Trust ,

OK
Defendants-Appellants.

DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

*** ORAL ARGUMENT REQUESTED ***

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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES	ii
STATEMENT OF THE QUESTIONS PRESENTED	vii
STATEMENT OF JURISDICTION	viii
EXHIBIT INDEX	ix
JUDGMENT AND ORDER APPEALED FROM AND RELIEF SOUGHT	1
STATEMENT OF RELEVANT FACTS AND PROCEEDINGS	5
STANDARDS OF REVIEW	22
ARGUMENT	
1. THE COURT OF APPEALS ERRED WHEN IT REVERSED THE TRIAL COURT'S RULING GRANTING SUMMARY DISPOSITION TO THE DUNCAN PARK COMMISSION ON THE BASIS THAT PLAINTIFF'S CLAIMS AGAINST THE DUNCAN PARK COMMISSION WERE BARRED BY THE GOVERNMENTAL TORT LIABILITY ACT.	25
2. THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE DUNCAN DEED CREATED A TRUST AND THAT THE DUNCAN DEED TRANSFERRED OWNERSHIP OF THE PARK PROPERTY TO THREE PRIVATELY APPOINTED TRUSTEES.	33
RELIEF SOUGHT	40

INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Adams Outdoor Advertising, Inc. v. City of Holland</i> , 234 Mich. App. 681; 600 N.W.2d 339 (1999)	27
<i>Alton v. Meeuwenberg</i> , 108 Mich. 629; 66 N.W. 571 (1896)	35
<i>Badeaux v. Ryerson</i> , 213 Mich. 624; 182 N.W. 22 (1921)	39
<i>Baldwin Manor, Inc. v. Birmingham</i> , 341 Mich. 423; 67 N.W.2d 812 (1954)	35
<i>Ballard v. Ypsilanti Twp.</i> , 457 Mich. 564; 577 N.W.2d 890 (1998)	32
<i>Bonner v. City of Brighton</i> , 298 Mich. App. 693; 828 N.W.2d 408 (2012)	24
<i>Chandler v. Muskegon County</i> , 467 Mich. 315; 652 N.W.2d 224 (2002)	22
<i>Chicago Lumbering Co. v. Powell</i> , 120 Mich. 51; 78 N.W. 1022 (1899)	39
<i>Christiansen v. Gerrish Twp.</i> , 239 Mich. App. 380; 608 N.W.2d 83 (2000)	36
<i>City of Grand Haven v. Grocer's Co-op Dairy Co.</i> , 330 Mich. 694; 48 N.W.2d 362 (1951)	27
<i>Coblentz v. City of Novi</i> , 475 Mich. 558, 567; 719 N.W.2d 73 (2006)	23
<i>Collison v. City of Saginaw</i> , 84 Mich. App. 325; 269 N.W.2d 586 (1978)	32
<i>Dep't of Natural Resources v. Carmody-Lahti Real Estate, Inc.</i> , 472 Mich. 359; 699 N.W.2d 272 (2005)	35

<i>Detroit v. Walker</i> , 445 Mich. 682; 520 N.W.2d 135 (1994)	25
<i>DeWitt v. Roscommon Co. Rd. Comm.</i> , 45 Mich. App. 579; 207 N.W.2d 209 (1973)	38
<i>Flajole v. Gallaher</i> , 354 Mich. 606; 93 N.W.2d 249 (1958)	15
<i>Glancy v. City of Roseville</i> , 457 Mich. 580; 577 N.W.2d 897 (1998)	22
<i>Grand Rapids v. Crocker</i> , 219 Mich. 178; 189 N.W. 221 (1922)	29
<i>Hawkins v. Dillman</i> , 268 Mich. 483; 256 N.W. 492 (1934)	36
<i>Herman v. Detroit</i> , 261 Mich. App. 141; 680 N.W.2d 71 (2004)	23
<i>Holmes v. Mich. Capital Med. Ctr.</i> , 242 Mich. App. 703; 620 N.W.2d 319 (2000)	22
<i>Hoste v. Shanty Creek Management, Inc.</i> , 459 Mich. 561; 592 N.W.2d 360 (1999)	24, 30
<i>House v. Grand Rapids Housing Comm.</i> , 2004 WL 1057823 (Mich. App. May 11, 2004)	29
<i>In re Wilcox</i> , 233 F.3d 899 (6 th Cir. 2000)	26
<i>Jackson v. Saginaw County</i> , 458 Mich. 141; 580 N.W.2d 870 (1998)	23
<i>Johnson Family Ltd. Partnership v. White Pine Wireless, L.L.C.</i> , 281 Mich. App. 364; 761 N.W.2d 353 (2008)	23
<i>Kentwood v. Sommerdyke Estate</i> , 458 Mich. 642; 581 N.W.2d 670 (1998)	35
<i>Klapp v. United Ins. Group Agency, Inc.</i> , 468 Mich. 459; 663 N.W.2d 447 (2003)	23

<i>Knights of Equity Mem. Scholarship Comm.,</i> 359 Mich. 235; 102 N.W.2d 463 (1960)	34
<i>Kubczak v. Chem. Bank & Trust Co.,</i> 456 Mich. 653; 575 N.W.2d 745 (1998)	33
<i>Little v. Hirschman,</i> 469 Mich. 553; 677 N.W.2d 319 (2004)	35
<i>Macomb County Prosecutor v. Murphy,</i> 464 Mich. 149; 627 N.W.2d 247 (2001)	29
<i>Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club,</i> 283 Mich. App. 264; 769 N.W.2d 234 (2009)	22
<i>Nezworski v. Mazanec,</i> 301 Mich. 43; 2 N.W.2d 912 (1942)	33
<i>Nunn v. Flint Housing Comm.,</i> 2006 WL 335850 (Mich. App. Feb. 14, 2006)	29
<i>O'Neill v. Emma L. Bixby Hospital,</i> 182 Mich. App. 252; 451 N.W.2d 594 (1990)	32
<i>Patrick v. YMCA,</i> 120 Mich. 185; 79 N.W, 208 (1899)	24
<i>Pauley v. Hall,</i> 124 Mich. App. 255; 335 N.W.2d 197 (1983)	22
<i>Payne v. Godwin,</i> 147 Va. 1019, 1024; 133 S.E. 481 (1926)	39
<i>People v. Nutt,</i> 469 Mich. 565; 677 N.W.2d 1 (2004)	24
<i>Petipren v. Jaskowski,</i> 494 Mich. 190; 833 N.W.2d 247 (2013)	23
<i>Redmond v. Van Buren County,</i> 293 Mich. App. 344; 819 N.W.2d 912 (2011)	36
<i>Rental Property Owners Ass'n of Kent Co. v. City of Grand Rapids,</i> 455 Mich. 246; 566 N.W.2d 514 (1997)	26

<i>Rohrbaugh v. Huron-Clinton Metropolitan Auth.</i> , 75 Mich. App. 677; 256 N.W.2d 240 (1977)	32
<i>Royston v. City of Charlotte</i> , 278 Mich. 255; 270 N.W. 288 (1936)	32
<i>Seldon v. SMART</i> , 297 Mich. App. 427; 824 N.W.2d 318 (2012)	22
<i>State Farm Fire & Cas. v. Old Republic Ins. Co.</i> , 466 Mich. 142; 644 N.W.2d 715 (2002)	24
<i>Ter Beek v. City of Wyoming</i> , 495 Mich. 1; ___ N.W.2d ___ (2013)	23
<i>Thies v. Howland</i> , 424 Mich. 282; 380 N.W.2d 463 (1985)	35
<i>2000 Baum Family Trust v. Babel</i> , 488 Mich. 136; 793 N.W.2d 633 (2010)	36, 37, 38
<i>Union Guardian Trust Co. v. Nichols</i> , 311 Mich. 107; 18 N.W.2d 383 (1945)	34
<i>Vander Toorn v. City of Grand Rapids</i> , 132 Mich. App. 590; 348 N.W.2d 697 (1984)	28
<i>Van Ness v. Washington</i> , 29 U.S. (4 Pet.) 232; 7 L. Ed. 842 (1830)	24
<i>Vargo v. Sauer</i> , 457 Mich. 49; 576 B.W.2d 656 (1998)	31

CONSTITUTION, STATUTES, COURT RULES

Const. 1963, Art. 7, § 22	26
Const. 1963, Art. 7, § 27	21, 26, 28
Const. 1963, Art. 7, § 34	25, 26
M.C.L. 8.3a	24

M.C.L. 117.1a	27
M.C.L. 324.73301	8
M.C.L. 691.1401	8
M.C.L. 691.1401(e)	25, 28, 29, 30
M.C.L. 691.1407(2)	29
M.C.L. 691.1407(5)	20
MCR 2.116(C)(7)	8, 10, 19, 20, 22, 23
MCR 2.116(C)(10)	8, 10, 23

STATEMENT OF THE QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS ERR WHEN IT REVERSED THE TRIAL COURT'S RULING GRANTING SUMMARY DISPOSITION TO THE DUNCAN PARK COMMISSION ON THE BASIS THAT PLAINTIFF'S CLAIMS AGAINST THE DUNCAN PARK COMMISSION WERE BARRED BY THE GOVERNMENTAL TORT LIABILITY ACT?

The Court of Appeals says "No."

Plaintiff- Appellee says "No."

Defendants- Appellants say "Yes."

2. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE DUNCAN DEED CREATED A TRUST AND THAT THE DUNCAN DEED TRANSFERRED OWNERSHIP OF THE PARK PROPERTY TO THREE PRIVATELY APPOINTED TRUSTEES?

The Court of Appeals says "No."

Plaintiff- Appellee says "No."

Defendants- Appellants say "Yes."

STATEMENT OF JURISDICTION

The Court has jurisdiction over this Application for Leave to Appeal pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2)(c).

EXHIBIT INDEX

- A** *Nash v. Duncan Park Comm., published opinion of the Court of Appeals, issued March 20, 2014 (Docket Nos. 309403, 314017)*
- B** *Complaints*
- C** *Minutes of 10/20/1913 Common Council Meeting*
- D** *1913 Ordinance*
- E** *Trust Deed and Deed of Gift*
- F** *Transcript of 07/06/2011 Deposition of Pat McInnis*
- G** *1994 Ordinance*
- H** *10/03/1994 Correspondence*
- I** *10/04/1994 Memo*
- J** *Affidavit of Edward H. Lystra*
- K** *Order of 01/16/2012 granting motion for summary disposition in 2010 case*
- L** *03/06/2012 Opinion & Order in 2012 case*
- M** *Defendants' Motion for Summary Disposition in 2012 case (without exhibits)*
- N** *Plaintiff's Response to Defendants' Motion for Summary Disposition in 2012 case (without exhibits)*
- O** *Transcript of 07/09 2012 Hearing*
- P** *12/17/2012 Opinion & Order in 2012 case*
- Q** *Plaintiff's Motion for Summary Disposition on the "Trust" Issue and Brief in Support in 2012 case (without exhibits)*
- R** *Defendants' Response to Plaintiff's Motion for Summary Disposition on the "Trust" Issue in 2012 case (without exhibits)*
- S** *Transcript of 11/26/ 2012 Hearing*

T *Transcript of 12/17/2011 Hearing*

U *Transcript of 01/16/2012 Hearing*

V *House v. Grand Rapids Housing Comm., 2004 WL 1057823 (Mich. App. May 11, 2004)*

W *Nunn v. Flint Housing Comm., 2006 WL 335850 (Mich. App. Feb. 14, 2006)*

JUDGMENT AND ORDER APPEALED FROM AND RELIEF SOUGHT

These two wrongful death cases both pertain to 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") of October 22, 1913, the use of Martha Duncan's private property was transferred by Martha H. Duncan to three "trustees" for and in behalf of the people of the City of Grand Haven and dedicated 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"), in Ottawa County Circuit Court Case No. 10-002119-NO, and defendants DUNCAN PARK TRUST ("DPT"), EDWARD LYSTRA ("Lystra"), RODNEY GRISWOLD ("Griswold") and JERRY SCOTT ("Scott"), in Ottawa County Circuit Court Case No. 12-002801-NO, apply for leave to appeal from the decision of the Michigan Court of Appeals in *Nash v. Duncan Park Commission* and *Nash v. Duncan Park Trust*, published opinion of the Court of Appeals, issued March 20, 2014 (Docket Nos. 309403, 314017). (**Exhibit A**) Defendants respectfully request that this Court reverse the March 20, 2014 opinion of the Court of Appeals and: (1) affirm the trial court's order of January 16, 2012 granting the DPC's motion for summary disposition and the trial court's order of March 6, 2012 which denied plaintiff's motion for reconsideration in Case No. 10-002119-NO, and (2) affirm the trial court's order of December 17, 2012 denying plaintiff's motion for summary disposition and granting summary disposition to all defendants in Case No. 12-002801-NO.

Plaintiff, Diane Nash, personal representative of the Estate of Chance Aaron Nash (“Nash”) appealed by right to the Court of Appeals in Case No. 10-002119-NO. In her appeal, Nash argued that the trial judge, the Honorable Jon Hulsing, reversibly erred when he granted summary disposition to the DPC on the basis that Nash’s claims were precluded because of immunity conferred on the DPC by the Governmental Tort Liability Act (“GTLA”), M.C.L. 691.1401 *et seq.*

In Case No. 12-002801-NO, Nash also appealed by right to the Court of Appeals. Nash sought to overturn the trial court’s ruling granting summary disposition to all defendants.¹ Summary disposition was granted to the DPT on the basis that a DPT never existed. The trial court granted summary disposition to Lystra, Griswold and Scott in their alleged capacities as “trustees,” reasoning that there can be no trustees for a non-existent trust. Summary disposition was also granted to Lystra, Griswold and 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. 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.

This case involves legal principles of major significance to the State’s jurisprudence, including whether a municipal commission created by ordinance is entitled to invoke the protection of the GTLA, as an “authority authorized by law,” and whether, as the Court of Appeals held, municipalities cannot create such an authority in the absence of an enabling law

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.

enacted by the Legislature. This case also concerns issues of significant public interest and it involves claims against the DPC, which defendants maintain is a political subdivision of the State and the DPC commissioners, who defendants contend are officers of a political subdivision of the State.

The Court of Appeals wrongly ruled that the DPC is not entitled to invoke the protection of governmental immunity. This determination by the Court of Appeals was predicated on the erroneous conclusion that the DPC is not a "board" or an "authority authorized by law" within the meaning of the GTLA, despite the fact 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 flawed premise that a municipality may not, under Michigan's Constitution, create by ordinance an authority, such as a municipal commission, without an enabling law passed by the Legislature. This erroneous ruling served to eviscerate 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 Court of Appeals erroneously determined that the Duncan Deed created a trust that transferred ownership of the real property comprising Duncan Park to three "trustees," rather than solely constituting a common-law dedication of private property by means of which Martha Duncan gave up possession but not ownership of the property. The Court of Appeals' conclusion that the Duncan Deed conveyed legal ownership of the park property to three trustees also irreconcilably conflicts with the Court's further holding, in agreement with defendants, that the Duncan Deed constituted a common-law dedication of property to the City

of Grand Haven for a public use. If the Duncan Deed accomplished a common-law dedication, ownership of the original property remained in the original owner; Martha Duncan and her heirs, and, accordingly, was never transferred to three “trustees.”

Additionally, the opinion of the Court of Appeals also fails to address or in any fashion take into account the trial judge’s astute observation, as argued below on behalf of defendants, that if the language of the deed was intended to create a “Duncan Park Trust” with park “trustees,” “then the language [of the Duncan deed] requiring the City to accept the premises and create the DPC would be surplusage.”

Moreover, the Court of Appeals’ analysis fails appreciate that even if a DPT existed, the DPT would not be a proper defendant in this action. That is so since under the terms of both the Duncan Deed and the ordinance creating the DPC, the DPC, a separate and distinct legal entity, has “entire control and supervision” of Duncan Park and it is the DPC that has “the power and authority at all times to manage and control” Duncan Park.

Defendants request that this Honorable Court grant their application for leave to appeal the March 20, 2014 opinion of the Court of Appeals or, in the alternative, request that the Court peremptorily reverse the March 20, 2014 opinion.

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.” (**Exhibit B, Complaints, ¶ 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. (**Exhibit B, ¶ 8**) Plaintiff also alleges that the claimed actions and omissions of these defendants constitute “gross negligence” and “willful and wanton misconduct.” (**Exhibit B, 12-002801-NO Complaint, ¶ 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' January 17, 2013 order entered in Docket No. 309403.²

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, Exhibit C*) 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.³

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. (*Exhibit C, p. 2; 1913 Ordinance, Exhibit D*)

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]." (*Exhibit D, § 5; Trust Deed and Deed of Gift, Exhibit E §*

² The estate filed a third action arising from the death of plaintiff's decedent, against Robert L. DeHare, the groundskeeper for Duncan Park, L.C. Case No. 12-03145-NO). (*Plaintiff-Appellant's Brief on Appeal, Docket No. 314017, pp. 1, 7*)

³ The minutes incorporate a complete, section-by-section statement of the proposed deed. (*Exhibit C, p.1*)

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. (**Exhibit D**, § 6; *Transcript of 07/06/2011 Deposition of Pat McInnis*, **Exhibit F**, TR at 59:8-9)

The ordinance creating the DPC was enacted a second time in October 1994. (*1994 Ordinance*, **Exhibit G**)⁴

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. (**Exhibit D**, § 3) Those "trustees" constituted the first "Duncan Park Commission." (**Exhibit D**, §§ 2, 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 that such parcel of land shall always be held and used as a public park

⁴ 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*, **Exhibit H**) 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*, **Exhibit I**) However, the minutes of the October 20, 1913 council meeting document the resolution by Alderman DeYoung to adopt the 1913 ordinance. (**Exhibit C**, p. 2)

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. (**Exhibit E, ¶ 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, Exhibit J, ¶ 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. (**Exhibit D, §§ 3, 5; Exhibit E, § 2; Exhibit G, §§ 3, 5**)

C. The Motions for Summary Disposition:

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" ("RUA"), 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, Exhibit T*) 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. (**Exhibit T**, 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, Exhibit U*) 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. (**Exhibit U**, 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. (**Exhibit U**, TR at 23:12-25 - 28:1-19) Plaintiff's counsel also argued that the Recreational Use Act, M.C.L. 324.73301 did not provide immunity because Duncan Park was a public park and because there was evidence of gross negligence by the DPC. (**Exhibit U**, 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. (**Exhibit U**, 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. (**Exhibit U**, TR at 40:24-25 – 44:1-3)

The court then found that the RUA did not apply to plaintiff's claims, since Duncan Park was owned by a public entity, the DPC, and the RUA only limits liability with respect to privately-owned land. (**Exhibit J**, TR at 44:4-18)

The trial judge stated that it was declining to address the DPC's motion to the extent it was based on the open and obvious doctrine. (**Exhibit J**, TR at 44:18-23)

The court's ruling granting summary disposition was embodied in an order of January 16, 2012 (**Exhibit K**), Thereafter, in its March 6, 2012 Opinion and Order (**Exhibit L**), 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)*, **Exhibit M**) One facet of defendants' "lack of legal duty" argument was that "[d]espite the donor's use of the word 'Trustees' in her 'Trust Deed and Deed of Gift,'

there is no separate Duncan Park trust entity.’ Accordingly, summary disposition is warranted as it was simply not possible for the ‘Duncan Park Trust’ to owe a legal duty to plaintiff’s decedent or for the individual defendants under the title of ‘trustee’ to owe any duty to plaintiff’s decedent separate and distinct from any duty owed as a DPC commissioner.” (**Exhibit M**, pp. 14-15, quoting **Exhibit J**, ¶ 7)

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)*, **Exhibit N**, pp. 4-7)

A hearing on the motion was held on July 9, 2012. (*Transcript of July 9, 2012 Hearing*, attached as **Exhibit O**) 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. (**Exhibit O**, 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, Exhibit P*, p. 2; see also *Exhibit O*, TR at 30:7-22)⁵

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.” (*Exhibit P*, 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), Exhibit Q*) 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), Exhibit R*) 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. (*Exhibit R*, p. 4) 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”

⁵ During the same July 9, 2012 hearing, the trial court denied plaintiff’s motion seeking to default the defendants, finding that the motion was frivolous, and awarded defendants’ attorney his fees for the time spent in preparing a response to the motion. (*Exhibit O*, TR at 45:11-18; 46:7-18)

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. (**Exhibit R**, p. 5) Defendant supported their motion response with a number of exhibits, including the affidavit of Edward Lystra, chairman of the DPC. (**Exhibit J**)

On November 26, 2012, a hearing was held on plaintiff's motion. (*Transcript of November 26, 2012 Hearing*, attached as **Exhibit S**) 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." (**Exhibit S**, TR at 6:18; 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.⁶ (**Exhibit O**, 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. (**Exhibit O**, 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." (**Exhibit O**, 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." (**Exhibit O**, TR at 9:14-17)

⁶ Exhibit D to Plaintiff's Brief on Appeal.

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, is 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. (**Exhibit O**, 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. (**Exhibit O**, 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. (**Exhibit O**, 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. (**Exhibit O**, 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." (Exhibit O, TR at 18:2-6)⁷ Counsel contended that "if you had a Duncan Park Trust in existence as a separate legal entity, you would've not needed the Duncan Park Commission or the Duncan Park Commissioners and that transaction would have been absolutely meaningless." (Exhibit O, 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." (Exhibit O, 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. (Exhibit P) The court "determine[d] that the grantee is the governmental unit, the City of Grand Haven – the entity that accepted the gift of land." (Exhibit P, p. 3) 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.'" (Exhibit P, p. 3)⁸ The trial court then 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:

The six page deed signed by Mrs. Duncan and accepted by the City expressed intent by the grantor to convey Duncan Park to the City on behalf of the citizens of Grand Haven. This is the only logical interpretation which gives effect to all of the provisions of the deed. The deed did not convey Duncan Park to any named trust. Instead, it conveyed the land to "trustees for and in behalf of the People of the City of Grand Haven" contingent upon the Common Council of the City of Grand Haven accepting the premises. Part of the acceptance by the City involved

⁷ Plaintiff's counsel agreed: "Counsel's right. The Trust Agreement does not reference a trust known as the Duncan Park Trust." (Exhibit O, TR at 29:19-20)

⁸ Quoting *Flajole v. Gallaher*, 354 Mich. 606, 609; 93 N.W.2d 249 (1958).

its creation of the DPC which would then have exclusive management authority over Duncan Park. A process was created by which the City would name successor "trustees" or commissioners. The City assumed financial responsibility for the premises.

Certainly as *Flajole* stated, one could read ambiguities into this instrument. However, only a slanted interpretation of the instrument would conclude that Mrs. Duncan intended to convey the premises to a "Duncan Park Trust," an entity not mentioned in the instrument. Further, any conveyance of the premises to an entity other than the City would render meaningless the language conditioning the conveyance of the property on the acceptance of the premises by the City and the creation of a DPC. Any such interpretation would violate all of the previously listed rules of construction.

Of course, *if* there were any ambiguities in the deed, this Court would then look at the surrounding circumstances to determine the parties' intentions. The surrounding circumstances reveal that the City formally accepted the "gift" from Mrs. Duncan and created an ordinance which was acceptable to her. Contemporaneously, Mrs. Duncan conveyed the property. The actions of both grantor and the City reflect, and confirm, what is obvious from the language of the deed that Duncan Park was conveyed to the City for the benefit of the People of Grand Haven.

The three elements of a gift *inter vivos* are 1) the intent to pass title gratuitously to the donee; 2) actual or constructive delivery of the gift; and, 3) acceptance by the donee of the gift. The evidence demonstrates that Mrs. Duncan intended to pass title of her land to the City and that the City accepted the gift. Mrs. Duncan and the City consummated their intent which was expressed in the deed by their subsequent actions.

Importantly, Plaintiff cannot point to any document which names a "Duncan Park Trust." Any such entity is not defined or even mentioned in the deed. Plaintiff's claim that the DPT exists appears to rest on the use of the word "trustees" in the deed. The word "trustee" has several meanings:

1. "A person (or institution) to whom legal title to property is entrusted to use for another's benefit.
2. Members of a governing board.
3. A person to whom property is legally committed in trust, to be applied either for the benefit of specified individuals, or for public uses; one who is intrusted (sic) with property for the benefit of another; also, a person in whose hands the effects of another are attached in a trustee process.

The second definition listed above applies in this case. Analysis of the deed shows that the term "trustees" are the members of the governing board of Duncan Park. In other words, they are the commissioners of the DPC. "Commissioner" and "trustee" are two names for the same position. It does not matter which is the obverse and which is the reverse, they are the "same coin." The City accepted the premises and holds title to the fee. The City created the DPC. The mayor names the commissioners who then have exclusive management of the premises-for the benefit of the People of Grand Haven.

Likewise, the phrase "upon the trusts" refers not to the legal definition of a "trust" but to the dictionary definition of "agreement or pact." Importantly, the nine listed conditions (agreements) are listed immediately after this phrase in the deed. Similarly, the ninth and final condition (agreement) states that if the DPC ceases to exist, the appropriate court upon application of a citizen shall take "charge of this trust" and take action consistent with the deed. Again, that refers not to any DPT, rather the word "trust" refers to the dictionary definition of "agreement or pact." Thus, the Court would appoint new commissioners of the DPC to carry out the agreements contained within the deed. Any other interpretation would render large portions of the deed meaningless. This interpretation is buttressed by the affidavit of Mr. Lystra, one of the Duncan Park Commissioners. Lystra denies that there is a separate DPT.

Plaintiff legitimately points to inconsistent and confusing positions taken by the City of Grand Haven during this litigation. The city manager, during his deposition, denied that the City owns Duncan Park. Instead, the city manager said that the DPC owns Duncan Park. Plaintiff points to a licensing agreement executed in the 1990's generated between the DPC and the City allowing the City to use Duncan Park. This latter agreement was apparently prepared at the insistence of the insurance company for the City. Importantly, however, the City was not named as a party in this or the prior litigation. Therefore, there are no party admissions regarding ownership of Duncan Park and there certainly is no stipulation between the parties on this issue.

Plaintiff also points to the property profile report attached to her response brief as exhibit A. This shows that the originally named "trustees" own the parcel in question. Plaintiff declares by fiat that this document is conclusive. However, Plaintiff presents no authority establishing that the information contained within a property profile report is conclusive evidence. Indeed, it seems obvious that the deed was recorded by simply reviewing the first two paragraphs of the deed, not analyzing the entire deed. The property profile report is simply wrong.

The Court must also address the language in MCL 554.351 which states in part:

"No gift, grant, bequest or devise, whether in trust or otherwise to religious, educational, charitable or benevolent uses, ... or anything therein contained which shall in other respects be valid under the laws of this state, shall be invalid by reason of the indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities. **If in the instrument creating such a gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes, shall vest in such trustee.** If no such trustee shall be named in said instrument ... then the trust shall vest in the court of chancery for the proper county, and shall be executed by some trustee appointed for that purpose by or under the direction of the court; and said court may make such orders or decrees as may be necessary to vest the title to said lands or property in the trustee so appointed." [Emphasis added].

This statutory language, when combined with the first two paragraphs of the deed in which Mrs. Duncan conveys the land to the named trustees on behalf of the City of Grand Haven, supports Plaintiff's position. However, as Plaintiff points out in her brief, "it is a general principle of trust law that a trust is created only if the settlor manifests an intention to create a trust ... " MCL 554.352 also states that the intention of the creator shall be carried out whenever possible. Thus, regardless of whether or not a document is poorly drafted or if the document is subject to multiple interpretations, the *intent* of the settlor must be honored. Because of this, this Court cannot fall prey to any "gotcha" words or phrases which run counter to the intent--evidenced in the entire deed--of the settlor.

Again the entire deed must be analyzed and harmonized so as to give every term and phrase meaning. Plaintiff says that Mrs. Duncan intended to create a trust. The Court disagrees. Mrs. Duncan intended to convey the land for the benefit of the citizens of Grand Haven. She accomplished this by requiring the City to create an acceptable ordinance in which a DPC was created. Mrs. Duncan named the first commissioners whom she called "trustees." Mrs. Duncan then, as a condition of the gift, required the City-not the trustees-to accept the gift. The ordinance was to be created "immediately after *the acceptance [by the City] of this grant.* " If the City did not create the DPC or accept the premises, then there would be no conveyance. If the gift was to the trustees, then the language requiring the City to accept the premises and create a DPC would be surplusage. It defies common sense to deem the acceptance of Duncan Park by the City as surplusage.

Perhaps the best strategy in analyzing Mrs. Duncan's intent as expressed in the deed is to look at the mechanics of how the gift was conveyed. The mechanics:

- Required the City to accept the land-the very first of the declared interests and purposes required the City to accept the "above-granted premises." This can *only* refer to the land itself as the legal description of the land was stated immediately before these nine interests.
- Conditioned that acceptance of the land recognized the terms and conditions of the dedication.
- Recognized that any such acceptance would *bind* the City. This begs the question: If the City was not accepting the land, then what would bind the City?

When the Court looks at this entire transaction it becomes readily apparent that the City owns the park land and the DPC has exclusive management authority over the land. This interpretation gives effect to all of the provisions of the deed and makes those provisions harmonious.

(Exhibit P, pp. 4-7; emphasis supplied in original; footnotes omitted)

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 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." (Exhibit P, p. 7)

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.” (Exhibit P, p.7, 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. (Exhibit P, pp. 7-8)⁹

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 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

⁹ On appeal 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.

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 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." (Exhibit A, p. 21) The Court of Appeals found that the DPC is "a privately-appointed group of three trustees" [who] "controls private property without governmental oversight." (*Id.*)

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. (Exhibit A, p. 16)

The Court of Appeals also held that the DPC is not an "authority authorized by law" under the GTLA, because Article 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." (Exhibit A, p. 19)

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.” (Exhibit A, p. 21)

STANDARDS OF REVIEW

MCR 2.116(C)(7) “provides that a party may move for summary disposition on the ground that governmental immunity bars the claim.” *Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club*, 283 Mich. App. 264, 278; 769 N.W.2d 234 (2009). This Court reviews de novo a trial court’s grant of summary disposition. *Chandler v. Muskegon County*, 467 Mich. 315, 319; 652 N.W.2d 224 (2002). “The applicability of governmental immunity is a question of law that is also reviewed de novo.” *Seldon v. SMART*, 297 Mich. App. 427; 824 N.W.2d 318 (2012).

A plaintiff opposing a motion for summary disposition based on the defense of governmental immunity, must demonstrate the existence of a genuine factual dispute by coming forward with admissible evidence in the form of opposing affidavits, sworn testimony, admissions or documentation. Mere opinion, conclusory denials, unsworn averments, speculation, inadmissible hearsay, or an attorney’s argument, cannot create a genuine issue of material fact and do not satisfy MCR 2.116(C)(10). *Pauley v. Hall*, 124 Mich. App. 255, 262; 335 N.W.2d 197 (1983). As pertains to a dispositive motion based on governmental immunity, “[i]f the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred.” *Holmes v. Mich. Capital Med. Ctr.*, 242 Mich. App. 703, 706; 620 N.W.2d 319 (2000). A trial court may grant summary disposition to a governmental agency on the basis of statutory immunity after the court has reviewed all of the documentary evidence filed by the parties. *Glancy v. City of*

Roseville, 457 Mich. 580, 583; 577 N.W.2d 897 (1998). In reviewing a trial court's ruling pursuant to MCR 2.116(C)(7), this Court considers "all documentary evidence submitted by the parties, accepting as true the contents of the complaint, unless affidavits or other appropriate documents specifically contradict them." *Herman v. Detroit*, 261 Mich. App. 141, 143; 680 N.W.2d 71 (2004).

"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).

A trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Coblentz v. City of Novi*, 475 Mich. 558, 567; 719 N.W.2d 73 (2006). A motion decided on the pursuant to MCR 2.116(C)(10) entails consideration of all evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party; however, summary disposition is warranted where the evidence shows no genuine issue as to any material fact. *Id.*, 567-568. Summary disposition is appropriate when reasonable minds could not differ on the evidence presented. *Jackson v. Saginaw County*, 458 Mich. 141; 580 N.W.2d 870 (1998). This Court reviews for clear error factual findings in support of a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(10). *Ter. Beek v. City of Wyoming*, 495 Mich. 1; ___ N.W.2d ___ (2013).

The interpretation of a deed, including whether a deed is ambiguous, is a question of law that this Court reviews de novo. *Klapp v. United Ins. Group Agency, Inc.*, 468 Mich. 459, 463; 663 N.W.2d 447 (2003); *Johnson Family Ltd. Partnership v. White Pine Wireless, L.L.C.*, 281 Mich. App. 364, 389; 761 N.W.2d 353 (2008). When a common-law dedication is effectuated by

a deed, a court must look to the deed itself to determine the grantor's intent. See *Patrick v. YMCA*, 120 Mich. 185, 192-193; 79 N.W. 208 (1899), and *Van Ness v. Washington*, 29 U.S. (4 Pet.) 232; 7 L. Ed. 842 (1830).

When reviewing an ordinance, this Court applies the same rules that govern construction of statutes. "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

1.

THE COURT OF APPEALS ERRED WHEN IT REVERSED THE TRIAL COURT'S RULING GRANTING SUMMARY DISPOSITION TO THE DUNCAN PARK COMMISSION ON THE BASIS THAT PLAINTIFF'S CLAIMS AGAINST THE DUNCAN PARK COMMISSION WERE BARRED BY THE GOVERNMENTAL TORT LIABILITY ACT.

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."¹⁰ 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.

¹⁰ Quoting the GTLA's definition of "political subdivision" set forth at then-current M.C.L. 691.1401(e). Legislative amendments have relabeled it.

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.”

(Exhibit A, pp. 18-19; emboldened emphasis added, other emphasis in original) The foregoing 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.

The Michigan Constitution gives cities the authority to enact ordinances relating to municipal concerns. Mich. Const. 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.” Mich. Const. Art. 7, § 34.

The Court of Appeals, relying on Art 7, § 27 of the Constitution erroneously concluded that the City of Grand Haven lacked authority to create, by ordinance, an “authority,” such as the DPC, effectively interpreting that section of the Constitution as giving the Legislature the exclusive authority to do so, “absent an enabling ‘law’ passed by the Legislature.”¹¹ It is immediately and glaringly evident that that the plain language of Art 7, § 27 of the Constitution provides no support for this conclusion. By its terms, Art 7, § 27 only addresses the

¹¹ Exhibit A, p. 19.

power of the Legislature to create “additional forms of government or authorities,” and it does not address or govern municipalities’ ability to create an “authority” by enactment of an ordinance. The pervasive effect of the Court of Appeals’ holding is not only to find the Grand Haven ordinance creating the DPC to be invalid, but the holding, if allowed to stand, also serves to invalidate every other municipal ordinance enacted in Michigan for the purpose of creating a municipal commission.

The erroneous Court of Appeals’ holding that the city of Grand Haven lacked authority to enact an ordinance creating the DPC is demonstrably at odds with the concept of municipal autonomy as embodied in the Michigan Constitution and the Home Rule City Act¹², 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.

¹² 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).

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.]

The Michigan Constitution, at Art 7, § 27 does not expressly deny to municipalities the power to enact ordinances creating municipal commissions, such as the DPC. See *Vander Toorn v. City of Grand Rapids*, 132 Mich. App. 590, 596; 348 N.W.2d 697 (1984) (“The powers of a local government board or commission are limited to those provided by the city charter or local ordinance.”). Consequently, the City of Grand Haven acted within its authority when in enacted the ordinance creating the DPC.

The DPC’s status as an “authority” that was “authorized by law” is critical, because if the DPC is entitled to this status under M.C.L 691.1401(e), then the DPC is immune from suit under the GTLA. 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.” (Exhibit A, p. 19) This analysis is unsound because it fails to take into account one of the fundamental tenets of statutory construction; namely, that when determining the meaning to be given to an undefined term in one section of a legislative act, this 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. 149, 159; 627 N.W.2d 247 (2001). “[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). 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” The Legislature, in M.C.L. 691.1401(e), included in the definition of “political subdivision” an “authority” that was “authorized by law,” without specifically mentioning a “commission.” But in M.C.L. 691.1407(2) the Legislature identified members of a “commission” as individuals that were capable of invoking immunity under the GTLA. Harmonizing these sections of the GTLA, results in the determination that the Legislature intended that commissions that are created by a municipality constitute an “authority” that is “authorized by law” and, thus, entitled to the immunity afforded by the GTLA. Indeed, two panels of the Court of Appeals, albeit in unpublished opinions, have ruled 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) (**Exhibit V**) (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) (**Exhibit W**) (“The formation of the Flint Housing Commission by a City of Flint resolution renders it a ‘political subdivision’ for purposes of the Act. Consequently, even if the issue were to be considered by this Court, the defendant’s status falls

under the category of a political subdivision as defined under the Governmental Immunity Act.”)¹³

Although the entity created by Grand Haven ordinance to “have 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.” (Exhibits D, G)¹⁴ A “board” is an entity that is specifically denoted by the Legislature as coming within the definition of a “political subdivision” under the GTLA. M.C.L. 691.1401(e). 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 the Court of Appeals to forego well-settled principles of construction by ignoring the significance of the ordinance’s use of the words “Park Board.” Contrary to the defective analysis of the Court of Appeals, the Court was obliged to presume that every word of the ordinance has some meaning or import, and was required to avoid an interpretation of the ordinance that rendered the ordinance’s use of the term “Park Board” surplusage. *Hoste v. Shanty Creek Management, Inc.*, 459 Mich. at 574.

¹³ Neither plaintiff, nor the Court of Appeals, disputed that operation of a public park constitutes a governmental function. See **Exhibit A**, p. 18 (“The parties agree that maintaining a park is an exercise of a governmental function.”).

¹⁴ “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”

In concluding that the DPC is not a political subdivision cloaked with immunity under the GTLA, the Court of Appeals proclaimed that “[t]he trustees ... take no guidance from the city of Grand Haven, and are not accountable for their actions to the City.” (Exhibit A, p. 20) This is not an accurate statement. The ordinance 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 reasonableness of the DPC’s request. (Exhibit D, § 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.” (Exhibit A, p. 20) 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].” (Exhibit D, § 2)

Finally, the Court of Appeals’ 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 combines state-private endeavors.’” (Exhibit A, pp. 20-21, quoting *Vargo v. Sauer*, 457 Mich. 49, 68; 576 B.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 is a political subdivision as defined under the GTLA, both as a “board” and as an authority authorized by Grand Haven ordinance. Moreover, the DPC engaged in a

governmental function when it undertook its duties of 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. 255, 257-258; 270 N.W. 288 (1936) ; *Rohrbaugh 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."). In *Ballard v. Ypsilanti Twp.*, 457 Mich. 564; 577 N.W.2d 890 (1998), this Court observed the Court of Appeals had correctly held that the defendant township was afforded immunity under the GTLA with respect to a wrongful death suit arising from the drowning deaths of plaintiff's decedents while swimming at a township park.

The DPC's operation and maintenance of Duncan Park is a direct result of the creation of the DPC by Grand Haven ordinance and, thus, the trial court correctly found that the DPC was a political subdivision engaged in a governmental function and was entitled to immunity under the GTLA. The DPC was not 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). The DPC is not, as found by the Court of Appeals, "a unique construct of Martha Duncan's trust," but is, rather, an entity created by a city ordinance that was enacted two days before Martha Duncan executed the Duncan Deed.

2.

THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE DUNCAN DEED CREATED A TRUST AND THAT THE DUNCAN DEED TRANSFERRED OWNERSHIP OF THE PARK PROPERTY TO THREE PRIVATELY APPOINTED TRUSTEES.

1. *Possession and control of Duncan Park by the DPC, a political subdivision cloaked with immunity, provides the basis supporting the trial court's ruling and, thus, whether or not a trust owned Duncan Park is an issue of no consequence.*

The Court of Appeals devotes approximately one-half of its opinion to analyzing and discussing whether a Duncan Park Trust exists and, if so, whether the trust and its trustees own the land comprising the park. Defendants contend that such an inquiry is both unnecessary and largely irrelevant. Under the ordinance creating the DPC, the DPC was given "the entire supervision and control of said 'Duncan Park,'" and "the power and authority at all times to manage and control [Duncan Park]." (Exhibit D, §§ 3, 5) Similarly, the Duncan Deed provides that the Park Board, named "The Duncan Park Commission" "shall have entire control and supervision of said Duncan Park" and that the DPC "shall have the exclusive supervision, management and control" of Duncan Park. (Exhibit E, §§ 2, 7)

In order recover on a premises liability claim, a plaintiff must establish that the named defendant had possession and control of the premises at issue. *Kubczak v. Chem. Bank & Trust Co.*, 456 Mich. 653, 660; 575 N.W.2d 745 (1998). A defendant has possession of the premises if the defendant exercises actual dominion and control over the premises. *Id.* at 661. If the defendant has no dominion or control over the property, the defendant lacks reasonable power to prevent the alleged injury and cannot be held liable for the alleged damages. *Id.* at 661-662 citing *Nezworski v. Mazanec*, 301 Mich. 43, 56; 2 N.W.2d 912 (1942). The DPC had exclusive dominion and control over Duncan Park. The DPC came into existence two days before any

trust or trustees were purportedly created by Martha Duncan's execution of the Duncan Deed. Even if another entity, such as a trust owned the park land, it was the DPC, being in possession and control that had the ability and duty to prevent hazardous conditions on park land. Thus, if a trust existed and owned the property, the trust could not be held liable for injuries occurring in Duncan Park and such an entity would not be a viable defendant in these premises liability actions. Contrary to the Court of Appeals, ownership of Duncan Park is not "the bedrock question"¹⁵ in these cases. Because the DPC and the commissioners, as discussed above, are entitled to immunity under the GTLA, dismissal of both lawsuits was the right result.

2. *The Duncan Deed, by its express terms, constituted a dedication of private land to the City of Grand Haven for use as a public park. The Court of Appeals' determination that the Duncan Deed created a trust and transferred ownership of the land to the trustees cannot be reconciled with Martha Duncan's dedication of the land to the City for use as a public park.*

The Court of Appeals placed great significance on the Duncan Deed's use of the terms "trust" and trustee in finding that the deed created a trust and conveyed the park property to three trustees.¹⁶ However, the use of the word "trustee" in an instrument, while potentially indicative of the intent to create a trust, is "not absolutely decisive." *Union Guardian Trust Co. v. Nichols*, 311 Mich. 107, 114; 18 N.W.2d 383 (1945). Words alone are not necessarily indicative of a trust. *Knights of Equity Mem. Scholarship Comm.*, 359 Mich. 235, 240; 102 N.W.2d 463 (1960) (Words such as "trust" or "trustee" are 'neither necessary to the creation of a trust nor conclusive with respect thereto even if used.').

¹⁵ Exhibit A, p. 7

¹⁶ Exhibit A, pp. 12-14

Contrary to the opinion of the Court of Appeals, the Duncan deed did not create a “Duncan Park Trust,” nor did it transfer ownership of the park property to a trust or trustees or for that matter any other person or entity. That is because the Duncan Deed, by its explicit terms, constituted a common-law “dedication” of property for a public use, a point on which the Court of Appeals was in agreement with defendants. It conferred an easement to the City of Grand Haven to use a parcel of property as a public park, “Duncan Park.” *Little v. Hirschman*, 469 Mich. 553, 557, n. 4; 677 N.W.2d 319 (2004) (explaining that a common law dedication creates only an easement in the public). Although it has been said that a municipality in which dedicated property is situated may take the property as “trustee” for the public, *Baldwin Manor, Inc. v. Birmingham*, 341 Mich. 423, 430; 67 N.W.2d 812 (1954), an easement conveys no title to land. *Thies v. Howland*, 424 Mich. 282, 289, n. 5; 380 N.W.2d 463 (1985). Rather, it is an inherently limited estate in land. *Dep’t of Natural Resources v. Carmody-Lahti Real Estate, Inc.*, 472 Mich. 359, 381; 699 N.W.2d 272 (2005).

“A common-law dedication is an intention on the part of the owner to dedicate the land for public use, which is accepted by the public.” *Kentwood v. Sommerdyke Estate*, 458 Mich. 642, 653; 581 N.W.2d 670 (1998). A common law dedication has been defined as “... an appropriation of [privately owned] land for some public use, *made by the owner of the fee*, and accepted for such use by or on behalf of the public” *Alton v. Meeuwenberg*, 108 Mich. 629, 634; 66 N.W. 571 (1896) (emphasis added). “A valid common-law dedication of land to the public requires the following elements: (1) an intent of the owners of the property to offer the property to the public for use; (2) acceptance of the owners’ offer by public officials and maintenance of the property by public officials, and (3) use of the property by the public

generally.” *Redmond v. Van Buren County*, 293 Mich. App. 344, 353; 819 N.W.2d 912 (2011).

“With regard to an intention to dedicate, all facts and circumstances bearing on the question are considered.” *2000 Baum Family Trust v. Babel*, 488 Mich. 136, 148; 793 N.W.2d 633 (2010).

The Duncan deed satisfies all of the elements of a valid dedication of land to the public use.

Facts and circumstances relied upon to show a dedicator’s intent, must have a positive and unequivocal character. *Hawkins v. Dillman*, 268 Mich. 483; 256 N.W. 492 (1934). The Duncan Deed language unequivocally communicates Martha Duncan’s intent to dedicate the described parcel of property “for and in behalf of the Citizens of the City of Grand Haven as a public park,” Duncan Park, “and for no other purpose.”¹⁷ Any doubt that Mrs. Duncan intended to create a dedication is completely dissipated by the language in the deed referring to “the premises so dedicated,” and stating that if the land ceases to be used as a public park, the effect shall be “as if such dedication had never been made.” (Exhibit E, ¶ 3) The deed required the City of Grand Haven to accept the offer. A formal means of acceptance can be by resolution, such as was done hereby the Grand Haven Common Council on October 20, 1913. (Exhibit C, p. 2) *Christiansen v. Gerrish Twp.*, 239 Mich. App. 380, 389; 608 N.W.2d 83 (2000). Under both the deed and Grand Haven ordinance, the responsibility for maintenance of Duncan Park was that of public officials, the DPC. There is no dispute that the property known as Duncan Park is and always has been used by the public generally.

That the Duncan Deed is a dedication and not a document creating a trust conveying ownership of the property to trustees, rests on recognition of a single salient fact apparently

¹⁷ Exhibit E, ¶ 3.

overlooked by the Court of Appeals in its analysis - - when Martha Duncan dedicated her private property to the City of Grand Haven, although she gave up *possession* of the property she, and not three “trustees” as the Court of Appeals erroneously and inexplicably found¹⁸, necessarily retained *ownership* of the realty comprising Duncan Park. This point was touched on by Justice Markman in addressing the law of common-law dedication in *2000 Baum Family Trust v. Babel*, 488 Mich. at 145, while at the same time noting some similarity between a dedication and a charitable trust:

This realm of law was said to be “anomalous,” in that “[u]nder it, rights are parted with and acquired in modes and by means unusual and peculiar.” *Patrick*, 120 Mich. at 193 (citations and quotation marks omitted). First, although ordinarily some conveyance or written instrument is required to transmit a right to real property, a “dedication may be made without writing, by act *in pais* [an act performed outside of legal proceedings], *as well as by deed.*” *Id.* (citation and quotation marks omitted). In other words, the statute of frauds is not applicable to the dedication of land to the public. See *Baker v. Johnston*, 21 Mich. 319, 348 (1870). Second, *like a charitable trust*, there need be no grantee in being at the time of the dedication to give it effect. *Patrick*, 120 Mich. at 190. Third, and most significant to the instant case,

[i]t is not at all necessary that the owner should part with the title which he has, for dedication has respect to the possession, and not the permanent estate. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has. [Id. at 193 (citation and quotation marks omitted).]

(emphasis added).

The intent to create a common-law dedication of private land for a public purpose “can be gathered from the circumstances.” *DeWitt v. Roscommon Co. Rd. Comm.*, 45 Mich. App. 579,

¹⁸ Exhibit A, p. 17 (“Although the land was dedicated to the City of Grand Haven for public purposes, ownership remained in the trustees.”)

581; 207 N.W.2d 209 (1973). Indeed, "all facts and circumstances bearing on the question are considered." *2000 Baum Family Trust v. Babel*, 488 Mich. at 148. The language of the Duncan Deed demonstrates not only that Martha Duncan intended to make a common-law dedication but it also makes clear her intent to retain ownership of the property. The Duncan Deed unambiguously says 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 Court of Appeals avoided addressing the significance of this language in its analysis. The Duncan Deed provides that the grantees merely "hold and occupy, and not "own" the property, and that the possession conferred by the dedication reverts to Mrs. Duncan or her heirs as the property owners should it no longer be used as a public park:

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 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.* (Exhibit E, ¶ 3; emphasis added)

Another circumstance that demonstrates that the Duncan Deed did not create a trust or transfer ownership of the land to "trustees" is the fact that the deed specifically refers to the Grand Haven City ordinance creating the DPC. A deed that refers to and is subject to another

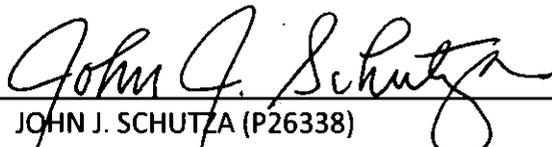
instrument is construed in light of that other instrument. *Chicago Lumbering Co. v. Powell*, 120 Mich. 51, 57; 78 N.W. 1022 (1899) (“It is elementary that the effect of conveyances of land may be affected and limited by other papers to which they refer.”). The ordinance that created the DPC specifically refers to the creation of the DPC and the commissioners and the powers and responsibilities of the DPC, and not to the creation of a trust or to the powers and responsibilities of “trustees” with respect to Duncan Park. **(Exhibit D)** Moreover, where, as here the Duncan Deed ostensibly granted or conveyed realty “to the PEOPLE OF THE CITY OF GRAND HAVEN” and “to the parties of the Second Part and to their successors in office forever,” **(Exhibit E, p. 1)** no transfer of ownership took place because the common law requires a definite and certain grantee. *Payne v. Godwin*, 147 Va. 1019, 1024; 133 S.E. 481 (1926); see also *Badeaux v. Ryerson*, 213 Mich. 624, 647; 182 N.W. 22 (1921). Because the Grand Haven common council, on October 20, 1913 enacted the ordinance creating the DPC comprised of the three commissioners, there was simply no need, as found by the trial court, for a trust with three trustees to be created two days later when Martha Duncan executed the Duncan Deed. The Court of Appeals disparaged the trial court’s choice of definition of “trustee,” as used in the Duncan Deed, as meaning “members of a governing board,” rather than as “trustees” of an actual “trust.” **(Exhibit A, pp. 13-14)** However, the definition chosen by the trial court “better fits the circumstances of this case”¹⁹ since the deed specifically refers to the DPC as a “Board of Trustees,” **(Exhibit E, ¶ 7)** and because the DPC was already in existence, and Martha Duncan knew that it would be in existence, when her deed was eventually executed, inasmuch as her execution of the deed was conditioned on the City’s passage of the ordinance creating the DPC.

¹⁹ Exhibit A, p. 14

RELIEF SOUGHT

Defendants-Appellants, DUNCAN PARK COMMISSION, DUNCAN PARK TRUST, EDWARD LYSTRA, RODNEY GRISWOLD and JERRY SCOTT, request that the Court grant their application for leave to appeal the March 20, 2014 opinion of the Court of Appeals or, in the alternative, peremptorily reverse the March 20, 2014 opinion.

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