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STATE OF MICHIGAN
IN THE SUPREME COURT

SUNRISE RESORT ASSOCIATION, INC., a Michigan Non-Profit Corporation, GREGORY P. SOMERS and MELISSA L. SOMERS, husband and wife, and KARL BERAKOVICH,

Plaintiffs-Appellees,

v.

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendant-Appellant.

Supreme Court No. _____

Court of Appeals Docket No. 354540

Cheboygan County Circuit Court
Case No. 20-8790-ND

Filed under AO 2019-6

CHEBOYGAN COUNTY ROAD COMMISSION'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

This application for leave to appeal is filed following the Court of Appeals' December 2, 2021 opinion, which reversed the trial court's July 30, 2020 opinion and order granting the Road Commission's motion to dismiss. (Exhibit 1, Court of Appeals published Opinion, Appellant's App'x 001A-010A; Exhibit 2, July 30, 2020 Circuit Court Opinion and Order entered in the Circuit Court for the County of Cheboygan by the Honorable Aaron J. Gauthier, Appellant's App'x 011A-018A; Exhibit 3, Register of Actions, Appellant's App'x 019A-022A).

This application is filed on January 13, 2022, which is within 42 days of the Court of Appeals' opinion, and is therefore timely pursuant to MCR 7.305(C)(2)(a). Accordingly, this Court has jurisdiction to consider this Application for Leave to Appeal pursuant to MCR 7.303(B)(1) and MCR 7.305.

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STATEMENT OF THE QUESTIONS INVOLVED

First Question: Whether Plaintiffs' claim accrued in 2015 and is barred by the statute of limitations?

Defendant answers	Yes.
Plaintiffs' answer:	No.
The trial court answered:	Yes.
The Court of Appeals answered.	No.

Third Question: Whether Plaintiffs' claim for injunctive relief is barred by this Court's precedent, the plain statutory language of the GTLA, and the doctrine of mandamus?

Defendant answers	Yes.
Plaintiffs' answer:	No.
The trial court answered:	Yes.
The Court of Appeals answered.	No.

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INTRODUCTION

The Court of Appeals' published opinion is alarming for several reasons. First, the court held that a claim against a governmental agency under the sewage disposal system event exception to the GTLA is not subject to Michigan's accrual statute or decades of its interpretation and application by this Court. Next, the Court of Appeals' opinion resurrected the "trespass nuisance" exception to governmental immunity, despite this Court's precedent and clear statutory language to the contrary. Finally, the opinion suggests that Michigan courts can order governmental agencies to perform discretionary tasks in a specific manner—contrary to precedent and the constitutional separation of powers. Each of these conclusions are incorrect, contrary to the plain statutory language at issue, and contrary to precedent of this Court. The Court of Appeals' conclusions will not only impact the substantial rights of the parties in this case but will also affect litigants across this State in numerous future cases. Arguably, now, any claim sounding in tort can be brought against a governmental agency regardless of GTLA as long as the requested remedy is injunctive in nature. And the claimant can demand that the court force the governmental agency to carry out its discretionary operations in a specific way. This Court's review is warranted and necessary.

The facts of this case are simple and straightforward. Plaintiffs' Complaint alleged that (1) the sewage system had a design defect and (2) that this defect resulted in flooding in 2015 and 2018. The Road Commission filed a motion for summary disposition arguing that the act and injury (i.e., claim) accrued in 2015. The statute of limitations is three years, therefore, Plaintiffs' 2020 Complaint was time barred. The trial court agreed and granted the motion to dismiss.

The Court of Appeals found, as a matter of first impression, that the injury claimed by Plaintiffs in 2018 constituted a separate "event" with its own statute of limitations, regardless of whether they were alleged to have been caused by the same underlying act or defect. This conclusion is legally incorrect.

To start, the Court of Appeals' opinion plainly provides private actors with greater protection from lawsuits than governmental parties. This

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is contrary to the purpose and language of the GTLA. *Stanton v Battle Creek,* 466 Mich 611, 618; 647 NW2d 508 (2002). Second, it ignores the limitations and accrual statutes, which are clearly applicable to sewage disposal event system claims. Nothing in MCL 691.1416 or MCL 691.1417 affects the applicable limitations period or suggests that continuing damages based on the same underlying alleged wrongful act somehow constitute separate accrual dates for purposes of avoiding the statute of limitations. See *Garg v Macomb Co Cmty Mental Health Services*, 472 Mich 263, 281-282; 696 NW2d 646 (2005); *Henry v Dow Chem Co*, 501 Mich 965, 965; 905 NW2d 601 (2018).

The Court of Appeals attempted to avoid prior opinions regarding abrogation of the continuing wrongs doctrine by concluding that the damages from 2018 were a pleaded as a "separate, discrete" backup "event" from the 2015 damage and, therefore, the statute of limitations did not start to run on the latter "event" until 2018. But this is incorrect. The pleadings clearly allege one defect (the design of a newly installed system) that caused flooding in 2015 and 2018. The fact that the damage was allegedly greater in 2018 or that Plaintiffs only want compensation for the 2018 flood is irrelevant as to when the claim accrued. Again, a claim accrues when the act and injury first occur. Because the claim accrued in 2015, Plaintiffs are barred not only from bringing any claim based on the 2015 "event" but also from bringing any claim based on future injury caused by the exact same alleged defect.

Next, the Court of Appeals resurrected the trespass nuisance exception to governmental immunity. This Court has found that there is no "trespass nuisance" exception to governmental immunity. *Pohutski v City of Allen Park*, 465 Mich 675, 689–690; 641 NW2d 219 (2002). Further, under MCL 691.1417(2), the provisions of the sewage disposal system event exception "*abrogate common law exceptions*, if any, to immunity for the overflow or backup of a sewage disposal system and p*rovide the sole remedy for obtaining any form of relief* for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory." The Legislature could not have spoken in more certain terms. The Court of Appeals' opinion to the contrary undermines decades of this Courts jurisprudence and the plain intent of our Legislature as clearly reflected in the statutory language.

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The Court of Appeals further concluded that MCL 691.1417 does not bar Plaintiffs' request for injunctive relief because they are not seeking compensation for past "damages" caused by a sewage disposal system event. The Court of Appeals instead found that Plaintiffs' claim is one based on "future" damages and that this is not covered by the statute.

Again, the Court of Appeals' analysis and conclusion are erroneous. Under MCL 691.1417(2), the provisions of the sewage disposal system event exception "abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and p*rovide the sole remedy for obtaining any form of relief* for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory." (Emphasis added). "Damages," as used in the statute above, encompasses damage to real property and other types of damage, like personal property damage, which is why it is coupled with "physical injuries." In other words, "damages or physical injuries" is a category of harm for which relief may be sought, not a remedy. It is the phrase "any form of relief" that bars Plaintiffs' request because it is broad enough to encompass injunctive relief. Obviously, injunctive relief is a "form of relief," for the alleged property damage.

For each of these reasons, the Court of Appeals erred. This Court should grant leave and reinstate the order of the trial court. In the alternative, this Court should grant MOAA on the issues raised in this application.

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STATEMENT OF FACTS

This case involves a claim under the sewage disposal system event exception to the Governmental Tort Liability Act ("GTLA").[1] Plaintiffs, Sunrise Resort Association, Inc.; Gregory P. Somers and Melissa L. Somers, and Karl Berakovich each claim to own property in Cheboygan County Michigan.[2] According to Plaintiffs, a drainage system diverts the natural drainage routes from a large area northwest of Plaintiffs' property to a drain that flows through their properties on the way to Burt Lake.[3]

In approximately 2013, a township bicycle trail was constructed on the west side of West Burt Lake Road resulting in various modifications to the existing drainage system.[4] Plaintiffs asserted that in 2014 the bicycle path washed out, including at the 24-inch culvert under West Burt Lake Road that drains onto Plaintiffs' properties.[5] Plaintiffs then allege that the Cheboygan County Road Commission (the "Road Commission") made modifications to the drainage system in 2015 causing additional flooding to their properties:

> 11. Defendant thereafter made modifications to the drainage system that protected the bicycle path washout site but actually increased the amount and rate of water directed onto Plaintiffs' properties, including significant

---

[1] For the purposes of this appeal, only, the Road Commission does not contest the allegations in Plaintiffs' First Amended Complaint. However, the Road Commission does not admit or in any way concede the accuracy of Plaintiffs' allegations within the context of the larger litigation. The Road Commission was entitled to summary disposition because, even if the factual allegations were true, this lawsuit must be dismissed as untimely.

[2] Plaintiffs' Amended Complaint, ¶¶ 1-3, Appellant's App'x, 023A-024A.

[3] Amd. Complaint, ¶ 6, Appellant's App'x, 024A.

[4] Amd. Complaint, ¶ 9, Appellant's App'x, 024A.

[5] Amd. Complaint, ¶ 10, Appellant's App'x, 025A.

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> extension and enlargement of the culvert outlet onto Plaintiffs' properties.
>
> 12. That Plaintiff, Sunset Resort Association, Inc., contacted representatives of the Defendant and warned the Defendant that the *modifications made in 2015 were the cause of the minor damage sustained by Plaintiffs* and that more severe damage would likely result if further modifications were not made. Contacts were formalized by a letter and emails in early 2016. [Emphasis added.][6]

See also Amd. Complaint, ¶¶ 20, 27, Appellant's App'x, 026A (again alleging that the 2015 damage was caused by modifications to the drainage system and affected the "Plaintiffs" collectively). In addition to the damage in 2015, Plaintiffs allege that their parcels sustained further damage from erosion from water on or about May 4, 2018, which damaged three private driveways.[7]

In other words, Plaintiffs alleged the 2015 "design modifications" made by the Road Commission first caused damage to "Plaintiffs'" collective properties in 2015 by "increase[ing] the amount and rate" of water to the property, and that these same modifications resulted in further damage in 2018.[8]

Plaintiffs filed their initial Complaint on February 20, 2020. After the Road Commission filed a Motion for Summary Disposition, Plaintiffs filed an Amended Complaint on April 27, 2020, alleging three counts: (1) sewage disposal system event exception, (2) gross negligence, and (3) injunctive relief to abate trespass nuisance. Plaintiffs requested monetary damages under the Sewage Disposal System Event exception to the Governmental Tort Liability Act ("GTLA"). They further requested injunctive relief for abatement of alleged trespass nuisance arising out of the exact same facts, "requiring Defendant to restore the

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[6] Amd. Complaint, ¶¶ 11-12, Appellant's App'x, 025A.

[7] Amd. Complaint, ¶ 13, Appellant's App'x, 025A.

[8] Amd. Complaint, ¶¶ 10-13, 20, 27, Appellant's App'x, 025A-027A.

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drainage that existed prior to the changes the Defendant made as part of its bike path installation in 2013 and 2015."[9]

The Road Commission withdrew its first motion for summary disposition following Plaintiffs' Amended Complaint (which superseded the original pleadings).[10] On May 13, 2020, the Road Commission filed a second Motion for Summary Disposition.[11] The Road Commission argued that Plaintiffs' claims were barred by governmental immunity and the statute of limitations. First, the Road Commission asserted that Plaintiffs' claim under sewage disposal system event exception to governmental immunity (MCL 691.1416-1419) was barred by the three-year statute of limitations because the claim accrued in 2015 when Plaintiffs alleged flooding first occurred following the "design modifications."[12] The Road Commission further argued that Plaintiffs' claim for injunctive relief from "trespass nuisance" must also be dismissed as a matter of law it is barred by the GTLA, which provides that a sewage disposal system event exception claim is the "sole remedy for obtaining *any form of relief*."[13] Furthermore, Plaintiffs' Complaint sought specifically to have the Court enter an order mandating that Road Commission restore the drainage system that existed before a

---

[9] Amd. Complaint, ¶28, Appellant's App'x, 027A.

[10] Plaintiffs attached two photographs to their appellate brief that were filed in conjunction with their response to the Road Commission's first motion for summary disposition, which was withdrawn after Plaintiff filed an amended complaint. Plaintiffs did not attach these photographs to their second response brief. As such, while they are technically in the lower court record, it cannot fairly be said that they were among the items considered by the Court when ruling on this motion. Nevertheless, neither the photos nor their accuracy should have any bearing on the outcome of this appeal.

[11] See Register of Actions, Appellant's App'x, 019A-022A.

[12] Defendant's Second Motion for Summary Disposition, Appellant's App'x, 028A-048A.

[13] Defendant's Second Motion for Summary Disposition, Appellant's App'x, 028A-048A.

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bicycle path was constructed, i.e., essentially Plaintiffs requested a writ of mandamus, which cannot be issued when the act in question is discretionary.[14] Finally, the Road Commission asserted that the Plaintiffs had failed to plead any facts to support its gross negligence claims, and that claim must also be dismissed.[15]

Plaintiffs filed a response brief on June 1, 2020.[16] Plaintiffs asserted that a new claim occurred every time an overflow occurred, regardless of whether these overflows were the result of the same alleged underlying defect (as alleged in the complaint: a modified design). Plaintiffs further alleged that their claim for trespass nuisance was not precluded by the GTLA, and that injunctive relief was permissible to restore the drainage system to its status prior to the 2015 modifications.[17]

The trial court held a hearing on the Road Commission's motion on June 15, 2020. After hearing argument from both parties, it took the matter under advisement and ultimately issued a lengthy and well-reasoned opinion on July 30, 2020. Regarding the issue of when Plaintiffs' claim accrued for purposes of the statute of limitations, the trial court concluded:

> The question of when a claim accrues must be answered by looking to MCL 600.5827, commonly referred to as the "accrual statute." It provides that a "claim accrues at the time the wrong upon which the claim is based was done

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[14] Defendant's Second Motion for Summary Disposition, Appellant's App'x, 028A-048A.

[15] Plaintiffs initially sought to have the gross negligence claim dismissed without prejudice, but also agreed during the motion hearing that the claim "shouldn't have been filed" in the first place. M Tr, 16; Appellant's App'x, 076A. This Claim was dismissed with prejudice and was not raised as part of Plaintiffs' appeal. See Opinion and Order, pp 6, 8; Appellant's App'x, 016A, 018A.

[16] See Register of Actions, Appellant's App'x, 019A-022A.

[17] Plaintiffs' Response Brief, pp 1-6; Appellant's App'x, 049A-054A.

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regardless of the time when damage results." *Id.* When is the wrong "done"? Not when the tortfeasor acts, but when the claimant is harmed. *Henry v Dow Chemical Co,* 501 Mich 965 (2018), citing *Trentadue v Buckler Automatic Lmvn Sprinkler Co,* 479 Mich 378, 387 (2007).

So the real question becomes whether Plaintiffs were first harmed in 2015 or 2018. Based on the allegations in Plaintiffs' complaint, the answer is clear-they suffered some damage to the real property, albeit minor, in 2015. Defendant correctly argues that the claim accrued at that time. "[T]he accrual of the claim occurs when both the act and the injury first occur." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club,* 283 Mich App 264, 291 (2009). "Subsequent claims of additional harm caused by one act do not restart the claim previously accrued." *Id.* In *Froling,* the allegedly wrongful filling in of a low area by a neighbor caused several distinct floodings of the plaintiffs property. Defendant aptly compares that situation to this case, in which the allegedly wrongful changes made in 2015 to the drainage system resulted in an overflow in both 2015 and 2018. The claim *first* accrued in 2015.

Plaintiffs, for their part, do not really dispute this accrual analysis. Rather, they assert that the statutory language of the "sewage disposal system event" exception creates a new claim that accrues after each "event"-a backup or overflow of a drainage system.

***

The "sewage disposal system event" exception does *not* contain a statute of limitations or provide that it restarts every time there is new flooding on Plaintiffs' property as a result of the actions taken by Defendant in 2015. Rather, the three-year limitations period began to run when Plaintiffs' tort claim first accrued. MCL 600.5805(1) & (2); MCL 600.5827. That occurred when they first suffered

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> harm, in 2015. Plaintiffs' use of a definitional statute to abrogate the law on the limitations period and its accrual is incorrect legally, and it would also result in the strange situation where a private party defendant would be entitled to summary disposition under these same factual circumstances but not a governmental entity. Thus, Plaintiffs' analysis would interpret the GTLA exceptions to allow for *broader* tort liability for governmental agencies than for private parties. This runs contrary to the "basic principle" that the immunity conferred is *broad,* and the statutory exceptions *narrowly* construed. *Nawrocki,* 463 Mich at 158.
>
> Moreover, one of the requirements for Plaintiffs to avoid governmental immunity is that the sewage disposal system had a defect. "Defect" is defined as "a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). Defendant correctly argues that any such defect occurred once, in 2015 as alleged in Plaintiffs' amended complaint. And Plaintiffs first suffered harm as a result of that defect in 2015. The fact that they later suffered subsequent harm does not restart the limitations period or mean that a new claim has accrued. [Opinion and Order, pp 5-6; Appellant's App'x, 015A-016A.]

Furthermore, regarding Plaintiffs' trespass nuisance claims, the Court concluded as follows:

> Trespass is a tort. *Adams v Cleveland-Cliffs Iron Co,* 23 7 Mich App 51, 62 (1999). So is nuisance. *Id.* at 61. And there is no longer any "trespass-nuisance" exception to governmental immunity. *Pohutski v City of Allen Park,* 465 Mich 675, 689-690 (2002). Rather, under MCL 691.1417(2), the provisions of the "sewage disposal system event" exception "abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system *and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory."*

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> [Emphasis added]. Accordingly, Defendant is entitled to summary disposition of Count Three of Plaintiffs' Amended Complaint, as it is barred by governmental immunity and/or the statute of limitations. [Opinion and Order, pp 6-7; Appellant's App'x, 016A-017A].

Accordingly, the Circuit Court dismissed Plaintiffs' complaint with prejudice.

Plaintiffs timely filed an appeal.[18] In sum, and as analyzed in detail in the argument section of this brief, the Court of Appeals concluded in a published opinion that the 2018 claim was a "separate, discrete" backup "event" from the 2015 claim and, therefore, the statute of limitations did not start to run on the latter "event" until 2018. The Court of Appeals further held that Plaintiffs' request for injunctive relief for "trespass nuisance" was available despite the plain language of the sewage disposal system event exception to the GTLA.[19]

The Road Commission then timely filed this application for leave to appeal.

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[18] Plaintiffs based their appellate arguments on completely different facts than were raised in the trial court. On appeal, Plaintiffs now alleged—*contrary* to their Complaint—that the 2015 flooding was only to the Somers' property and that the 2015 damage resulted from a different underlying defect (a driveway culvert that was blocked with debris). See Plaintiffs' COA Brief, pp 3, 9 fn 5, 10-11. Plaintiffs did not ask for leave to file a second amended Complaint or argue these facts in response to either of the Road Commission's motions for summary disposition. See Plaintiffs' Response Brief, Appellant's App'x, 049A-055A.

[19] Court of Appeals Opinion, Appellant's App'x, 001A-010A.

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GROUNDS FOR REVIEW

Grounds for consideration of this application for leave to appeal exist pursuant to MCR 7.305(B)(2), (3), and (5).

This case involves a clearly erroneous published opinion regarding issues of major significance in this State's jurisprudence. MCR 7.305(B)(3), (5)(a). First, in essence, the Court of Appeals has concluded in a published opinion that governmental agencies are subject to the now abrogated continuing wrongs doctrine in claims brought under the sewage disposal system event exception to the GTLA.

The general accrual and limitations periods apply to this claim. MCL 691.1411(1). The statute of limitations for actions for injury to property is three years. MCL 600.5805(2). "A person *shall not* bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section." MCL 600.5805(1) (emphasis added). MCL 600.5827, often referred to as the "accrual statute," provides that "*the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results*." (Emphasis added). This Court has clarified that the "wrong" occurs when both the act and the injury first occur. And, "[s]ubsequent claims of additional harm caused by one act do not restart the claim previously accrued." *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264, 291; 769 NW2d 234 (2009). See also See *Garg v Macomb Co Cmty Mental Health Services*, 472 Mich 263, 281-282; 696 NW2d 646 (2005); *Henry v Dow Chem Co*, 501 Mich 965, 965; 905 NW2d 601 (2018).

Turning to the alleged facts, Plaintiffs sustained damage to their collective properties in 2015 due design modifications to the drainage system made by the Road Commission. This is when the alleged "wrong" was done, and Plaintiffs were free to bring a claim at that time. In fact, not only were they free to file suit in 2015, but they were also required to file within three years of that date based on the statute of limitations. They did not. Plaintiffs appear to regret that decision. And this Court has previously acknowledged that statutes of limitation can have a harsh effect. But the Legislature has undertaken the necessary task of

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balancing interests and providing a mandatory limitations and accrual framework. "This is a power the Legislature has because such a statute of limitations bears a reasonable relationship to the permissible legislative objective." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 392; 738 NW2d 664 (2007). Plaintiffs 2020 Complaint was filed at least a year after the three-year statute of limitations expired and the Road Commission was entitled to dismissal.

Yet, the Court of Appeals found, as a matter of first impression, that the injury claimed by Plaintiff in 2018 constituted a separate "event" with its own statute of limitations, regardless of whether they were alleged to have been caused by the same underlying act or defect.

This conclusion is severely flawed. To start, it plainly provides private actors with greater protection from lawsuits than governmental parties. This is contrary to the purpose and language of the GTLA. *Stanton v Battle Creek,* 466 Mich 611, 618; 647 NW2d 508 (2002). Second, it ignores the limitations and accrual statutes, which are clearly applicable to sewage disposal event system claims. Nothing in MCL 691.1416 or MCL 691.1417 affects the applicable limitations period or suggests that continuing damages based on the same underlying alleged wrongful act somehow constitute separate accrual dates for purposes of avoiding the statute of limitations. In effect, the Court of Appeals has applied the continuing wrongs doctrine to this case.

Next, the Court of Appeals erroneously resurrected the "trespass nuisance" exception to governmental immunity. This Court has found that there is no "trespass nuisance" exception to governmental immunity. *Pohutski v City of Allen Park*, 465 Mich 675, 689–690; 641 NW2d 219 (2002). Further, under MCL 691.1417(2), the provisions of the sewage disposal system event exception "*abrogate common law exceptions*, if any, to immunity for the overflow or backup of a sewage disposal system and p*rovide the sole remedy for obtaining any form of relief* for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory." (Emphasis added). The Legislature could not have spoken in more certain terms. The Court of Appeals' opinion to the contrary undermines decades of this Courts jurisprudence and the plain intent of our Legislature as clearly reflected in the statutory language.

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The Court of Appeals further concluded that MCL 691.1417 does not bar Plaintiffs' request for injunctive relief because they are not seeking compensation for past "damages" caused by a sewage disposal system event. The Court of Appeals instead found that Plaintiffs' claim is one based on "future" damages and that this is not covered by the statute.

Again, the Court of Appeals' analysis and conclusion are erroneous. "Damages," as used in the statute above, encompasses property damage and other types of damage, like personal property damage, which is why it is coupled with "physical injuries." In other words, "damages or physical injuries" is a category of harm for which relief may be sought, not a remedy. It is the phrases "sole remedy" and "any form of relief" that bars Plaintiffs' request because they are broad enough to encompass injunctive relief. MCL 691.1417. Obviously, injunctive relief is a "form of relief" for the alleged property damage.

Each of these conclusions are clearly erroneous and will cause material injustice. MCR 7.305(B)(5)(a). And, as outlined above, the Court of Appeals published opinion misapplies both the statutory language and precedents of this Court on several issues of major significance to this State's jurisprudence and the result is contrary to the Legislature's language and intent. MCR 7.305(B)(3). This Court's review is warranted and necessary.

Further, the issues raised in this application are of significant public interest. MCR 7.305(B)(2). The Court of Appeals' opinion will not only impact the substantial rights of the parties in this case but will also affect litigants across this State in numerous future cases. The Court of Appeals' opinion represents a drastic expansion of governmental liability. Based on the reasoning of the Court of Appeals, injunctive relief for an underlying tort claim may suddenly be available even where no exception to the GTLA exists at all. The result will be inevitably be a confusing onslaught of claims contrary to the foundational the very purpose of the GTLA itself: preventing governmental agencies from being hailed into court and tied up in expensive litigation in the first instance. In fact, the prospect of injunctive relief can be even more untenable than traditional monetary damages. Specifically, Plaintiffs ask that the Road Commission restore the drainage system to what it was in 2013 and 2015 prior to the installation of a bike path. Complaint,

Appellant's App'x, 027A. How, exactly, will this relief be enforced without resulting in endless ongoing future litigation, court monitoring, and court interference with discretionary actions? How will courts ensure the public interest – which very well may be directly impacted by injunctions such as the one sought in this case and is *not* inherently reflected in a lawsuit brought by a select group of private persons – is protected?

What's more, the Court of Appeals' opinion reflects a fundamental shift in the type of injunctive relief that can be sought by claimants against governmental actors. Simply put, injunctions against a governmental agency are governed by a different set of legal principals than those against private citizens. Courts historically may order a governmental agency or official to perform a duty that is ministerial in nature, only. They may not order the specific performance of discretionary duties. Unlike the cases from this Court cited by the Court of Appeals, Plaintiffs here do not seek to enforce any specific statutory right. In such an instance, injunctive relief based on an underlying alleged tort is not available. The Court of Appeals analysis is flawed, and the result is incorrect. Its implications affect governmental agencies and litigants across this State. This Court's discretionary review is warranted and necessary.

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LEGAL STANDARD

Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive a motion for summary disposition based on governmental immunity, "the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Com'n*, 465 Mich 68, 74; 631 NW2d 678, 682 (2001), citing *Wade v Dep't of Corrections*, 439 Mich 158, 164; 483 NW2d 26 (1992). When considering a motion brought under 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." *Beals v Michigan*, 497 Mich 363, 370; 871 NW2d 5 (2015) "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether the claim is barred by immunity is a question for the court to decide as a matter of law." *Id.*

"The applicability of governmental immunity is a question of law that this Court reviews de novo on appeal." *Id.* This Court also reviews de novo questions of statutory interpretation. *In re Reliability Plans of Elec Utilities for 2017-2021*, 505 Mich 97, 118; 949 NW2d 73 (2020). "Reviewing an issue de novo means that we review the legal issue independently, without deference to the lower court." *Id.*

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ARGUMENT

In Michigan, immunity for non-sovereign units of government is provided by statute in the Governmental Tort Liability Act ("GTLA"), MCL 691.1401 *et seq.* *Stanton v Battle Creek,* 466 Mich 611, 615; 647 NW2d 508 (2002). The only exceptions to the broad grant of immunity are set forth in the GTLA itself. *Nawrocki v Macomb Co Rd Com'n*, 463 Mich 143, 157; 615 NW2d 702 (2000) ("although governmental agencies may be under many duties, with regard to the services they provide to the public, only those enumerated within the statutorily-created exceptions are legally compensable if breached").[20] It is well settled that courts construe the immunity conferred upon governmental agencies broadly but construe the statutory exceptions to that immunity narrowly. *Stanton,* 466 Mich at 618. And, as stated above, to survive a C(7) motion raised on the grounds of governmental immunity, Plaintiffs *must* allege facts warranting the application of an exception. *Fane*, 465 Mich at 74.

I. Plaintiffs' claim accrued in 2015 and the Complaint, filed in 2020, is barred by the statute of limitations.

The specific statutory exception at issue in this case is the sewage disposal system event exception. See MCL 691.1416-1419. Pursuant to this exception,

> (2) A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency. Sections 16 to 19 abrogate common

[20] The exceptions to governmental immunity are (1) the highway exception, MCL 691.1402; (2) the motor-vehicle exception, MCL 691.1405; (3) the public-building exception, MCL 691.1406; (4) the proprietary-function exception, MCL 691.1413; (5) the governmental-hospital exception, MCL 691.1407(4); and (6) the sewage-disposal-system-event exception, MCL 691.1417(2) and (3). See *Wesche v Mecosta Co Road Comm*, 480 Mich 75, 84 n 10; 746 NW2d 847 (2008); *Hannay v Dep't of Transp*, 497 Mich 45, 60 n 34; 860 NW2d 67 (2014).

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> law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory. [MCL 691.1417(2).]

And, like any claim under the GTLA, a claimant must also demonstrate that their action is timely.[21]

Here, dismissal was warranted based on Plaintiffs' own pleadings. Plaintiffs' Amended Complaint asserts that "the modifications made in 2015 were the cause of the minor damage sustained by Plaintiffs." Am. Complaint, ¶ 12, 20, 27; Appellants' App'x 025A-026A. All that is required for a claim to accrue is the allegedly negligent act (the design modifications made in 2015), and alleged damage (which Plaintiffs allege first occurred in 2015).[22] Accepting these allegations as true,[23]

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[21] As outlined in the fact section of this brief, Plaintiffs' counsel agreed during the motion hearing that the gross negligence claim (i.e., Count II) "shouldn't have been filed" in the first place. M Tr, 16; Appellant's App'x, 076A. This Claim was dismissed with prejudice and has not been raised as part of Plaintiffs' appeal. See Opinion and Order, pp 6, 8; Appellant's App'x, 016A, 018A; Plaintiffs' COA Brief, Statement of Questions Presented and Argument sections. Accordingly, this part of the Circuit Court's Opinion should likewise be affirmed.

[22] Furthermore, to the extent that Plaintiffs now claim that the 2015 flooding was not sufficiently described in the pleadings to qualify as an "event" under MCL 691.1416(k) nor MCL 691.1417(3), this argument is likewise without merit. Plaintiffs claimed the same modifications the Road Commission made to its drainage system resulted in increased water flow and caused both the 2015 and 2018 flooding. If Plaintiff has failed to state a claim for the 2015 flooding, the 2018 flooding could not have been properly pleaded, either.

[23] Plaintiffs also alleged that a motion on the pleadings was improper or prejudicial. But "the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate." See

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their claim accrued in 2015. The Court of Appeals erred in holding otherwise and this error will not only affect the substantial rights of the parties in this case, but also in every action brought under the sewage disposal system event exception in the State of Michigan from here on out.

A. Plaintiffs' claim accrued in 2015 because that's when—according to Plaintiffs' own Complaint—the "wrong" was done. Nothing in the statutory language of the GTLA directs a different result and the Legislature clearly did not intend governmental entities to be subject to *greater* liability than private actors. The Court of Appeals' ruling is a de facto resurrection of the continuing wrongs doctrine, despite this Court's precedent to the contrary.

Based on the record before the trial court, Plaintiffs' claim is clearly barred by the statute of limitations. The general accrual and limitations periods apply to this claim based on the plain language of the GTLA. MCL 691.1411(1), part of the GTLA, provides "[e]very claim against any governmental agency shall be subject to the general law respecting limitations of actions except as otherwise provided in this section." The statute of limitations for actions for injury to property is three years.

Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club, 283 Mich App 264, 292; 769 NW2d 234 (2009). "In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence." *Id.* It is of note that Plaintiffs requested and received a substantial FOIA request a year before this litigation. They had a significant volume of material upon which to plead their claims. What's more, Plaintiffs had every opportunity to amend their complaint if it did not accurately reflect their purported case. And, in fact, they did so. They did not, however, make any request for amendment to reflect the distinctly different assertions now made on appeal. Nor did they move for reconsideration in the Circuit Court. Their associated allegation of error regarding facts outside the record and unpreserved issues of law are without merit.

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MCL 600.5805(2). "A person *shall not* bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section." MCL 600.5805(1) (emphasis added). MCL 600.5827, often referred to as the "accrual statute," provides that "*the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results*." (Emphasis added).

Turning to the alleged facts in this case, it is necessary to determine when Plaintiffs claim accrued, i.e., when was the "wrong" done? Accepting the allegations in the Complaint as true, Plaintiffs sustained damage to their collective properties in 2015 due design modifications to the drainage system made by the Road Commission:

> 11. Defendant thereafter made modifications to the drainage system that protected the bicycle path washout site but actually increased the amount and rate of water directed onto Plaintiffs' properties, including significant extension and enlargement of the culvert outlet onto Plaintiffs' properties.
>
> 12. That Plaintiff, Sunset Resort Association, Inc., contacted representatives of the Defendant and warned the Defendant that the modifications made in 2015 were the cause of the minor damage sustained by Plaintiffs and that more severe damage would likely result if further modifications were not made. Contacts were formalized by a letter and emails in early 2016. [Emphasis added.][24]

See also Amd. Complaint, ¶¶ 20, 27, Appellant's App'x, 026A (again alleging that the 2015 damage was caused by modifications to the drainage system and affected the "Plaintiffs" collectively). In addition to the damage in 2015, Plaintiffs allege that their parcels sustained further damage from erosion from water on or about May 4, 2018,

[24] Amd. Complaint, ¶¶ 11-12, Appellant's App'x 025A.

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stemming from the exact same 2015 design "modifications."[25] Plaintiffs Complaint expressly alleges that the design modifications were the cause of the erosion damage caused to the Plaintiffs' properties, "which was greatly increased in approximately 2015 when Defendant increased the amount and rate of the water directed onto Plaintiffs' properties without the knowledge or permission of the Plaintiffs."[26]

In other words, Plaintiffs assert that a change in the design of the drainage system in 2015 increased water flow onto their properties and resulted with at least one flooding event on their collective properties sometime in 2015. "[T]he accrual of the claim occurs when both the act and the injury first occur." *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264, 291; 769 NW2d 234 (2009). "Subsequent claims of additional harm caused by one act do not restart the claim previously accrued." *Id.* See also *Garg v Macomb Co Cmty Mental Health Services*, 472 Mich 263, 281-282; 696 NW2d 646 (2005); *Henry v Dow Chem Co*, 501 Mich 965, 965; 905 NW2d 601 (2018). There really should not be any dispute: the claim accrued in 2015.

Plaintiffs' allegation of subsequent flooding arising out of the same 2015 design modification does not operate to extend the statute of limitations or otherwise save Plaintiffs' claim. In finding otherwise, the Court of Appeals undoubtedly applied the now-abrogated common law "continuing wrongs" doctrine despite its assertion that this doctrine has no application to the case. Michigan previously recognized a common law exception to the application of a statutory period of limitations, sometimes referred to as the "continuing wrongs doctrine," when the alleged trespass was of a continuing nature—such as repeated flooding. Under this doctrine, the period of limitations did not begin to run following the occurrence of the first wrongful act; rather, it started only after the continuing wrong was abated. See *Garg v Macomb Co Cmty Mental Health Services*, 472 Mich at 281-282; *Marilyn Froling Revocable Living Tr*, 283 Mich App at 280. However, "*Garg* and its progeny completely and retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of this state, including in nuisance

[25] Amd. Complaint, ¶ 13, Appellant's App'x 025A.

[26] Amd. Complaint, ¶¶ 20, 27, Appellant's App'x 026A.

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and trespass cases." *Marilyn Froling Revocable Living Tr*, 283 Mich App at 288.

As such, Plaintiffs' cause of action—related to repeated flooding events caused by the same alleged defect—accrued after the first flooding, i.e., when both the "last conduct and first, subsequent corresponding injury occurred." *Id*. For example, in *Marilyn Froling Revocable Living Tr*, the plaintiffs asserted claims against several neighbors in connection with flooding on their property that occurred after the defendants made modifications to their properties ending in 1998, first causing flooding in 2001. *Id*. at 273. The defendant neighbors moved for summary disposition, arguing that the three-year period of limitations barred the plaintiffs' claims. *Id*. at 274-275. As in this case, the court determined that, under MCL 600.5805 and MCL 600.5827, "the accrual of the claim occurs when both the act and the injury first occur, that is when the 'wrong is done.'"[27] In other words, subsequent flooding *did not restart* the running of the statute of limitations because "subsequent claims of additional harm caused by one act do not restart the claim previously accrued. For the purposes of accrual, there need only be one wrong and one injury to begin the running of the period of limitations." *Id*. at 291. Accordingly, the plaintiffs' claim was barred by the statute of limitations:

> Here, the Froling Trust's last claim first accrued with the flooding in June 2001. Thus, to be timely, the Froling Trust needed to file its claim by June 2004. But because it did not file its claim until November 2004, the Froling Trust's claims were time-barred. Accordingly, we conclude that, applying the plain language of MCL 600.5805(10), the trial

[27] Of course, this Court is not bound by the Court of Appeals. However, the analysis in *Marilyn Froling Revocable Living Tr* is based on *Garg* and completely consistent with *Henry v Dow Chem Co*, 501 Mich 965, 965; 905 NW2d 601 (2018). It is of further note that Plaintiffs are claiming the same specific continued harm and cause (increased water flow from 2015 design modifications causing flooding to their properties). See *Mays v Governor of Michigan*, 506 Mich 157, 183–185; 954 NW2d 139 (2020).

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> court properly granted the neighbors summary disposition on the ground that the Froling Trust's claim was untimely. [*Id.* at 291-292.]

Plaintiffs' case is similarly barred by the applicable three year of statute of limitations. Plaintiffs' Complaint alleges that modifications to the drainage system in 2015 caused damage to Plaintiffs' properties also in 2015. (Amd. Complaint, ¶ 11-12). In other words, Plaintiffs allege that the negligent act and the damage occurred in 2015.[28] The

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[28] Plaintiffs alleged several facts in their appellate briefs that were both outside of the lower court record and plainly contradicted by their own pleadings. Specifically, Plaintiffs claimed that the 2015 flooding occurred only on the Somers' driveway and was due to the Somers' driveway culvert being clogged with debris. See Plaintiffs' COA Brief, pp 3, 9 fn 5, 10-11. Based on these new "facts," Plaintiffs' argue that dismissal of all the Plaintiffs' claims was premature and improper. Further, Plaintiffs asserted that the trial should have assumed some of the pleadings were, in fact, untrue if such an assumption might have saved their claim. For example, Plaintiffs argued that the trial court should not have assumed that the 2015 flooding event actually occurred or that any defect in the drainage system caused the flooding in the first place. See Plaintiffs' COA Brief, pp 10-11. Plaintiffs also now claim that they did not plead any defect in the drainage system at all and could not have done so without discovery. See Plaintiffs' COA Brief, pp 10-11. This is inaccurate at best and is easily disproven by a review of Plaintiffs' amended Complaint. See Amd. Complaint, ¶¶ 10-13, 17-28, Appellant's App'x 025A-027A. The standard proffered by Plaintiffs would force a Circuit Court to sua sponte find that the pleadings were not accurate if that might possibly save the claim from summary disposition.

The Court of Appeals, to its credit, did state that it was basing the opinion on the facts alleged in the Complaint. Opinion, p 1-2. But, despite briefing on this issue from the Road Commission, the court did not address these disparities and the fact of the matter remains that the record presented for consideration on appeal was unequivocally not the same as what was preserved in the trial court.

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wrong occurred in 2015, the claim accrued in 2015, and Plaintiffs could have brought their claim for that wrong in 2015 or within three years thereafter. They did not. MCL 600.5805; MCL 600.5827. Instead, Plaintiffs filed the instant case until on or about February 20, 2020, over a full year after the statute of limitations expired.[29] The Court of Appeals conclusion to the contrary is clearly erroneous, contrary to this Court's precedent, and warrants this Court's discretionary review.

B. The definition of "event" under MCL 691.1416 does not change the applicable accrual statute or statute of limitations.

The Court of Appeals found, as a matter of first impression, that the injury claimed by Plaintiff in 2018 constituted a separate "event" with its own statute of limitations, regardless of whether they were alleged to have been caused by the same underlying act or defect.

This opinion is flawed for several reasons. First, it plainly provides private actors with greater protection from lawsuits than governmental parties. This is contrary to the purpose and plain language of the GTLA. *Stanton,* 466 Mich at 618.

Second, it ignores the limitations and accrual statutes, which are clearly applicable to sewage disposal event system claims. Nothing in MCL 691.1416 or MCL 691.1417 affects the applicable limitations period or suggests that continuing damages based on the same

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[29] As noted in the Grounds for Review section above, this Court has previously acknowledged that statutes of limitation can have a harsh effect. Here, its proper application prevents Plaintiffs' claims. But the Legislature has undertaken the necessary task of balancing interests and providing a mandatory limitations and accrual framework. "This is a power the Legislature has because such a statute of limitations bears a reasonable relationship to the permissible legislative objective." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 392; 738 NW2d 664 (2007). Plaintiffs 2020 Complaint was filed at least a year after the three-year statute of limitations expired and the Road Commission was entitled to dismissal.

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underlying alleged wrongful act somehow constitute separate accrual dates for purposes of avoiding the statute of limitations.

MCL 691.1416(k), part of the *definitions* section of the sewage disposal system event exception, provides that a " '[s]ewage disposal system event' or 'event' means the overflow or backup of a sewage disposal system onto real property." In other words, the term "event" as considered within the context of the GTLA is merely a definitional term used to describe an injury or damage. See *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010) (this Court considers the placement and purpose of words in the statutory scheme when interpreting a statute).

And, thereafter, sections MCL 691.1417 through MCL 691.1419 describe additional requirements (including notice and a defect, i.e., an act) a claimant must satisfy such that the alleged tort falls within the exception to the broad grant of governmental immunity found under MCL 691.1407.[30] For example, MCL 691.1417(3) provides that

> (3) If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:
>
> (a) The governmental agency was an appropriate governmental agency.
>
> (b) The sewage disposal system had a defect.
>
> (c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.

[30] As noted in the trial court, Plaintiffs also failed to provide timely notice of the 2015 flooding. See Defendant's Motion for Summary Disposition; Appellant's App'x, 028A-048A.

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> (d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
>
> (e) The defect was a substantial proximate cause of the event and the property damage or physical injury.

In other words, the Legislature was setting forth detailed definitions and descriptions of the specific elements of a claim necessary *to fall within the exception*. However, additional alleged injuries (i.e., events) from the exact same alleged "defect" do not restart the statute of limitations. The necessary corollary to this is that there is no indication that the Legislature was intending to make every instance of damage—regardless of the source—subject to a new statute of limitations contrary to MCL 600.5805 and MCL 600.5827.

In fact, one of the requirements for Plaintiffs to avoid governmental immunity is that the sewage disposal system had a "defect." "Defect" is defined as "a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). Any such alleged defect occurred only once: in 2015 as alleged in Plaintiffs' amended complaint. And Plaintiffs—again based on their own Complaint—first suffered harm as a result of that defect in 2015. The fact that they later claim to have suffered subsequent harm of the same nature does not restart the limitations period or mean that a new claim has accrued.

To that end, it simply does not follow that a claimant who pleads an "event" is thereafter absolved of compliance with the limitations and accrual provisions statutes. To the contrary, MCL 691.1411(1), part of the GTLA, provides "[e]very claim against any governmental agency shall be subject to the general law respecting limitations of actions except as otherwise provided in this section." Nothing in the sewage disposal system event exception "otherwise provid[es]" for a separate accrual provision or limitations periods. And again, to be clear, neither MCL 691.1416(k) nor MCL 691.1417(3) defines when a claim accrues. **There is no separate statute of limitations or accrual definition provided under the sewage disposal system event exception** and "a court may read nothing into an unambiguous statute that is not

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within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The claimant must also comply with MCL 600.5805 and MCL 600.5827.[31]

It is persuasive to note that the Court of Appeals previously rejected an argument nearly identical to the one Plaintiffs raise here with regard to the application of the term "event" in *Marilyn Froling Revocable Living Tr*, 283 Mich App at 288-292 based on this Court's Opinion in *Garg*. In *Marilyn Froling Revocable Living Tr*, the plaintiff asserted a plaintiff may file a claim anytime within three years following the "time of the . . . injury . . ." based on the plain language of the limitation's statute. As such—like Plaintiffs' argument regarding an "event"—the

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[31] As mentioned above, this interpretation is not only congruent with the plain statutory language and case law, but also the general principle that courts construe the immunity conferred upon governmental agencies broadly but construe the statutory exceptions to that immunity narrowly. *Stanton,* 466 Mich at 618. As was noted by the trial court,

> Plaintiffs' use of a definitional statute to abrogate the law on the limitations period and its accrual is incorrect legally, and it would also result in the strange situation where a private party defendant would be entitled to summary disposition under these same factual circumstances but not a governmental entity. Thus, Plaintiffs' analysis would interpret the GTLA exceptions to allow for *broader* tort liability for governmental agencies than for private parties. This runs contrary to the "basic principle" that the immunity conferred is *broad,* and the statutory exceptions *narrowly* construed. *Nawrocki,* 463 Mich at 158. [Opinion and Order, p 6; Appellants' App'x, 68.]

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plaintiff asserted the statute of limitations began to run at the time of its last alleged "injury." *Id*. at 289. However, the court correctly noted that, "[o]nce all of the elements of an action for . . .injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run. Later *damages* may result, but they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred." *Id*. at 290, quoting *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972). The court went on to explain that

> The operation of these principles can be seen in a case with similar factual circumstances. In *[Terlecki v Stewart, 278 Mich App 644; 754 NW2d 899 (2008)],* the defendants' last negligent conduct was in 2001 when they capped a pipe running through a culvert near the plaintiffs' property. That same year, the plaintiffs began experiencing flooding and tree damage on their property. Applying the plain language of MCL 600.5805(10) and MCL 600.5827 to the plaintiffs' cause of action for nuisance and trespass, this Court concluded that, despite the fact that the plaintiffs continued to suffer flooding and tree damage after 2001, the last possible date that the plaintiffs' claim could have accrued was in 2001, when both the last conduct and first, subsequent corresponding injury occurred. Accordingly, contrary to the Froling Trust's interpretation of the statutes, its claims are still time-barred. [*Id*. at 290.]

Similarly, here, Plaintiffs' claim accrued after the design modifications allegedly resulted in flooding in 2015. As such, despite the fact that Plaintiffs claim that they continued to suffer flooding after 2015, the last possible date their claim could have accrued was 2015, when both the "last conduct and first, subsequent corresponding injury occurred." *Id*. The statute of limitations does not reset each time Plaintiffs' property floods. Neither the definition of the term "event" nor the other proofs necessary under the GTLA alter the application of these statutes.

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Of course, it is possible to imagine alternate facts that might create a separate claim if private property is repeatedly flooded. Imagine, for example, if a culvert flooded due to a design modification and later due to a blockage caused by debris.[32] The only way the statute of limitations would "reset" is if there was some change in the sewage disposal system that created a new, separate defect—i.e., a new wrongful act—and which then caused flooding and damage.

This Court's Order in *Henry v Dow Chem Co*, 501 Mich 965; 905 NW2d 601 (2018), also supports the Road Commission's position. In *Henry*, this Court reversed for the reasons stated in the Court of Appeals' dissent, which provided:

> Our Supreme Court in *Trentadue*, interpreting this language, explained that "the wrong is done when the plaintiff is harmed rather than when the defendant acted." *Id*. at 388 (quotation marks, citation, and alteration omitted). This language stems from our Supreme Court's decision in *Stephens v Dixon*, 449 Mich 531, 534–535; 536 NW2d 755 (1995), which in turn referred to the its decision in *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972), in which our Supreme Court stated "[o]nce all of the elements of an action for ... injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run. **Later damages may result, but they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred**." *Id*.; see *Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club*, 283 Mich App 264, 290; 769 NW2d 234 (2009).
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> The Court in *Trentadue* also expressly rejected the common-law discovery rule, stating that "the statutory scheme is exclusive and thus precludes this common-law

[32] Of course, the claimant would need to satisfy each of the other elements under the GTLA.

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> practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply." *Trentadue*, 479 Mich at 389. **Similarly, in *Garg v Macomb Co Community Mental Health Servs,* 472 Mich 263, 282; 696 NW2d 646 (2005), our Supreme Court held that Michigan does not recognize the "continuing violations" doctrine, explaining that nothing in the statute of limitations "permits a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as 'continuing violations.' To allow recovery for such claims is simply to extend the limitations period beyond that which was expressly established by the Legislature." Thus, in determining when plaintiffs' claims accrued under MCL 600.5827, and mindful of *Trentadue* and *Garg*, we must ascertain when plaintiffs were harmed, not when plaintiffs learned they had been harmed nor when they learned the extent of the harm. We further undertake this analysis mindful of the precept that the claim accrues and the period of limitations begins to run once all elements of the action, including damages, are present.** [*Henry*, 319 Mich App at 733–734.]

In other words, additional flooding – i.e., additional injury or events – based on the exact same alleged defect does not restart the statute of limitations. These subsequent injuries are not "separate, discrete" events contrary to the Court of Appeals opinion.

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II. Injunctive relief is not available in a claim premised on "trespass nuisance" or the sewage disposal system event exception to the GTLA. And, perhaps more importantly, the specific relief requested by Plaintiffs is clearly not obtainable.

A. There is no trespass nuisance exception to governmental immunity. Both the Legislature and this Court have clearly spoken on this issue. It does not matter what "remedy" Plaintiffs seek. The Court of Appeals clearly erred in holding otherwise.

There is no longer any "trespass-nuisance" exception to governmental immunity. As was determined by this Court:

> the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity. Trespass-nuisance simply is not one of the five exceptions to immunity set forth in the governmental tort liability act. As stated above, we are bound by the clear and unambiguous statutory text; we lack constitutional authority to impose on the people of this state our individual policy preferences regarding the availability of lawsuits arising from the operation of a sewage system. We must "seek to faithfully construe and apply those stated public policy choices made by the Legislature" in drafting the governmental tort liability act. *Nawrocki, supra* at 151, 615 N.W.2d 702. We are mindful that, because immunity necessarily implies that a "wrong" has occurred, some harm caused by a governmental agency may lack a remedy. *Id.* at 157, 615 N.W.2d 702. Although governmental agencies have many duties regarding the services they provide to the public, a breach of those duties is compensable under the statute only if it falls within one of the statutorily created exceptions. [*Pohutski v City of Allen Park*, 465 Mich 675, 689–690; 641 NW2d 219 (2002).]

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And, here, Plaintiffs' so-called trespass nuisance claim is premised on the same underlying facts as the sewage disposal system event claim.[33] Under MCL 691.1417(2), the provisions of the sewage disposal system event exception "***abrogate common law exceptions***, if any, to immunity for the overflow or backup of a sewage disposal system and provide the ***sole remedy for obtaining any form of relief*** for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory." (Emphasis added).[34]

Plaintiffs' claim for trespass nuisance has been completely abrogated. It really is as simple as that. The Court of Appeals, in bringing back the specter of a claim obviously extinguished, clearly erred in holding otherwise. It's opinion is contrary to the precedent of this Court and the plain language of the GTLA. What's more, cases of this Court finding that a specific statutory right can be enforced via injunction have absolutely no place here. Plaintiffs claim no specific right. *Lash v City of Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007); *Michigan Assn of Home Builders v City of Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019). And it does not matter what form of remedy Plaintiffs seek – the sewage disposal system event exception is the "sole remedy" for this type of claim. MCL 691.1417.

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[33] An "injunction is a remedy, not an independent cause of action." *Redmond v Heller*, ___Mich App ___, ___; ___NW2d___ (Mich Ct App, May 28, 2020), slip op at 5; *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008). Because a remedy must be supported by a timely underlying cause of action, the trial court properly dismissed Plaintiffs' request for an injunction premised on the untimely claims.

[34] Cases cited by Plaintiffs in the Court of Appeals purporting to support the availability of injunctive relief were issued decades before *Pohutski* and do not involve the claim of trespass nuisance—which is what Plaintiffs pleaded here. See e.g., *Sweeney v Bird*, 293 Mich 624, 631; 292 NW 506 (1940) (considering remedies available for complete and continuous flooding of property—i.e., a taking— prior to the GTLA or sewage disposal system event exception); *Bennett v Eaton Co*, 340 Mich 330, 338; 65 NW2d 794 (1954) (considering a servitude and taking).

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This should be the end of the analysis. Plaintiffs' Complaint sets forth a claim for injunctive relief for "trespass nuisance." There is no trespass nuisance exception. Plaintiffs did not plead in avoidance of governmental immunity. *Mack v City of Detroit*, 467 Mich 186, 190; 649 NW2d 47, 50 (2002). In suggesting otherwise or determining that injunctive relief might be available under the GTLA, the Court of Appeals was essentially creating a cause of action for Plaintiffs where none was pleaded. The Road Commission was properly granted summary disposition and the trial court's dismissal should have been affirmed.

B. Based on the plain statutory language, injunctive relief is *not* obtainable under the sewage disposal system event exception GTLA.

As outlined above, Plaintiffs are seeking injunctive relief in this case as a remedy for the tort of trespass nuisance. There is no longer any "trespass nuisance" exception to the GTLA and the Road Commission was entitled to dismissal.

That said, Plaintiffs' claim is based on the exact same underlying facts as their sewage disposal system event claim. Injunctive relief is not available under the sewage disposal system event exception to the GTLA, either. The Court of Appeals clearly erred in holding otherwise.

The Court of Appeals concluded that MCL 691.1417 does not bar Plaintiffs' request for injunctive relief because they are not seeking compensation for past "damages or physical injuries" caused by a sewage disposal system event. The Court of Appeals concluded instead that Plaintiffs' claim is one based on "future" damages and that this is not covered by the statute. With respect, the Court of Appeals reached the wrong result.

An injunction is not a separate cause of action and the underlying claim in this case is one for relief from tort. See, e.g., *Kratze v Indep Order of Oddfellows, Garden City Lodge No 11*, 442 Mich 136, 143; 500 NW2d 115 (1993) (discussing injunctive relief as a remedy for tort). Plaintiffs assert their request for relief in conjunction with the exact same underlying claim and factual allegations of injury due to the

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sewage disposal system event. Therefore, Plaintiffs' claim—to the extent it can be made at all—sounds in tort and is governed by the GTLA. It is nonsensical to bifurcate requested relief from the underlying substance of the claim. See MCL 600.2940 (injunctive relief in the form of abatement is a damage available when underlying claim of nuisance is proved).

That said, the sewage disposal system event exception provides the sole remedy for "any form of relief" based on its plain language. Clearly, again, an "injunction" is a form of relief. Specifically, MCL 691.1417 provides in pertinent part:

> Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide ***the sole remedy for obtaining any form of relief for*** *damages or physical injuries* caused by a sewage disposal system event regardless of the legal theory. [Emphases added.]

"Damages," as used in the statute above, encompasses property damage and other types of damage, like personal property damage, which is why it is coupled with "physical injuries." MCL 691.1417(3) and (4) refer to "property damage or physical injury" several times, which demonstrates that the statute is referring to physical, rather than monetary damages. In other words, "damages or physical injuries" are categories of harm for which relief may be sought, not remedies. It is the phrases "*sole remedy*" and "*any form of relief*" that bar Plaintiffs' request because it is broad enough to encompass injunctive relief. It does not matter if the claimant asks for this relief to stop "future" harm; the premise of the request is still a claim under the sewage disposal system event exception and the injunction is a form of relief (i.e., remedy) requested pursuant to this exception.

The Court of Appeals also incorrectly read *Lash* and *Michigan Assn of Home Builders* as supporting the conclusion that an injunction was available here. In *Lash v City of Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007), this Court explained that the claimant could possibly seek injunctive relieve to enforce *a specific statutory right*, i.e., lawful application of the residency requirements under MCL 15.602. Likewise,

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in *Michigan Assn of Home Builders v City of Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019), this Court found injunctive relief might be available to enforce the requirements a separate *specific* statute regarding limitations on fees associated with building permits. MCL 125.1522(1). Plaintiffs have not cited or claimed any such statutory "right" in this case. As such, neither *Lash* nor *Michigan Assn of Home Builders* support the Court of Appeals' opinion on this issue.[35]

Again, the underlying claim in this case—whether stylized as one for trespass nuisance or a sewage disposal system event—is one sounding in tort. See *Adkins v Thomas Solvent Co*, 440 Mich 293, 315; 487 NW2d 715 (1992). A "tort" is "an act that has long been understood as a civil wrong that arises from the breach of a legal duty other than the breach of a contractual duty." *In re Bradley Estate*, 494 Mich 367, 381; 835 NW2d 545 (2013). The term "tort liability" used in MCL 691.1407(1) means "*all legal responsibility* arising from a noncontractual civil wrong for which a remedy *may* be obtained in the form of compensatory damages." *In re Bradley Estate*, 494 Mich at 385. And "*all* suits that seek to impose 'tort liability' for an agency's discharge of a governmental function are barred by the GTLA, subject to several exceptions that the Legislature has expressly provided for in the GTLA and in other statutes authorizing suit against governmental agencies." *In re Bradley Estate*, 494 Mich at 378 (emphasis in original).

Plaintiffs' Complaint sets forth claims sounding in tort: one under the sewage disposal event system and another, based on the same facts, labeled trespass nuisance. The remedy for these claims "may" be compensatory damages. In fact, Plaintiffs indeed ask for compensatory damages. Therefore, to the extent *any* recovery is available, it is

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[35] Further, injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. *Acer Paradise, Inc v Kalkaska Cty Rd Comm'n*, 262 Mich App 193, 205; 684 NW2d 903 (2004). Here, an injunction would be improper because Plaintiffs had an adequate remedy at law, at least in theory, but that is now barred by the expiration of the statute of limitations.

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unequivocally governed by the GTLA. And the GTLA does not provide for injunctive relief.

The Court of Appeals further erred in relying upon MCL 691.1418(4), which provides "Unless this act provides otherwise, a party to a civil action brought under section 17 has all applicable common law and statutory defenses ordinarily available in civil actions, and is entitled to all rights and procedures available under the Michigan court rules." First, injunctive relief is not a "right or procedure." It's a remedy. And, MCL 691.1417 already provides that the sole remedy is the one provided under GTLA. MCL 691.1417(3). Further supporting the Road Commission's conclusion is MCL 691.1418(1), which provides that "economic damages are the *only* compensation for a claim under section 17." And, again, MCL 691.1419(1) further discusses "compensation" to a claimant.

It really is difficult to imagine how the Legislature could have been more all-encompassing in its language. The exception provides the "***sole*** remedy" for "***any*** form of relief." Clearly, the intent was to provide the sole remedy for these types of claims through the GTLA exception. The only type of remedy available under MCL 691.1416-1419 is "economic damages." Relief not mentioned in MCL 691.1416-1419 is not available for an alleged sewage disposal system event. The remedy of injunctive relief is not available because it is not provided for in MCL 691.1416-1419.

In sum, the Court of Appeals published opinion misapplies both the statutory language and precedents of this Court. The result is plainly contrary to the Legislature's intent as applied to this case. But, and perhaps more importantly for the purpose of this Court's discretionary review, the Court of Appeals' opinion represents a drastic expansion of governmental liability. Based on the reasoning of the Court of Appeals, injunctive relief for an underlying tort claim may be suddenly available even where no exception to the GTLA exists at all. The result will be inevitably be a confusing onslaught of claims contrary to the foundational the very purpose of the GTLA itself: preventing governmental agencies from being hailed into court and tied up in expensive litigation in the first instance.

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The Court of Appeals analysis is flawed, and the result is incorrect. Its implications affect governmental agencies and litigants across this State. This Court's discretionary review is clearly warranted.

C. Plaintiffs' request for an injunction is the functional equivalent of a claim for a writ of mandamus and Plaintiffs *cannot* satisfy any of the elements necessary to warrant this type of extraordinary relief. Therefore, it was not even necessary for the Court of Appeals to reach the question of whether some hypothetical injunctive relief not at issue in this case is available.

Even if the plain language of MCL 691.1417 did not bar Plaintiffs' request for an injunction, the specific injunction sought by Plaintiff is nevertheless completely unobtainable. Specifically, Plaintiffs seek injunctive relief mandating that the Road Commission restore the drainage system that existed prior to the installation of the bike path. Amd. Complaint ⁋ 28, Appellant's App'x 027A. The contours of this request are the functional equivalent of a writ of mandamus.

To start, the Court of Appeals erred in its conclusion that because "plaintiffs are not seeking to compel the performance of a ministerial act to which plaintiffs have a clear legal right and that defendant has a clear legal obligation to perform," Plaintiffs' request is not mandamus. Court of Appeals Opinion, p 9 n 5. In looking to the *substance of the claim*, Courts do not merely consider whether a party has made a *viable* request or one that would satisfy all the elements necessary to obtain the requested relief. See, e.g., *Anderson v Myers*, 268 Mich App 713, 715; 709 NW2d 171 (2005); *Trowell v Providence Hosp & Med Centers, Inc*, 502 Mich 509, 530; 918 NW2d 645 (2018) (Viviano, J., concurring). In fact, and oftentimes, a claimant mislabels a cause of action for the very reason that it would not be compensable if otherwise properly pleaded. The Court of Appeals' logic is backwards: it is precisely because Plaintiffs are not seeking enforcement of a ministerial act to which they have a clear right that their injunctive request was properly dismissed.

Plaintiffs in this case are asking the Court to order the Road Commission to restore the prior drainage system. Amd. Complaint ⁋ 28,

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Appellant's App'x 027A. In other words, they are requesting that the Road Commission be forced to perform a specific act in a specific manner. This request, even if labeled as injunctive relief, is fundamentally seeking a writ of mandamus. See *Warda v City Council*, 472 Mich 326, 337 n 7; 696 NW2d 671 (2005); *Burch v Mackie*, 362 Mich 488, 489-490; 107 NW2d 791 (1961); *Minarik v State Highway Commissioner*, 336 Mich 209, 213; 57 NW2d 501 (1953).[36]

The Court of Appeals' opinion reflects a fundamental shift in the type of injunctive relief that can be sought by claimants against governmental actors. Simply put, injunctions against a governmental

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[36] In *Burch v Mackie*, 362 Mich 488, 489-490; 107 NW2d 791 (1961), the plaintiff alleged that water was running from a resurfaced highway onto his property and sought an injunction against the State highway commissioner to "restore the natural and pre-existing drainage." In affirming the trial court's dismissal of the plaintiff's suit, this Court relied on *Minarik v State Highway Commissioner*, 336 Mich 209; 57 NW2d 501 (1953), a factually similar case. In *Minarik*, the Court stated:

> No litigant can mandamus a State officer in the circuit court simply by using the term injunction instead of mandamus when it is the latter remedy that he seeks. The circuit judge correctly held that plaintiffs were seeking a mandamus under the guise or misnomer of a mandatory injunction. [*Id*. at 213.]

The *Burch* Court also addressed *Sweeney v Hillsdale Co Bd of Rd Comm*, 293 Mich 624; 292 NW 506 (1940) and *Bennett v County of Eaton*, 340 Mich 330; 65 NW2d 794 (1954), both of which Plaintiffs have relied on here. The *Burch* Court ultimately noted that:

> In neither of these cases was the question of jurisdiction of the circuit court involved. The granting of the injunctive relief sought was not precluded by the statutory inhibition invoked in Minarik v State Highway Commissioner, supra, and likewise in the present suit, affecting the jurisdiction of circuit courts to issue writs of mandamus to State officers. [*Burch*, 362 Mich at 494].

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agency are governed by a different set of legal principals than those against private citizens. Courts historically may order a governmental agency or official to perform a duty that is ministerial in nature, only. They may not order the specific performance of discretionary duties. Unlike the cases from this Court cited by the Court of Appeals, Plaintiffs do not seek to enforce any specific statutory right in this case. In such an instance, injunctive relief based on an underlying alleged tort is not available.

"The requirements for issuance of a writ of mandamus are: (1) the plaintiff must have a clear legal right to performance of the specific duty sought to be compelled; (2) the defendant must have the clear legal duty to perform such act; and (3) the act must be ministerial, where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Keaton v Vill of Beverly Hills*, 202 Mich App 681, 683; 509 NW2d 544 (1993) (citations omitted). Also, "the plaintiff must be without an adequate legal remedy." *Id*. "Mandamus is an extraordinary remedy and will not lie to control the exercise or direction of the discretion to be exercised. Moreover, it will not lie for the purpose of reviewing, revising, or controlling the exercise of discretion reposed in administrative bodies." *Teasel v Dept of Mental Health*, 419 Mich 390, 409-10; 355 NW2d 75 (1984).

Plaintiffs do not have any clear legal right any specific drainage design. Likewise, the Road Commission does not have a duty to provide any specific drainage design or form. Moreover, Michigan Courts are not in the business of planning, ordering, and monitoring how a road commission or any other public body designs and builds its culverts. How to build and maintain a road and its appurtenances is within the Road Commission's sole discretion. And all maintenance and repairs within the right-of-way are exactly that: discretionary (i.e., not ministerial). Therefore, claimants cannot sue Road Commissions (or other public bodies) to have a specific modification performed.[37]

[37] Under the Court of Appeals decision, however, road commissions and other public entities in this State may soon find they are being hailed

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For these reasons, the requested injunctive relief is simply not available even if Plaintiffs' claim had been timely brought (which it was not).

1. Plaintiffs do not have any clear legal right to the requested modifications to the drainage system.

Plaintiffs have not pointed to any statute creating the right to have the drainage system reverted to how it existed prior to the 2015 modifications following installation of the bike path. And none exists. In fact, Plaintiffs cite to MCL 221.19(1), which provides:

> The board of county road commissioners ***may*** grade, drain, construct, gravel, shale, or macadamize a road under its control, make an improvement in the road, and may extend and enlarge an improvement. The board ***may*** construct bridges and culverts on the line of the road, and repair and maintain roads, bridges, and culverts. [Emphasis added.]

In other words, the Road Commission's actions regarding how it constructs and maintains the right-of-way is discretionary. See Section II.C.3 below. Plaintiffs simply have not (and cannot) point to any "right" entitling them to this relief.[38]

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into court with a multitude of similar requests. For example, every time a private citizen does not like the outcome of the vote of the board, they can file an injunction.

[38] For the first time on appeal, Plaintiffs ostensibly appear to be asserting some sort of constitutional right, i.e. alleging that they have been denied injunctive relief from a "taking" of their property. Plaintiffs' COA Brief, p 13. Plaintiffs did not plead inverse condemnation in Circuit Court—nor did they ask the Court for leave to amend their Complaint to add this claim. More importantly, however, injunctive relief is not available as a remedy for inverse condemnation. The remedy for such a claim is monetary damages.

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Because Plaintiffs cannot satisfy even the initial element of their requested relief (mandamus), it is simply not available.[39]

2. The Road Commission does not have any clear legal duty to revert its drainage system to the pre-2015 design.

Likewise, Plaintiffs have not asserted that the Road Commission was under any clear legal duty to take any specific act regarding the drainage system. The Road Commission is vested with the *discretion* to build culverts and maintain the right of way. MCL 224.19; MCL 224.21. It does not have a duty to do so in the specific way as demanded by Plaintiffs (or in any specific manner). Plaintiffs' request is also nonsensical because it seeks to have the Road Commission somehow revert to a system developed prior to the installation of the bicycle path. Assuming this were even possible, the Road Commission has no *duty* act upon its discretionary authority in the way requested by Plaintiffs and—even if the claim were timely—Plaintiffs cannot prevail in obtaining the injunctive relief sought.[40]

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[39] Likewise, *Morley v Twp of Bangor*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2019 (Docket No 340636), Appellants' App'x, pp did not address the common law abrogation as contained in the sewage disposal system event exception, nor did the Court actually conclude that the requested injunctive relief actually would have been available. As such, this unpublished case is not binding or persuasive as to the facts of this case. See MCR 7.215(C).

[40] In a similar vein, a court cannot enjoin the discretionary actions of any governmental department unless the department is acting beyond its legal authority. *Bates v City of Hastings*, 145 Mich 574, 581; 108 NW 1005 (1906); *Baker v Roscommon County Road Com'n*, 329 Mich 671, 679; 46 NW2d 579 (1951). In *Bates*, this Court held that "it is a well-settled rule of law that the judicial power cannot interfere with the legitimate discretion of any other department of government, unless it is acting beyond its legal discretion." *Bates*, 145 Mich at 581. An injunction is only appropriate where an agency has abused its

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3. Plaintiffs claim for injunctive relief cannot be used to compel a discretionary act.

Finally, a writ of mandamus is inappropriate based on Plaintiffs' allegations because the act to be compelled must be "ministerial." An act is "ministerial" in nature if it is "prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 439; 722 NW2d 243 (2006). In this case, MCL 224.19 provides, in part, that the "board *may* construct bridges and culverts on the line of the road, and repair and maintain roads, bridges, and culverts." In other words, this section affords discretion to the Road Commission. See *Warda v City Council*, 472 Mich 326, 336-337; 696 NW2d 671 (2005) (where "a statute empowers a governmental agency to undertake a discretionary decision, and provides no limits to guide either the agency's exercise of that discretion or the judiciary's review of that exercise, the decision is not subject to judicial review absent an allegation that the exercise of that discretion was unconstitutional."). See also *Township of Canton v Wayne Co Rd Comm*, 141 Mich App 322, 325; 367 NW2d 385 (1985).[41]

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discretion. *Hiers v Brownell*, 376 Mich 225, 234; 136 NW2d 10 (1965). Public officers or boards ordinarily may be enjoined if they act without authority or unlawfully. *Diggs v State Bd of Embalmers and Funeral Directors*, 321 Mich 508, 514; 32 NW2d 728 (1948). In other words, before an injunction can be issued, the Road Commission's actions must amount to an abuse of discretion in the sense that the Road Commission is acting without authority or is unconstitutional. *Id.* Here, the Road Commission modified the drainage system pursuant to its authority under MCL 224.19. And no constitutional claims were ever raised before the Circuit Court. Accordingly, injunctive relief is not available or appropriate.

[41] For example, in *Township of Canton v Wayne Co Rd Comm*, 141 Mich App 322, 325; 367 NW2d 385 (1985), the Court of Appeals addressed the use of the permissive "may" in MCL 224.19:

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Again, in Count III, Plaintiffs allege that the alleged trespass-nuisance "cannot be remedied by money damages alone and only be remedied by injunctive relief requiring Defendant to restore the drainage that existed prior to the changes the Defendant made as part of its bike path installation in 2013 and 2015." Amd. Complaint, ¶28; Appellant's App'x, 027A. However, the methods a road commission employs to maintain the roads, bridges, and culverts under its jurisdiction are left to the discretion of the road commission and this discretion makes mandamus inappropriate. Even if their claims were timely (again, which they are not), Plaintiffs' request for injunctive relief to abate a "trespass nuisance" is neither appropriate nor available.[42]

> This statutory language, providing that the commission "may" make improvements they consider best, illuminates the discretionary authority of the road commission. The statute does not list any specific methods which must be employed by the road commission in keeping the roads safe and convenient for public travel. Thus, the road commission has no clear and specific legal duty to control the dust on county roads via the specific program involved. [*Id.* at 329.]

[42] Several other cases support this conclusion. For example, in *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 520; 810 NW2d 95 (2011), the Court held that mandamus is "an inappropriate tool to control a public official's or an administrative body's exercise of discretion." However, mandamus "will lie to compel the exercise of discretion, **but not to compel its exercise in a particular manner**." *Teasel v Dep't of Mental Health*, 419 Mich 390, 409-410; 355 NW2d 75 (1984) (emphasis added).

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CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons and authorities, Defendant Board of County Road Commissioners for the County of Cheboygan respectfully request that this Court GRANT this application for leave, REVERSE the Opinion of the Court of Appeals and AFFIRM the Circuit Court's Opinion and Order dismissing this action with prejudice. In the alternative, the Road Commission requests that this Court grant MOAA on the merits of the application. The Road Commission further respectfully requests any additional relief deemed necessary, including but not limited to, awarding costs and fees incurred in this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 13,757 countable words as calculated by the word processing document used in its preparation. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

Respectfully submitted,

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