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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. 163949

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 REPLY BRIEF

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ARGUMENT

The Court of Appeals' opinion ignores the plain language of the sewage disposal system event exception to the GTLA. It also contravenes published opinions of this Court and the Court of Appeals regarding whether injunctive relief is available. This Court's discretionary review is warranted to resolve the conflict.

I. Neither the definition of the term "event" nor any of the other prerequisites to imposition of liability under the sewage disposal system even exception to the GTLA alter the claim's accrual or limitations period.

A. The requirements for avoidance of immunity in MCL 691.1416 through MCL 691.1419 do not change the definition of when a claim accrues.

Plaintiffs conflate two separate things: (1) what must occur for a tort claim to "accrue" and (2) what must occur for a claimant to avoid immunity for that same alleged tort. Plaintiffs' Answer, p 11-14. Only the latter is addressed by sewage disposal system event exception, and it has no impact on the accrual date.

Specifically, Plaintiffs argue that a claim under the sewage disposal system event cannot accrue until each of the five items present in MCL 691.1417(3) occurs. Plaintiffs' Answer, p 14. This is incorrect. Again, the statutory requirements for waiver of immunity have nothing to do with the actual accrual date.

Except as otherwise provided in the GTLA itself, a governmental agency is immune from tort liability if engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). MCL 691.1416 to MCL 691.1419 carve out a narrow exception to governmental immunity for an overflow or backup of a sewage disposal system onto real property, i.e., a claim that may have been previously pleaded as one sounding in trespass nuisance under the common law but for the comprehensive and exclusive tort immunity and exceptions provided by the GTLA. And a governmental agency is *still* "immune from tort liability for the overflow or backup of a sewage disposal system" *unless* the claimant can show that several statutory requirements have been

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met under MCL 691.1416 through MCL 691.1419, which "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." *Linton v Arenac Co Rd Com'n*, 273 Mich App 107, 113; 729 NW2d 883 (2006).

With respect to Plaintiffs' argument, MCL 691.1417(3) "imposes several requirements for a claimant to *avoid* governmental immunity for a sewage disposal system event." *Willett v Charter Tp of Waterford*, 271 Mich App 38, 49; 718 NW2d 386 (2006) (emphasis added). These additional requirements only prescribe when a claimant can avoid immunity; they do not alter when the underlying claim accrued. The accrual date remains constant regardless of whether immunity is waived. And it remains constant regardless of the statutory definitions of "event" or "damages" or any other term.

In fact, the GTLA specifically says this is so. MCL 691.1411(1) provides that "[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." There is no language whatsoever in the sewage disposal event exception that addresses accrual or limitations. The general law must therefore apply. The statute of limitations for actions for injury to property is three years. MCL 600.5805(2). And MCL 600.5827, 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." Plaintiffs assert that a change in the design of the drainage system in 2015 increased water flow onto their properties and resulted in at least one flooding event on their collective properties sometime in 2015. Plaintiffs claim the same 2015 modifications caused the 2018 flooding. "[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.* (emphasis added). 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). Clearly, the claim accrued in 2015.

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For the same reason, neither the definition nor the use of the term "event" in MCL 691.1416 or MCL 691.1417 makes any difference to this analysis. See Plaintiffs' Answer, p 3-4, 11-14. The definitions that are glaringly absent from MCL 691.1416 are those for a statute of limitations or accrual. Everything else about the statute pertaining to this exception to governmental immunity describes what must occur for the government to be held liable for this tort – the statute does not redefine when a claim accrues.

Again, the Road Commission is not claiming that separate wrongful *acts* (plural) would not be compensable. Plaintiffs' Answer, p 3. But there are no separate "acts" alleged in this case. The only act (singular) alleged was implementation of a defective design in 2015. The claim accrued in 2015 and Plaintiffs' argument does not change this conclusion.

B. *Haney* does not help Plaintiffs' argument. Instead, it demonstrates the difference between a new underlying wrong and a stale one.

Plaintiffs argue that an Opinion of this Court issued after Defendant's application was filed supports their case. It doesn't. In fact, the difference between *Haney* and this case underscores the Road Commission's point. Plaintiffs' Answer, p 3-4, 16-17.

Specifically, Plaintiffs cite to *Twp of Fraser v Haney*, ___Mich___, ___' ___ NW2d ___(February 8, 2022). In *Haney*, this Court considered whether the continuing wrongs doctrine barred a claim brought by the Township against property owners who were keeping hogs on their property in violation of a local ordinance. This Court concluded that it did not:

> The wrong alleged in plaintiff's complaint is defendants' keeping of hogs on their property. The presence of the hogs on the property constitutes the wrong, and that wrong, along with the attendant harms it causes, is being committed as long as the piggery operates. For example, the fact that defendants had hogs on their property *yesterday* is not a wrong that occurred until

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> yesterday, and any claims arising from harms due to the hogs' presence yesterday could not have accrued until then either. Therefore, because defendants had hogs on their property within the limitations period, claims accrued during that period and plaintiff's action is timely.
>
> Our conclusion is further supported by the plain language of the Zoning Enabling Act. MCL 125.3407 states that a "use" of land in violation of a zoning ordinance is a nuisance per se. "Use" means "[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional ...."[15] A "use" is thus inherently ongoing. And the nature of zoning violations typically makes a limitations period of little relevance to nuisance-abatement actions concerning present or ongoing nonconforming uses. [*Twp of Fraser v Haney*, slip op at 4.]

In other words, each day that the defendants kept a pig on their property was another separate underlying "wrongful act" or ongoing use in violation of the ordinance. *Id.* at 5. And the Township's action was "timely because it was commenced while defendants' unlawful conduct was ongoing." *Id.* at 6.

This case is clearly different. Here there is only *one* underlying alleged act: a modification to a roadside drainage ditch that was implemented in 2015. Based on the Complaint, the system was designed in 2015 and installed in 2015. No subsequent modifications are alleged. The fact that the same drain system existed in 2018 does not make it a separate alleged wrongful act. As outlined in the Road Commission's application, this case is instead substantially similar to *Marilyn Froling Tr.* And, as in that 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.'" 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." *Id.* at 291

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(emphasis added). Of course, this Court is not bound by the Court of Appeals. However, the analysis in *Marilyn Froling Tr* is based on *Garg* and completely consistent with *Henry v Dow Chem Co*, 501 Mich 965, 965; 905 NW2d 601 (2018): "Once 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**." quoting *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972). *Haney* does not change this conclusion. Instead, *Haney* is an example of separate and distinct (even if continuing) wrongful acts. The distinct statutes at issue in *Haney* are also not at issue here.

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. Nothing in *Haney* changes this conclusion.

II. Plaintiffs are not entitled to an injunction of any kind—either under a theory of trespass nuisance or under the GTLA.

A. There is no trespass-nuisance exception to the GTLA and the sewage disposal system event exception GTLA does not permit injunctive relief

Simply put, there is no longer any "trespass-nuisance" exception to governmental immunity. *Pohutski v City of Allen Park*, 465 Mich 675, 689–690; 641 NW2d 219 (2002). Plaintiffs argue that their claim is one based on "future" damages and that this is not covered by the statute. Plaintiffs' Answer, pp 17-18. Plaintiffs are wrong.

The underlying claim in this case is one for relief from tort. 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).

> Our analysis, however, requires more. MCL 691.1407(1) refers not merely to a "tort," nor to a "tort claim" nor to a

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> "tort action," but to "tort *liability*." The term "tort," therefore, describes the type of liability from which a governmental agency is immune. As commonly understood, the word "liability," refers to liableness, i.e., "the state or quality of being liable." To be "liable" means to be "legally responsible [.]" Construing the term "liability" along with the term "tort," it becomes apparent that the Legislature intended "tort liability" to encompass legal responsibility arising from a tort. We therefore hold that "tort liability" as 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 384–385 (emphases added).]

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." *Id.* at 378 (emphasis in original).

While this Court has recognized that the type of damages sought can illuminate the underlying nature of a claim in some circumstances, the nature of the claim here is clearly one sounding in tort. Trespass-nuisance is "defined as trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage." *Contl Paper & Supply Co, Inc v City of Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996). And in fact, this Court has repeatedly referred to the (now abrogated) common law "trespass-nuisance *exception* to governmental immunity." *Id.* In other words, this Court previously recognized a common law exception to *tort* immunity for the *tort* of trespass nuisance.

Both Plaintiffs and the Court of Appeals are also at odds with another published Court of Appeals Opinion on this issue, as well. In *Jackson Drain Com'r v Vill of Stockbridge*, 270 Mich App 273, 284-285; 717 NW2d 391 (2006), the plaintiffs argued that because they were only seeking equitable relief, *Pohutski* did not apply to bar their claim for

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trespass nuisance. But the Court of Appeals concluded that the *Pohutski* "Court clearly stated that MCL 691.1407 did not permit a trespass-nuisance exception to governmental immunity." Further, the Court of Appeals concluded that:

> The plain language of the [GTLA] does not limit the immunity from tort liability to liability for damages. As noted in *Pohutski*, governmental immunity is to be broadly construed, while exceptions to immunity are to be narrowly construed. To construe the statute as plaintiffs urge in the instant case would be to construe governmental immunity narrowly. Moreover, such a construction would judicially impose a term into the statute that the Legislature did not provide, which is not permitted.
>
> In addition, the decisions in both *Hadfield* and *Li II*—with respect to whether a trespass-nuisance action that merely seeks abatement of the nuisance is barred by governmental immunity—were plurality opinions. A plurality opinion of the Supreme Court, in which the reasoning is not supported by a majority of the justices, is not binding on this Court. Moreover, Justice Griffin, in rejecting the reasoning of the lead opinion in *Li II*, adhered to his previous position in *Li v Feldt (After Remand)*, 434 Mich 584, 596; 456 NW2d 55 (1990) (*Li I*). The Court in *Pohutski*, adopted Justice Griffin's opinion in *Li I*. Hence, the Supreme Court impliedly rejected the reasoning of the lead opinion in *Li II*. Therefore, unless an exception to immunity is found in the act itself, plaintiffs' nuisance claim must fail. [*Jackson Drain Com'r*, 270 Mich App at 284-285 (cleaned up).]

There is nothing unique about Plaintiffs' claimed injunctive relief that redefines the nature of the underlying allegation here. It is again important to recall that Plaintiffs are asking for the Road Commission to return the drainage system to its pre-2015 status. In other words, Plaintiffs want the Road Commission to spend money to put in place a specific drain system. But, just like *In re Bradley Estate,* if the nature of the claim is asking the government to reach into its coffers to satisfy

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a monetary claim (i.e., pay for the redesign of the drain), it is the same thing as tort damages. Cf. also *Wright v Genesee Co*, 504 Mich 410, 419; 934 NW2d 805, 810 (2019) ("unjust enrichment, by contrast, doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense."). Plaintiffs are also asking for monetary relief and an injunction based on the exact same alleged underlying tort. Therefore, to the extent *any* recovery is available at all, it is governed by the GTLA. And the GTLA does not provide for injunctive relief. See Defendant's Application, Section II.B.

B. Plaintiffs have no specific right to any modification to the public drainage system.

In fact, this Court has already rejected a nearly identical request for injunctive relief.[1] 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.]

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[1] Plaintiffs' also assert, without any support, that it is "illegal" for a system to back up or overflow. Plaintiffs' Answer, pp 20-21. It is not, in fact, illegal for a culvert to overflow. Even if Plaintiffs were to be deprived of all use or occupation of their property—the proper claim would be one for inverse condemnation. No such claim has actually been made here.

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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].

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.

Plaintiffs also incorrectly rely on *Lash* and *Michigan Assn of Home Builders* as supporting the conclusion that an injunction was available here. Plaintiffs' Answer, p 18-19. 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, 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 in 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.

At minimum, this application has raised serious issues of public interest and concern impacting governmental entitles (subdivisions of the State) across Michigan. It deserves this Court's attention and relief. MCR 7.205.

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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 3,174 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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