STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

DIANE NASH, Personal Representative of the Estate of Chance Aaron Nash,

Plaintiff-Appellee,

v

DUNCAN PARK COMMISSION,

Defendant-Appellant. /

Supreme Court No. 149168

Court of Appeals No. 309403

Ottawa County Circuit Court No. 10-002119-NO

CONSOLIDATED WITH

DIANE NASH, Personal Representative of the Estate of Chance Aaron Nash,

Plaintiff-Appellee,

v

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

Defendants-Appellants. /

Supreme Court No. 149169

Court of Appeals No. 314017

Ottawa County Circuit Court No. 12-002801-NO

BRIEF OF *AMICUS CURIAE* MICHIGAN MUNICIPAL LEAGUE

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STATEMENT OF THE BASIS OF JURISDICTION

On April 24, 2014, Defendant-Appellant filed an application for leave to appeal the March 20, 2014 opinion of the Court of Appeals. This Court granted that application on October 24, 2014. This Court therefore has jurisdiction over this appeal. MCR 7.301(A)(2); MCR 7.302(H)(3).

STATEMENT OF THE QUESTION INVOLVED

Does the broad constitutional authority given to local governments to create additional forms of government or authorities, and the concomitant immunity afforded those authorities, properly encompass a park commission created by city ordinance for the operation of a public park?

Plaintiff-Appellee answers, "no."

Defendant-Appellant answers, “yes."

Amicus Curiae Michigan Municipal League answers, “yes."

The Court of Appeals presumably answers, "no."

STATEMENT OF INTEREST

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of hundreds of Michigan cities and villages, most of which are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors,[1] which is broadly representative of its members. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

The Michigan Municipal League has a longstanding interest in the proper development of the law of governmental immunity, and its interest coincides with that of the public. This state's jurisprudence has long recognized that the issue of governmental liability is of "public interest." *Ross v Consumer Powers Co*, 420 Mich 567, 672, n 24; 363 NW2d 641 (1984). The Michigan Municipal League has a concomitant interest in ensuring that courts adhere to the broad authority provided to local

[1] The 2014-2015 Board of Directors of the Legal Defense Fund are: Lori Grigg Bluhm, Chair, City Attorney, Troy; Clyde J. Robinson, Vice Chair, City Attorney, Kalamazoo; James O. Branson, III, City Attorney, Midland; Randall L. Brown, City Attorney, Portage; Robert J. Jamo, City Attorney, Menominee; Catherine M. Mish, City Attorney, Grand Rapids; Eric D. Williams, City Attorney, Big Rapids; James J. Murray, City Attorney, Boyne City and Petoskey; John C. Schrier, City Attorney, Muskegon; Thomas R. Schultz, City Attorney, Big Rapids; Daniel P. Gilmartin, Executive Director & CEO Michigan Municipal League; Richard Bolen, Mayor Pro Tem, Wakefield and President, Michigan Municipal League; and William C. Mathewson, General Counsel, Michigan Municipal League, and Fund Administrator.

governments through the 1963 Michigan Constitution, including the authority to enact ordinances providing for the creation of public parks. The Court of Appeals' opinion, if left intact, threatens to severely limit constitutionally-derived municipal authority by holding that only the Legislature has "the power to create 'additional forms of government or authorities.'" The published decision also takes a strict constructionist approach, that is to an overly literal reading, to determining what constitutes a "political subdivision" in a manner which could significantly restrict the governmental agencies protected by governmental immunity.

The Michigan Municipal League has a concrete interest in ensuring that Michigan's broad immunity protects governmental parties from the distractions and expenses of defending tort lawsuits filed against them in the same way that the doctrine of sovereign immunity has historically protected the state. See generally *Ross v Consumers Power Co,* 420 Mich 567, 596; 363 NW2d 641 (1984). This Court emphasized that governmental immunity "protects the state not only from liability, but from the great public expense of having to contest a trial." *Odom v Wayne County*, 482 Mich 459, 478; 760 NW2d 217 (2008). The statute also is predicated on the theory that governmental parties engage in a great deal of risky conduct in the course of serving the public, often are seen as deep-pocket defendants, and lawsuits against them may serve to deter useful and socially desirable conduct because of the risk of suit. To guard against this, the Legislature enacted broad protections for governmental parties of all

kinds. The statute was intended to protect governmental parties against the burdens of discovery and trial, as well as against the potential for liability. (*Id.* at 479).

The Court of Appeals' recent opinion, if left to stand, threatens to expose governmental agencies to liability simply because the precise title given to the governmental agency is not listed in the definition of "political subdivision" under MCL 691.1401(e). In the Court of Appeals' view, a park commission, created by ordinance and with an underlying purpose of establishing and maintaining a public park, is not immune because this body was titled a "commission" instead of a "board" or "agency." In this way, the Court of Appeals applies a literalist approach to statutory construction, an approach which is generally disfavored and is particularly disfavored under these circumstances. It is, moreover, inconsistent with longstanding Michigan principles of law that evaluate the gravamen of a situation, not merely the title.

Even more alarming, the Court of Appeals' opinion strips local governments of power to pass ordinances creating authorities such as municipal park commissions. In the Court of Appeals' view, the constitutional grant of power to create "additional forms of government or authorities" to the Legislature prohibits local governments like cities from enacting creating an "authority" which would in turn be entitled to immunity under MCL 691.1401(e). The Michigan Municipal League has a particular interest in proper resolution of this case, a resolution which would reaffirm both the broad authority granted to its member cities and villages and the broad interpretation

to be given to governmental immunity. The Michigan Municipal League therefore requests that this Court reverse the Court of Appeals' decision.

STATEMENT OF FACTS

Amicus Curiae relies upon the Statement of Relevant Facts and Proceedings set forth in Defendant-Appellant's Brief on Appeal.

STANDARD OF REVIEW

This Court reviews *de novo* a circuit court's decision regarding a motion for summary disposition. *Petipren v Jaskowski*, 494 Mich 190, 201; 833 NW2d 247 (2013). In making the determination of whether the moving party was entitled to judgment as a matter of law, the Court reviews the entire record. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Judicial review of an ordinance is subject to the same standard as judicial review of a state statute. *Gora v City of Ferndale*, 456 Mich 704, 720; 575 NW2d 141 (1998). "Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharmacy*, 468 Mich 1, 6; 658 NW2d 127 (2003). "We exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). "'Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.'" (*Id* at 423, quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939)). Thus, "the burden of proving that a statute is unconstitutional rests with the party challenging it," *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007). See also,

In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 490 Mich 295, 307-308; 806 NW2d 683 (2011).

ARGUMENT

The Broad Constitutional Authority Given To Local Governments To Create Additional Forms Of Government Or Authorities, And The Concomitant Immunity Afforded Those Authorities, Properly Encompasses A Park Commission Created By City Ordinance For The Operation Of A Public Park.

Our system of government is based on grants of power *from* the people. *Kuhn v Dep't of Treasury*, 384 Mich 378, 385; 183 NW2d 796 (1971). In *Michigan Farm Bureau v Secretary of State*, 379 Mich 387, 391; 151 NW2d 797 (1967), this Court explained this concept in some detail:

> "*A Constitution is made for the people and by the people*. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it; 'for as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.' (*Cooley's Constitutional Limitations* (6th ed.), 81.)"

(Emphasis added). The 1913 Ordinance creating the Duncan Park Commission is a valid exercise of the City's police powers under the 1963 Michigan Constitution.

A. The 1963 Michigan Constitution constituted a sea of change in authority that municipalities derived directly from the Constitution, granting broad authority to municipalities, subject only to those powers expressly prohibited by the Constitution.

Michigan's 1908 Constitution was enacted at a time in which the authority of municipalities was at its nadir. This statement from the United States Supreme Court in *Atkin v State of Kansas*, 191 US 207, 221; 24 SCt 124; 48 LEd 148 (1903), is emblematic of this attitude: "In the case last cited we said that 'a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and, as such, it is subject to the control of the legislature.'" Under the 1908 Constitution, the authority of cities was limited, and the bulk of lawmaking authority was vested in the Legislature. Constitution 1908, art 8, § 20 provided that "[t]he legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts." Art 8, § 21 of the 1908 Constitution provided:

> Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state.

This approach was a significant change in 1908. In *Simpson v Gage*, 195 Mich 581; 161 NW 898 (1917), this Court recognized that cities had primacy in determining the benefits offered to its *own* employees. The legislature passed a statute requiring firefighters be given one day off for every four days worked as well as an annual twenty one day leave, all of which was to be paid time off. This Court invalidated the Act as special legislation in the interest of those it directly benefited, rather than a beneficent general law in the public interest enacted under a legitimate exercise of police power for the general welfare of the people. This Court further held the Act "is a palpable attempt to regulate the internal affairs of cities, amounting to an unwarranted interference with their rights of local self-government under those principles declared upon that subject in *People v Hurlbut* and *Davidson v Hine, supra*, since recognized, emphasized, and enlarged in article 8 of our latest Constitution." (*Id.* at 588).

However, the limitations on municipal authority were still significant. "Municipal corporations are state agencies, and subject to constitutional restrictions, the Legislature may modify the corporate charters of municipal corporations at will. 12 C. J. 1031. *Powers are granted to them* as state agencies to carry on local government. The state still has authority to amend their charters and enlarge or diminish their powers. Cooley, *Const. Lim.* (8th Ed.) 393. 'They derive all their powers from the source of their creation; and those powers are at all times subject to the control of the legislature. Such powers, also, in the absence of any constitutional regulation forbidding it, may be

enlarged, * * * extended or curtailed, or withdrawn altogether, as the legislature shall determine.' *Rogers v.Burlington*, 3 Wall. (70 U.S.) 654, 663; 18 L.Ed. 79." *Harsha v City of Detroit*, 261 Mich 586, 591; 246 NW 849 (1933). (Emphasis added).

"There is no doubt that it is competent for the Legislature to delegate its control over and power to regulate charges of common carriers operating within the state to a board or commission created for that purpose and within the range of legitimate municipal purposes to municipalities, *but when such power is delegated to a municipal corporation by its charter it must be done in express terms*." *Traverse City v Michigan RR Comm'n*, 202 Mich 575, 581; 168 NW 481 (1918). (Emphasis added). Thus, the 1908 Constitution gave to municipalities only that authority the Legislature deemed appropriate to grant.

The 1963 Constitution constituted a sea of change in authority that municipalities derived directly from the Constitution. The 1963 Constitution grants broad authority to cities. Specifically, Const 1963, art 7, § 22 provides:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. *No enumeration of power granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section*.

(Emphasis added). The Convention Comment to Const 1963, art 7, § 22 notes that the 1963 revision of art 8, § 21 of the 1908 constitution "reflects Michigan's successful experience with home rule. The new language is a more positive statement of municipal powers, giving home rule cities and villages *full power* over their own property and government, subject to this constitution and law." *Associated Builders and Contractors v City of Lansing*, 305 Mich App 395, 406; 853 NW2d 43 (2014), lv gtd 497 Mich 920; 856 NW2d 386 (2014), citing 2 Official Record, Constitutional Convention 1961, p 3393 (emphasis added). Thus, it is clear that the requirement of a specific delegation of legislative powers to a municipality that had previously been in existence was removed in the 1908 constitution.

Additionally, Const 1963, art 7, § 34, requires the Constitution and laws concerning cities be liberally construed:

> Sec. 34. The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. *Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.* (Emphasis supplied).

This Court has adhered to this constitutional imperative. "Home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied." *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994); *American Federation of State, County & Municipal Employees v City of Detroit*, 468 Mich 388, 410-411; 662 NW2d 695 (2003). Citing *Detroit v Walker*, the Court of Appeals held the police

power of cities is "of the same general scope and nature as that of the state," unless explicitly limited by the Constitution or statute. *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 480-481; 666 NW2d 271 (2003).

The addition of an entirely new section to the 1963 Constitution (art 7, § 34) requiring a liberal construction of the authority of cities is a significant change, and one that cannot be ignored. Cities are no longer "creatures of the state", that is akin to state agencies and departments, whose existence and authority can be extinguished by the whim of the legislature. Cities are constitutional entities that enjoy not only constitutional authority, but a liberal understanding of the additional powers given them by "we, the People."

B. The Home Rule City Act, MCL 117.1, *et seq*, grants cities the authority to pass ordinances relating to its municipal concerns.

In *Rental Prop Owners Ass'n of Kent County v City of Grand Rapids*, 455 Mich 246, 253-254; 566 NW2d 514 (1997), this Court described the broad powers possessed by home rule cities (like the City of New Haven) in Michigan:

> "Home rule cites have broad powers to enact ordinances for the benefit of municipal concerns under the Michigan Constitution."

(*Id*.). The authority of home rule cities to enact and enforce ordinances is further defined by the Home Rule City Act, MCL 117.1 *et seq.* It provides in relevant part:

> For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not, for any act to advance the interests of the city,

> the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns[2] subject to the constitution and general laws of this state. [MCL 117.4j(3); MSA 5.2083(3).]

The Home Rule City Act is "intended to give cities a large measure of home rule." *Rental Prop Owners Ass'n of Kent County,* 455 Mich at 254; *Associated Builders*, 305 Mich App at 412-413. It grants general rights and powers subject to enumerated restrictions. *Detroit v Walker,* 445 Mich 682, 690; 520 NW2d 135 (1994); *Conroy v Battle Creek,* 314 Mich 210; 22 NW2d 275 (1946).

C. The City of Grand Haven's enactment of an ordinance creating a park commission is a valid exercise of its power under the Michigan Constitution and the Home Rule City Act to create an "authority authorized by law", which, in turn, is properly afforded governmental immunity.

Consistent with this municipal governance system, the Governmental Tort Liability Act provides broad immunity for governmental defendants. Under MCL 691.1407(1), "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1401(a) defines "governmental agency as "this state or a political subdivision." In turn, MCL 691.1401(e) defines "political subdivision" as "a municipal corporation,

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[2] "Municipal concern" is not defined in the Constitution. At the time our 1963 Constitution was ratified, the term "concern" was commonly defined as "a matter of interest or importance to one; that which relates to or affects one; affair; matter; business" or "interest in or regard for a person or thing." *Webster's Third New International Dictionary* (1961). See, *People v Tanner*, 496 Mich 199; 853 NW2d 653 (2014).

county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of two or more of these when acting jointly; a district or authority created by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision."

In the Court of Appeals' view, the Duncan Park Commission, created through passage of a 1913 ordinance by the City of Grand Haven (see Df. App. pp. 6a-7a), does not fall within the definition of an "authority authorized by law" and thus should not be afforded the protection of governmental immunity. According to the Court of Appeals, "a city lacks the power to unilaterally create an 'authority;' only the Legislature may do so." *Nash v Duncan Park Com'n*, 304 Mich App 599, 632; 848 NW2d 435 (2014) . In so ruling, the Court of Appeals interpreted art 7, § 27 of the Constitution as granting the Legislature the *sole* power to create an "authority" or enable a city to do so:

> Thus, the Constitution 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."

(*Id*. at 633). The Court of Appeals' ruling in this regard reflects a fundamental misunderstanding of the broad authority granted to municipalities, including the

authority to create ordinances, and the very narrow constitutional limits on that authority.

Article 7, § 22 of the 1963 Constitution expressly confers upon cities and villages the "power to adopt resolutions and ordinances relating to its municipal concerns, property, and government[.]" While that power is "subject to the constitution and law," (*Id*.), there is no law or constitutional provision which infringes on that power. Contrary to the Court of Appeals' view, art 7, § 27 does *not* prohibit local governments from creating "authorities;" rather, it gives the Legislature discretionary power to create additional authorities:

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

Const 1963, art 7, § 27. A careful reading of art 7, § 27 provision makes clear that it does not strip cities of their power to create "authorities," but simply grants similar power to the Legislature. The purpose of the Home Rule City Act was to provide broad municipal authority and move away from a restrictive view in the powers of local government. "Home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied." *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994); *American Federation of State, County & Municipal Employees v City of Detroit*, 468 Mich 388, 410-411; 662 NW2d 695 (2003). Here, where neither art 7, §

27, nor any other constitutional provision, expressly denies home rule cities the power to create an "authority authorized by law," cities retain such power.

Accordingly, the 1913 Ordinance passed by the City of New Haven, which created the Duncan Park Commission, was a valid constitutional exercise of the city's authority. Of particular importance, art 7, § 23 of the Michigan Constitution vests local governments with the express power to establish, acquire, and maintain parks like the Duncan Park:

> Sec. 23. Any city or village may acquire, own, establish and maintain, within or without its corporate limits, parks, boulevards, cemeteries, hospitals and all works which involve the public health or safety.

Consistent with this, the City of Grand Haven passed the 1913 ordinance to create the "Duncan Park Commission," thereby facilitating the dedication of land designated the "Duncan Park" for use and enjoyment by the citizens of the City of Grand Haven. (Df. App. pp. 6a-7a). The Duncan Park Commission is an "authority authorized by law" under the 1963 Constitution and the Home Rule City Act, and as such, is entitled to governmental immunity as a "political subdivision" under MCL 691.1401(e). *Royston v City of Charlotte*, 278 Mich 255; 270 NW 288 (1936) (the establishment and maintenance of a park by a city, as authorized by the State Constitution and city charter, is a "governmental function," and the municipality is not liable for injuries caused by its employees or agents' negligence in maintenance thereof.). The Court of Appeals' opinion should therefore be reversed.

D. The designation of a "commission" rather than an "authority" or "board" is not dispositive of the immunity analysis, where "commission" is synonymous with "board" despite the precise label given.

The Court of Appeals' error in refusing to acknowledge a city's constitutional authority to create an "authority" was compounded by its concomitant error in holding that the labeling of an authority as a "commission" rather than a "board" defeats its entitlement to governmental immunity. Taking an extremely narrow and literalist approach, the Court of Appeals held that because the 1913 ordinance refers to the creation of the "Duncan Park *Commission*," and "commission" is not expressly included in the language of MCL 691.1401(e), immunity does not attach:

> 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.

(*Nash*, 304 Mich App at 632). This decision amounts to reversible error.

The cardinal principle of statutory construction is that courts must give effect to legislative intent. *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). When reviewing a statute, courts necessarily must first examine the text of the statute. *Dressel v Ameribank,* 468 Mich 557, 562; 664 NW2d 151 (2003). If the Legislature's intent is clearly expressed by the language of the statute, no further construction is permitted. *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000). Because the GTLA does not define "commission" or "board," it is appropriate to consult

a dictionary for a further understanding of this language. *Duffy v Michigan Dept of Natural Resources*, 490 Mich 198, 228; 805 NW2d 399 (2011) (citing *Klooster v City of Charlevoix*, 488 Mich 289, 304; 795 NW2d 578 (2011)). "Board," which is included in the definition of "political subdivision" as set forth in MCL 691.1401(e), is defined as "[a] group of persons having managerial, supervisory, or advisory powers." *Black's Law Dictionary* (8th ed.), p 184. "Commission" is similarly defined as "[a] body of persons acting under lawful authority to perform certain public services." (*Id*. at p 286). Thus, "board" is synonymous" with "commission." The 1913 Ordinance's express reference in Section 1 to the creation of a "Park Board" known as "The Duncan Park Commission" is proof positive that the two are one and the same in these circumstances. (Df. App. p. 6a).

The Court of Appeals' strict constructionist approach finds no support in the law or in the philosophy underlying statutory construction. United States Supreme Court Justice Antonin Scalia, the justice most identified with the term, has said that he is "not a strict constructionist and no one ought to be," and has called the philosophy "a degraded form of textualism that brings the whole philosophy into disrepute." Justice Scalia further distinguished the two philosophies by stating that "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." *A Matter of Interpretation*, Scalia, Princeton Univ. Press, 1998.

The law requires courts to look past the label chosen by the plaintiff to the substance of the claim asserted. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995) (stating that "in ruling on a statute of limitations defense the court may look behind the technical label…to the substance of the claim asserted."); *Adams v Adams*, 276 Mich App 704, 710-11; 742 NW2d 399 (2007) ("[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim."); *Attorney General v Mereck Sharp & Dohme Corp*, 292 Mich App 1, 9; 807 NW2d 343 (2011) ("a court is not bound by a party's choice of labels."). Similarly, courts must look past the actual name or designation given to an authority to determine whether it falls within the definition of a "political subdivision." The Court of Appeals' opinion in this case represents a drastic departure from this principle.

In short, regardless of how labeled, the 1913 ordinance created a Park Board title the Duncan Park Commission, to oversee the operation of the Duncan Park. Had the Court of Appeals looked past the label given to the Duncan Park Commission, it would have seen that this body, authorized to control and supervise a park for the benefit of Grand Haven's citizens (Df. App. p. 6a), was entitled to governmental immunity. The Duncan Park Commission is a "group of persons having managerial, supervisory, or advisory powers" – or in other words, a "board." *Black's Law Dictionary* (8th ed.), p 184. The Duncan Park Commission therefore should be protected with immunity from tort

liability as a "political subdivision" of the State. Only a reversal of the Court of Appeals' erroneous decision can achieve this desired result.

E. Left to stand, the Court of Appeals' published decision will expose governmental parties to a great risk of liability that the Legislature intended to prevent.

When the appellate courts narrow governmental immunity, they open the floodgates of litigation well beyond the Legislature's intent to broadly immunize governmental agencies and actors. This, in turn, directly affects the fair, efficient, and consistent functioning of our civil justice system. The Court of Appeals' opinion in this case narrows governmental immunity in two ways: first, by disregarding the constitutional authority of cities, villages, and other local governments to establish authorities like the Duncan Park Commission via ordinance; and second, by adopting a hyper-technical approach to determining what constitutes a "political subdivision." Left to stand, the Court of Appeals' decision will create a host of ills.

For decades, local governments have struggled with limitations on their power to enact ordinances deemed necessary to advance the interests of the city. *Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681, 687; 600 NW2d 339, 342 (1999), aff'd 463 Mich 675; 625 NW2d 377 (2001). The 1963 Constitution made clear that cities are given broad authority to enact ordinances to address municipal concerns. Const 1963, art 7, § 22. By holding that only the Legislature can create an "authority," the Court of Appeals' decision undermines the constitutionally-derived power granted

to cities, villages, and other local governments. It also undermines recent decisions of the Court which have recognized the power of cities to enact ordinances. See, e.g., *Associated Builders and Contractors v City of Lansing*, 305 Mich App 395; 853 NW2d 43 (2014), lv gtd 497 Mich 920; 856 NW2d 386 (2014) (holding that the City of Lansing's enactment of a prevailing wage ordinance was a valid exercise of its police powers). The broad power granted to cities by the 1963 Constitution, and codified in the Home Rule City Act, must be respected absent a constitutional or statutory provision to the contrary. Otherwise, the cities and villages comprising the Michigan Municipal League will be forced to operate in a "pre-1963" manner in which municipal authority and autonomy was at a low.

Further, the published decision will cause confusion amongst bench and bar because it essentially allows inconsistent and unpredictable outcomes to litigation involving claims against governmental agencies. While the Court of Appeals in this case held that "commission" is not encompassed within the definition of "political subdivision" for purposes of governmental immunity, at least two prior panels of the Court have held exactly the opposite. In *House v Grand Rapids Housing Comm*, Unpblished opinion per curiam of the Court of Appeals, issued May 11, 2014 (Docket No 248465) (attached hereto as **Exhibit A**), the Court of Appeals held that the Grand Rapids Housing *Commission* "is a governmental agency, created by ordinance[,]" and thus entitled to governmental immunity engaged in a governmental function.

Similarly, in *Nunn v Flint Housing Comm*, Unpublished opinion per curiam of the Court of Appeal, issued February 14, 2006 (Docket No 264262) (attached hereto as **Exhibit B**), the Court of Appeals held that "[t]he formation of the Flint Housing Commission by a City of Flint resolution renders it a 'political subdivision' for purposes of the [Governmental Tort Liability] Act." Left to stand, governmental agencies will have no way to know whether commissions and other authorities, authorized by ordinance, will be deemed "political subdivisions" by a particular panel of the Court such that they will be afforded the protection of governmental immunity. This inconsistency will, in turn, increase costs, create more litigation, and unsettle governmental immunity. The Michigan Municipal League urges this Court to issue an opinion making clear that immunity is broadly interpreted and that a commission created by municipal ordinance is a valid exercise of a city's powers and falls within the definition of a "political subdivision."

RELIEF

WHEREFORE, *amicus curiae* Michigan Municipal League respectfully requests that this Court reverse the March 20, 2014 opinion of the Court of Appeals, and grant any and all other relief which is proper in law and equity.

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Ottawa County Circuit Court No. 12-002801-NO

PROOF OF SERVICE

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EXHIBIT A

Not Reported in N.W.2d, 2004 WL 1057823 (Mich.App.)
(Cite as: 2004 WL 1057823 (Mich.App.))

C
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Arlene HOUSE, Plaintiff-Appellant,
v.
GRAND RAPIDS HOUSING COMMISSION and Mount Mercy Limited, Defendant-Appellees,
and
Frank MOST, d/b/a Most Enterprising, Defendant.

No. 248465.
May 11, 2004.

Before: GAGE, P.J., and O'CONNELL and ZAHRA, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiff appeals as of right the trial court's order granting defendants Grand Rapids Housing Commission (GRHC) and Mount Mercy Limited Partnership's motions for summary disposition.[FN1] We affirm.

FN1. This Court dismissed plaintiff's initial claim of appeal for lack of jurisdiction, because the order being appealed was not a final order for the reason that plaintiff's claims against defendant Frank Most were still outstanding. *House v. Grand Rapids Housing Comm,* unpublished order of the Court of Appeals, entered February 20, 2002 (Docket No. 239408). Plaintiff filed the claim of appeal in the present case after the trial court entered an order granting Most's motion for summary disposition.

I. Facts and Procedure

GRHC is a governmental agency, created by ordinance, which provides subsidized housing to certain qualified individuals. Mount Mercy Apartments, which is owned by Mount Mercy Ltd., is a residential apartment complex, through which GRHC provides such subsidized housing. GRHC and Mount Mercy Ltd. entered a management agreement regarding the land, buildings, and improvements of Mount Mercy Apartments, which stated, in pertinent part:

Appointment and Acceptance. The Owner [Mount Mercy Ltd.] appoints the Agent [GRHC] as exclusive agent for the management of the property described in Section 2 of this Agreement, and the Agent accepts the appointment, subject to the terms and conditions set forth in this Agreement.

The agreement included the following provision regarding maintenance of the Mount Mercy Apartments:

Maintenance and Repair. The Agent will cause the Project to be maintained and repaired in a condition at all times acceptable to the Owner, including but not limited to cleaning, painting, decoration, plumbing, carpentry, grounds care, and other maintenance and repair work as may be necessary, subject to any limitations imposed by the Owner in addition to those contained herein....

Under the management agreement, GRHC was responsible for the operation and maintenance of the apartments, but Mount Mercy Ltd. had the final say in many of the decisions.

Frank Most, doing business as Most Enterprising, was hired to maintain the parking lot of Mount Mercy Apartments by plowing snow and taking other reasonable measures to keep the parking lot safe. On February 21, 2000, plaintiff, a resident of Mount Mercy Apartments, slipped and fell in the snow-filled parking lot of Mount Mercy Apartments, fracturing her right ankle. Plaintiff filed a complaint against GRHC, Mount Mercy Ltd., and Most, alleging that they were negligent for failing

to keep the Mount Mercy Apartments parking lot reasonably safe and that her injuries were caused by these unsafe conditions.

GRHC moved for summary disposition under MCR 2.116(C)(7) and Mount Mercy Ltd. moved for summary disposition under MCR 2.116(C)(10). The trial court determined that Mount Mercy Ltd. maintained some limited control over the apartments, but did not have possession. Because liability requires both control and possession, the trial court granted Mount Mercy Ltd.'s motion for summary disposition. The trial court also granted GRHC's motion for summary disposition, concluding that GRHC was protected by governmental immunity, because all of the purposes it pursued were public and not private.[FN2]

FN2. The trial court denied plaintiff's motion for rehearing and later dismissed plaintiff's claims against Most.

II. Analysis

A. Standard of Review

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Rose v. Nat'l Auction Group,* 466 Mich. 453, 461; 646 NW2d 455 (2002). The trial court granted Mount Mercy Ltd.'s motion for summary disposition under MCR 2.116(C)(10). In reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Summary disposition is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

***2** The trial court granted GRHC's motion for summary disposition under MCR 2.116(C)(7). Summary disposition under MCR 2.116(C)(7) is proper for a claim that is barred because of immunity granted by law. *Smith v. Kowalski,* 223 Mich.App 610, 616; 597 NW2d 463 (1997). When reviewing a grant of summary disposition pursuant to MCR 2.116(C)(7), this Court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(5); *Maiden v. Rozwood,* 461 Mich. 109, 119; 597 NW2d 817 (1999). All well-pleaded allegations are accepted as true unless contradicted by documentation submitted by the moving party. *Id.*

B. Discussion

1. Mount Mercy Ltd.'s Liability

Plaintiff argues that Mount Mercy Ltd. retained sufficient possession and control of the Mount Mercy Apartments to be subject to tort liability for an alleged defective condition of the premises. As stated in *Merritt v. Nickelson,* 407 Mich. 544, 552-553; 287 NW2d 178 (1980):

Premises liability is conditioned upon the presence of both possession and control over the land. This is so because

"[T]he man in possession is in a position of control, and normally best able to prevent any harm to others."

Michigan has consistently applied this principle in imposing liability for defective premises.

Our application of this principle is in accordance with the Restatement of Torts. The Restatement imposes liability for injuries occurring to trespassers, licensees, and invitees upon those who are "possessors" of the land. A "possessor" is defined as:

"(a) a person who is in occupation of the land with intent to control it or

"(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

"(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)."

Ownership alone is not dispositive. Possession and control are certainly incidents of title ownership, but these possessory rights can be "loaned" to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility. [Citations omitted.]

"Possession" is defined as " '[t]he right under which one may exercise control over something to the *exclusion of all others*" ' *Derbabian v S & C Snowplowing, Inc,* 249 Mich.App 695, 703; 644 NW2d 779 (2002), quoting Black's Law Dictionary (7th ed) (emphasis in *Derbabian*). "Control" is defined as " 'the power to ... manage, direct, or oversee." ' *Id.* at 703-704, quoting Black's Law Dictionary (7th ed). "[P]ossession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the actual exercise of dominion and control over the property." *Kubczak v. Chemical Bank & Trust Co,* 456 Mich. 653, 661; 575 NW2d 745 (1998).

***3** Here, Mount Mercy Ltd. did not have possession of or a high degree of actual control over Mount Mercy Apartments when plaintiff was injured. Although Mount Mercy Ltd. retained control over some of GRHC's final decisions regarding the property, GRHC was responsible for the management and everyday decisions. Under the management agreement, GRHC was the "exclusive agent for the management of the property." It is clear under this agreement that Mount Mercy Ltd. gave GRHC possession of the apartment complex. Mount Mercy Ltd. did not control the apartment complex to the exclusion of all others and, thus, did not possess the property. See *Derbabian, supra* at 703. Although Mount Mercy Ltd. retained its ultimate authority over the complex, GRHC had actual control, being as it had the power to manage and oversee the complex. Furthermore, GRHC, being the manager of the property, was in the best position to prevent plaintiff's harm. See *id.* at 705. Therefore, Mount Mercy Ltd. was not a "possessor" for purposes of premises liability, and the trial court did not err in granting Mount Mercy Ltd.'s motion for summary disposition. *Id.* at 706.

2. GRHC's Liability

Next, plaintiff argues that GRHC was not protected by governmental immunity, because it was managing a private apartment complex at the time of the accident. Plaintiff argues that, because Mount Mercy Ltd. hired GRHC to manage a private apartment complex, defendants operated as partners, and GRHC was not engaged in a governmental function. We disagree. Generally, a governmental agency is immune from tort liability when it is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Curtis v. City of Flint,* 253 Mich.App 555, 558-559; 665 NW2d 791 (2002). Thus, if GRHC was not a governmental agency or was not engaged in the exercise or discharge of a governmental function in managing Mount Mercy Apartments when plaintiff was injured, it is not protected from tort liability.

First, GRHC is a governmental agency and not a combined public-private endeavor. A "governmental agency" is defined as "the state or a political subdivision." MCL 691.1401(d). "[T]he definition of 'governmental agency' does not include, or remotely contemplate, joint ventures, partnerships, arrangements between governmental agencies and private entities, or any other combined state-private endeavors." *Vargo v. Sauer,* 457 Mich. 49, 68; 576 NW2d 656 (1998). GRHC is a governmental agency created by ordinance and authorized by MCL 125.653(a).[FN3] Although Mount Mercy Ltd. is not a governmental agency,[FN4] because it is a partnership that includes private entities as limited partners,[FN5] defendants are claiming that GRHC-not Mount Mercy Ltd.-is a governmental agency. That GRHC is the sole member of a nonprofit corporation that is the general partner in a limited partnership with private entities does not change its status as a governmental agency.

FN3. MCL 125.663 expressly provides that a governmental housing commission such as GRHC is not precluded from asserting a defense of governmental immunity to

which it may be entitled under the law.

FN4. Nonetheless, because Mount Mercy Ltd. is a limited partnership having a Michigan nonprofit corporation (Mount Mercy Housing Corporation) as its sole general partner, and GRHC is the sole member of the Mount Mercy Housing Corporation, Mount Mercy Ltd. is a "qualified entity" with tax exempt status under MCL 125.661a(3)(a)(iii).

FN5. The limited partners of Mount Mercy Ltd. consist of Old Kent Financial Corporation, NBD Community Development Corporation, and First of America Community Development Corporation.

***4** Second, GRHC was engaging in a governmental function when it managed Mount Mercy Apartments. A "governmental function" is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). This definition of governmental function is broadly applied. *Adam v. Sylvan Glynn Golf Course,* 197 Mich.App 95, 97; 494 NW2d 791 (1992). "Tort liability may be imposed only if the agency was engaged in an ultra vires activity." *Id.* Plaintiff cites *Pardon v. Finkel,* 213 Mich.App 643; 540 NW2d 774 (1995), in support of her argument that GRHC's management of the apartment complex was private in nature, rather than a governmental function. In the present case, GRHC, unlike the defendant county in *Pardon,* was engaged in governmental activity that is expressly authorized by statute. MCL 125.651 *et seq.* expressly authorizes the operation of subsidized housing projects by municipal housing commissions. Among the powers specifically conferred upon housing commissions is the power "to lease and/or operate any housing projects or projects." MCL 125.657(b). Here, GRHC managed the Mount Mercy Apartments, which is a subsidized housing project. Because GRHC was engaged in an activity that is expressly authorized by statute, MCL 691.1401(f), it was engaged in a governmental function and is immune from tort liability.

Affirmed.

Mich.App.,2004.
House v. Grand Rapids Housing Com'n
Not Reported in N.W.2d, 2004 WL 1057823 (Mich.App.)

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EXHIBIT B

Not Reported in N.W.2d, 2006 WL 335850 (Mich.App.)
(Cite as: 2006 WL 335850 (Mich.App.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Colette NUNN and Redonna Clements, Plaintiffs-Appellees,
v.
FLINT HOUSING COMMISSION, Defendant-Appellant.

No. 264262.
Feb. 14, 2006.

Before: METER, P.J., WHITBECK, C.J., and SCHUETTE, J.

ORDER

PER CURIAM.

*1 The Court orders that the motion for immediate consideration is GRANTED.

The Court orders that the motion requesting that there shall be no stay of trial court proceedings per MCR 7.209(E)(4) is DENIED.

[UNPUBLISHED]

Defendant appeals as of right from the circuit court's order denying its motion for summary disposition premised on governmental liability. We reverse and remand for entry of summary disposition in favor of defendant. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

I. FACTS

Defendant is an municipal body established by the City of Flint by ordinance. Plaintiffs, former employees of defendant, filed suit asserting that defendant's agents pressured them to wrongfully evict one of defendant's tenants, and that in retaliation for their refusal to do so, defendant refused to rehire them in the course of a general restructuring. Plaintiffs attributed the wrongful conduct primarily to defendant's executive director, but chose to name as defendant only the Commission itself.[FN1]

FN1. We note that the plaintiff has since added Kenneth Crutcher, the Commission's executive director as a defendant in this case. This, however, does not affect this Court's analysis.

In denying defendant's motion for summary disposition, the trial court stated:

Now, defense ... brings this motion because they are saying that he gave illegal instructions and that's not within the scope of his authority.... I have to reject the motion because to say that he was acting illegally, means that the agency is always immune from liability. And while the law does grant broad governmental immunity, there are exceptions to that and in those exceptions, they're closed, if one can argue that it was an improper illegal act by the agency.

II. STANDARD OF REVIEW

MCR 2.116(C)(7) authorizes motions for summary disposition premised upon immunity granted by law. When deciding a motion under that rule, the court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. See *Amburgey v. Sauder,* 238 Mich.App 228, 231; 605 NW2d 84 (1999). We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v. Titan Ins Co,* 233 Mich.App 685, 688; 593 NW2d 215 (1999).

III. ANALYSIS

Governmental agencies in this state are generally immune from tort liability for actions taken in

furtherance of governmental functions. MCL 691.1407(1). A governmental function is statutorily defined as "an activity ... expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f).

Plaintiffs assert that defendant's status as a governmental entity was not decided below, and thus that that question is not properly before this Court. However, plaintiffs failed to raise the issue of the defendant's status in the trial court, and thereby waived the issue. See *Higgins Lake Prop Owners Ass'n v Gerrish Twp,* 255 Mich.App 83, 117; 662 NW2d 387 (2003) (Issues first raised on appeal need not be considered by this Court). Furthermore, in their complaint, plaintiffs themselves described defendant as "an entity ... organized under the laws of the State of Michigan." 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 . [FN2]

> FN2. Under the Act a " '[g]overnmental agency' means the state or a political subdivision." MCL 691.1401(d). " 'Political subdivision' means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized by law or formed by 2 or more political divisions; or an agency, department, court, board or council of a political subdivision." MCL 691.1401(b).

***2** The question, then, is whether the trial court erred in failing to conclude, as a matter of law, that defendant was immune from any liability stemming from its executive director's having pressured plaintiffs to use their positions to evict a tenant in violation of applicable law, and then using the general restructuring to retaliate against them by refusing to rehire them. We conclude that the trial court erred in failing to recognize defendant's immunity.

Even when the tort is committed during the employee's course of employment and is within the scope of the employee's authority, the governmental agency is not automatically liable. Where the individual tortfeasor is acting on behalf of an employer, the focus should be on the activity which the individual was engaged in at the time the tort was committed. A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception. The agency is vicariously liable in these situations because it is in effect furthering its own interests or performing activities for which liability has been statutorily imposed. However, if the activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function (*i.e.,* the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune pursuant to § 7 of the governmental immunity act. [*Ross v Consumers Power Co (On Rehearing),* 420 Mich. 567, 624-625; 363 NW2d 641 (1984).]

See also *Mack v. Detroit,* 467 Mich. 186, 204; 649 NW2d 47 (2002).

Plaintiffs do not assert that defendant, or its agent, in deciding whom to rehire, were engaging in a propriety function.[FN3] Nor do plaintiffs allege discrimination in violation of the Civil Rights Act. [FN4] The only statutory basis for their claim is their assertion that defendant's executive director's conduct constituted gross negligence, thus invoking the exception to immunity set forth in MCL 691.1407(2)(c). But that provision subjects a state agent, or individual, to liability for gross negli-

gence, not a state agency.[FN5] Plaintiffs otherwise rely on public policy as the basis for their claim for damages over having been not rehired in the course of defendant's reorganization.

> FN3. A proprietary function is "any activity ... conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees." MCL 691.1413.
>
> FN4. MCL 37.2101 *et seq.*
>
> FN5. MCL 691.1407(2)(c) provides that "without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if ... [t]he officer's employee's members' or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage."

In general, "either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski v Michigan Consolidated Gas Co,* 412 Mich. 692, 695; 316 NW2d 710 (1982). But an exception exists "based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id.* Normally such public policy is spelled out legislatively, but sometimes courts recognize "sufficient legislative expression of policy to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges." *Id.* Accordingly, a cause of action for wrongful discharge may lie where the employee was terminated because of "the failure or refusal to violate a law in the course of employment," or where termination was retaliation for "the employee's exercise of a right conferred by a well-established legislative enactment." *Id.* at 695-696.

***3** Plaintiffs assert that they were not rehired because they had refused to violate the law at defendant's executive director's urging. Assuming the truth of their allegations, as is appropriate on a(C)(7) motion, *Amburgey, supra,* plaintiffs do indeed assert an injury for which the law may provide a remedy. The actionable conduct was not the pressuring of plaintiffs to unlawfully evict a tenant, but rather the retaliatory refusal to rehire them. An agency making hiring decisions for purposes of engaging staff to carry out its governmental function is obviously thereby acting in its governmental capacity.

However, because only public policy, not statute, recognizes termination for refusal to break the law as an actionable tort, and because that tort thus is not among the statutory exceptions to governmental immunity, an adverse hiring decision in violation of public policy is not actionable against a governmental agency. *Mack, supra; Ross, supra.*

Moreover, a governmental entity cannot be held liable for the intentional torts of its employees. See *Payton v. Detroit,* 211 Mich.App 375, 393; 536 NW2d 233 (1995). Retaliatory discharge, or refusal to rehire, in violation of public policy is obviously intentional conduct. Accordingly, it is not actionable against defendant, the alleged wrongdoer's governmental employer.

For these reasons, we conclude that the trial court erred in failing to hold that defendant was entitled to governmental immunity. We reverse the judgment below, and remand this case for entry of summary disposition in favor of defendant.

Reversed and remanded. We do not retain jur-

isdiction.

Mich.App.,2006.
Nunn v. Flint Housing Com'n
Not Reported in N.W.2d, 2006 WL 335850 (Mich.App.)

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