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

APPENDIX TO DEFENDANT-APPELLANT CHEBOYGAN COUNTY ROAD COMMISSION'S SUPPLEMENTAL BRIEF

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STATE OF MICHIGAN

COURT OF APPEALS

SUNRISE RESORT ASSOCIATION, INC., GREGORY P. SOMERS, MELISSA L. SOMERS, and KARL BERAKOVICH,

Plaintiffs-Appellants,

v

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendant-Appellee.

FOR PUBLICATION
December 2, 2021
9:05 a.m.

No. 354540
Cheboygan Circuit Court
LC No. 20-008790-ND

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM.

In this action alleging real property damages as a result of modifications to a storm water drainage system, plaintiffs, Sunrise Resort Association, Inc. (Sunrise), Gregory P. Somers, Melissa L. Somers, and Karl Berakovich, appeal as of right the trial court's order granting summary disposition under MCR 2116(C)(7) (statute of limitations) in favor of defendant, Cheboygan County Road Commission. On appeal, plaintiffs argue that the trial court erred by granting defendant's motion for summary disposition because (1) their claim under the sewage-disposal-system-event exception to governmental immunity under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., was not barred by the statute of limitations, and (2) their request for injunctive relief was not untimely and was an available remedy. Pertinent to this appeal is the question regarding when a claim accrues under the sewage-disposal-system-event exception, MCL 691.1416 through MCL 691.1419, which is an issue of first impression involving the interpretation of statutory provisions. MCR 7.215(B)(2). We reverse and remand to the trial court for further proceedings.

I. BACKGROUND

This case involves plaintiffs' claim that defendant made modifications to a storm water drainage system that resulted in a backup and overflow and caused damage to their real property.[1]

Plaintiffs are owners of real property located on West Burt Lake Road in Cheboygan County. Defendant operates a public storm water drainage system in Cheboygan County, which diverts drainage through plaintiffs' properties to Burt Lake by way of ditches and culverts.

In 2013, a bicycle trail was constructed on the west side of West Burt Lake Road, which necessitated various modifications to the drainage system. In 2014, the bicycle path was washed out and defendant made further modifications to the drainage system. In early 2016, Sunrise warned defendant that modifications made in 2015 had caused minor damage to plaintiffs and that more severe damage would likely result. On May 4, 2018, plaintiffs' properties sustained significant damage caused by an overflow and backup of the storm water drainage system.

On February 20, 2020, plaintiffs filed the instant action against defendant and subsequently filed an amended complaint on April 22, 2020. Their complaint alleged that minor damage first occurred in 2015 when the modifications were made, and significant damage occurred on May 4, 2018, as the result of an overflow and backup. Plaintiffs sought monetary damages under the sewage-disposal-system-event exception to governmental immunity, as well as injunctive relief to abate the ongoing trespass or nuisance.

Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiffs' sewage-disposal-system-event exception claim was barred by the applicable three-year statutory period of limitations and by plaintiffs' failure to provide timely notice of their claim, as required by MCL 691.1419. Defendant also argued that injunctive relief was not available under MCL 691.1417 and that defendant had not abused its discretion because it had the authority to install and maintain the roads and culvert near plaintiffs' properties. Therefore, defendant's discretionary actions were not subject to judicial review. Plaintiffs responded that their claim was not time-barred because the statutory limitations period did not begin to run until the 2018 "event" and that the minor damage that occurred in 2015 was not the basis of any claim. Plaintiffs also asserted that injunctive relief was not barred by MCL 691.1417 because their request for injunctive relief did not involve physical injuries. Lastly, plaintiffs asserted that they were not requesting that the court interfere with defendant's discretionary authority.

Following a hearing on the motion, the trial court granted summary disposition under MCR 2.116(C)(7) in favor of defendant. The trial court ruled that plaintiffs' claim accrued in 2015 and, therefore, was not timely. The trial court further ruled that an injunction was not a separate cause of action and could not be premised on untimely claims. It also concluded that injunctive relief was not permitted under MCL 691.1417(2).

[1] The facts are summarized from plaintiffs' first amended complaint, which defendant accepts as true for purposes of this appeal.

This appeal followed.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision to grant summary disposition, "including whether a cause of action is barred by a statute of limitations." *Sabbagh v Hamilton Psychological Servs, PLC*, 329 Mich App 324, 335; 941 NW2d 685 (2019) (cleaned up). Under MCR 2.116(C)(7), "all well-pleaded allegations must be both accepted as true and construed in the light most favorable to the nonmoving party." *Id*. at 335-336. Additionally, the court "must consider all of the documentary evidence submitted by the parties . . . ." *Id*. at 336.

Whether governmental immunity applies is a question of law that is also reviewed de novo. *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410, 416-417; 934 NW2d 805 (2019). "De novo review means that we review the legal issue independently, without required deference to the courts below." *Id*. at 417. Likewise, questions of statutory interpretation are reviewed de novo. *Sabbagh*, 329 Mich App at 335.

> The rules of statutory interpretation are well established. Our primary goal when interpreting a statute is to discern the Legislature's intent, and the specific language used is the most reliable evidence of its intent. When the language of a statute is unambiguous, no judicial construction is permitted and the statute must be enforced as written in accordance with the plain and ordinary meaning of its words. [*Pike v Northern Mich Univ*, 327 Mich App 683, 696; 935 NW2d 86 (2019) (cleaned up).]

III. STATUTE OF LIMITATIONS

Plaintiffs argue that the trial court erred by granting summary disposition in favor of defendant on the basis that their claim under the sewage-disposal-system-event exception to governmental immunity is barred by the statute of limitations. We agree.

"The [GTLA] generally provides immunity from tort liability to a 'governmental agency' if the agency 'is engaged in the exercise or discharge of a governmental function.' " *Pike*, 327 Mich App at 691, quoting MCL 691.1407(1). However, "[t]here are several exceptions to the broad grant of immunity . . . ." *Pike*, 327 Mich App at 691. "The scope of governmental immunity is construed broadly, while exceptions to it are construed narrowly." *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 112; 729 NW2d 883 (2006).

The sewage-disposal-system-event exception is set forth at MCL 691.1416 through MCL 691.1419. *Cannon Twp v Rockford Pub Sch*, 311 Mich App 403, 415; 875 NW2d 242 (2015). "The Legislature, in adopting MCL 691.1416 through MCL 691.1419, intended to provide limited relief to persons who suffer damages as a result of a sewage disposal system event." *Willett v Waterford Charter Twp*, 271 Mich App 38, 46; 718 NW2d 386 (2006) (cleaned up). MCL 691.1417(2) provides:

> 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. [MCL 691.1416] to [MCL 691.1419] 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.

As this Court explained in *Willett*, 271 Mich App at 48:

> The Legislature promulgated MCL 691.1416 through MCL 691.1419 "[t]o afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages caused by a sewage disposal system event. Under MCL 691.1417(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. A "sewage disposal system event" is defined, in pertinent part, as "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). An "appropriate governmental agency" is defined as "a governmental agency that, at the time of [a] sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage . . . ." MCL 691.1416(b). [Cleaned up.]

To avoid governmental immunity under the sewage-disposal-system-event exception, a claimant must establish the following:

> (1) that the claimant suffered property damage or physical injuries caused by a sewage disposal system event;
>
> (2) that the governmental agency against which the claim is made is "an appropriate governmental agency," which is defined as "a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury";
>
> (3) that the sewage disposal system had a defect;
>
> (4) that the governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect;
>
> (5) that 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;
>
> (6) that the defect was a substantial proximate cause of the event and the property damage or physical injury;
>
> (7) reasonable proof of ownership and the value of [any] damaged personal property; and

> (8) that the claimant provided notice as set forth in MCL 691.1419. [*Linton*, 273 Mich App at 113-114 (cleaned up).]

Additionally, MCL 691.1411(1) provides, "Every claim against any governmental agency shall be subject to the general law respecting limitations of actions except as otherwise provided in this section." Accordingly, a claim under the sewage-disposal-system-event exception must also be timely filed.

The parties do not dispute that the applicable statute of limitations is MCL 600.5805, which provides, in relevant part:

> (1) 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.
>
> (2) Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person or for injury to a person or property. [MCL 600.5805(1) and (2).]

MCL 600.5827 defines accrual and provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in [MCL 600.5829] to [MCL 600.5838], and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

It is "clearly established that the wrong is done when the plaintiff is harmed rather than when the defendant acted." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 388; 738 NW2d 664 (2007) (cleaned up).

Plaintiffs argue that the trial court erred by finding that the 2015 incident started the running of the statutory limitations period. Plaintiffs contend that each "sewage disposal system event" gives rise to a cause of action that restarts the statutory limitations period and, therefore, their claim accrued on May 4, 2018. The question regarding when a claim accrues under the sewage-disposal-system-event exception is an issue of first impression.

Under MCL 600.5857, the period of limitations runs from the time *the claim* accrues. A cause of action generally "accrues when all of the elements of the cause of action have occurred and can be alleged in a proper complaint." *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 150; 200 NW2d 70 (1972); see also *Moll v Abbot Labs*, 444 Mich 1, 15-16;

506 NW2d 816 (1993).[2] In *Connelly*, our Supreme Court observed that damages were one of the elements of a cause of action. *Connelly*, 388 Mich at 151. A claim under the sewage-disposal-system-event exception requires a sewage disposal system event, which is defined, in part, as an "overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). Such a claim also requires damages to have occurred. *Linton*, 273 Mich App at 113. A plain reading of plaintiffs' complaint shows that it is premised on a specific, discrete backup event that occurred on May 4, 2018, and that plaintiffs are seeking to recover for damages that occurred only on that occasion. Because the event upon which plaintiffs' claim is based did not occur until 2018, and plaintiffs suffered no harm from that event until 2018, they could not have brought their claim any earlier. Therefore, plaintiffs' claim accrued in 2018. See *Connelly*, 388 Mich at 151; *Trentadue*, 479 Mich at 388. Therefore, under the three-year limitations period, plaintiffs timely filed their complaint on February 20, 2020.

The trial court concluded that plaintiffs' claim accrued in 2015 because plaintiffs alleged that they were first harmed in 2015.[3] Although plaintiffs are now precluded from bringing any claim based on the 2015 incident because they did not bring an action within three years of that incident, nothing in the statute precludes them from maintaining a separate claim for the event that occurred in 2018.

Defendant asserts that plaintiffs are attempting to apply the now-abrogated common-law "continuing wrongs doctrine." Under the "continuing wrongs doctrine," "when the nuisance is of a continuing nature, the period of limitations does not begin to run on the occurrence of the first wrongful act; rather, the period of limitations will not begin to run until the continuing wrong is abated." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 280; 769 NW2d 234 (2009). This doctrine, however, was completely abrogated, including in nuisance and trespass cases. *Id*. at 288. In *Marilyn Froling Revocable Living Trust* this Court explained:

> 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. In sum, the accrual of the claim occurs when both the act and the injury first occur, that is when the "wrong is done." [*Id*. at 291.]

Plaintiffs argue that the continuing-wrongs doctrine does not apply in this case and that a plaintiff can allege multiple claims based on discrete acts or omissions. See *Kincaid v Cardwell*, 300 Mich App 513, 525; 834 NW2d 122 (2013) (noting that "it is possible for the plaintiff to allege multiple claims of malpractice premised on discrete acts or omissions—even when those acts or omissions lead to a single injury—and those claims will have independent accrual dates

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[2] Although *Connelly* and *Moll* involved claims for personal injury, we find this analysis broadly applicable.

[3] We note that plaintiffs alleged that "minor damage" occurred in 2015. Plaintiffs did not allege that an overflow or backup occurred in 2015. Nonetheless, as discussed below, whether the 2015 incident constituted an "event" is not relevant to plaintiffs' claim based on the 2018 event.

determined by the date of the specific act or omission at issue"). Plaintiffs assert that each sewage disposal system event is a discrete and separate occurrence.

We conclude that the abrogation of the continuing-wrongs doctrine has no relevance in this case. The abrogation of the continuing-wrongs doctrine means that plaintiffs are prohibited from relying on the harm caused by the 2018 event to argue that any claim based on the 2015 incident is timely, or from arguing that any continuing harm arising from the 2015 incident operates to extend the limitations period for any claim based on the 2015 incident. This doctrine, however, is not applicable to plaintiffs' claim based on the 2018 event, which was timely filed in 2020.

Plaintiffs also argue that in order to conclude that the 2015 incident started the statutory limitations period, the trial court necessarily found that the 2015 incident met all the requirements of an "event." However, because plaintiffs' claim is based on the 2018 event, whether the 2015 incident constituted an event is not relevant. Accordingly, additional discovery regarding whether the 2015 incident constituted an "event" is not necessary.

Defendant also contends that, even if plaintiffs' claim had been timely filed, dismissal was proper because plaintiffs failed to provide proper notice of their claim. As stated earlier, MCL 691.1419(1) provides, in relevant part:

> [A] claimant is not entitled to compensation under [MCL 691.1417] unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered.

Defendant argues that plaintiffs failed to provide notice within 45 days after the 2015 incident. Plaintiffs respond that they properly provided notice within 45 days of the damage on May 4, 2018. As discussed, the 2018 event was an independent "sewage disposal system event" that gave rise to a separate claim. Plaintiffs' failure to provide notice after the 2015 incident has no relevance to whether they provided proper notice after the 2018 event. According to their complaint, plaintiffs provided proper notice of the May 4, 2018 event on June 15, 2018, which defendant does not dispute.

Therefore, because plaintiffs timely filed their complaint, we conclude that the trial court erred by concluding that plaintiffs' claim was barred by the statute of limitations and by granting summary disposition under MCR 2.116(C)(7) in favor of defendant.

IV. INJUNCTIVE RELIEF

Plaintiffs also argue that their claim for injunctive relief is permitted by MCL 691.1417(2) and not prohibited by the elimination of the trespass-nuisance exception to governmental immunity under *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). We agree.

In *Pohutski*, 465 Mich at 689-690, the Court held that "the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental

immunity."[4] In *Jackson Drain Comm'r v Village of Stockbridge*, 270 Mich App 273, 284; 717 NW2d 391 (2006), this Court stated that "*Pohutski* did not specifically address whether a trespass-nuisance action that merely seeks abatement of the nuisance is barred by governmental immunity. Instead, the Court clearly stated that MCL 691.1407 did not permit a trespass-nuisance exception to governmental immunity." However, our Supreme Court subsequently held that, even when "a statutory private cause of action for monetary damages does not exist, a plaintiff may nonetheless maintain a cause of action for declaratory and equitable relief." *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019); see also *Lash v Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007) (Concluding that the plaintiff could have enforced the statute by seeking injunctive relief under MCR 3.310 or declaratory relief under MCR 2.605(A)(1) despite the plaintiff's argument that a private cause of action for damages was the only mechanism to enforce the statute.). Therefore, governmental immunity does not bar a claim for an injunction to prevent future nuisance or a judgment to abate an existing nuisance. Accordingly, the trial court erred to the extent that it concluded that *Pohutski* barred plaintiffs' claim for injunctive relief.

However, the trial court also concluded that plaintiffs could only seek compensatory damages under MCL 691.1417(2), which provides:

> 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. *[MCL 691.1416] to [MCL 691.1419] 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.]

Defendant contends that under the plain language of this provision, injunctive relief is not permitted for an alleged sewage disposal system event.

"When the language of a statute is unambiguous, no judicial construction is permitted and the statute must be enforced as written in accordance with the plain and ordinary meaning of its words. *Pike*, 327 Mich App 683 at 696. "A court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Mich Ass'n of Home Builders*, 504 Mich at 212 (cleaned up). Additionally, "[T]he provisions of a statute should be read reasonably and in context." *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

MCL 691.1417(2) reads that MCL 691.1416 through MCL 691.1419 provide the *sole remedy* for obtaining *any form of relief* for *damages or physical injuries*. MCL 691.1417(3) provides, in relevant part, that a claimant "may seek compensation for the property damage or physical injury from a governmental agency . . . ." See also MCL 691.1418(1). MCL 691.1417

[4] We note that the claim in *Pohutski* occurred before the enactment of the sewage-disposal-system-event exception under MCL 691.1417, which took effect January 2, 2002. See 2001 PA 222; *Pohutski*, 465 Mich at 679, 697 n 2.

does not explicitly address injunctive relief. Rather, this provision only limits the remedy available for "*damages or physical injuries* caused by a sewage disposal system event" to compensatory damages. MCL 691.1417(2) and (3) (emphasis added); see also MCL 691.1418(1).

Plaintiffs argue that injunctive relief is permitted on the basis of MCL 691.1418(4) and MCR 3.310. MCL 691.1418(4) provides: "*Unless this act provides otherwise*, a party to a civil action brought under [MCL 691.1417] 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." (Emphasis added.) The Michigan court rules permit injunctive relief under MCR 3.310.

In this case, plaintiffs requested injunctive relief to avoid damages caused by a future sewage-disposal event. Plaintiffs did not seek injunctive relief to compensate for existing damages or physical injuries as a result of the 2018 event. The plain language of MCL 691.1417(2) does not bar injunctive relief as a remedy. Rather, read in context with MCL 691.1418(4) and MCR 3.310, injunctive relief is an available remedy. Our holding is further supported by *Mich Ass'n of Home Builders*, 504 Mich at 225, and *Lash*, 479 Mich 180 at 196, in which our Supreme Court concluded that declaratory and equitable relief are available even if a statutory private cause of action for monetary damages does not exist.

Therefore, the trial court erred by concluding that injunctive relief was not an available remedy to plaintiffs' claim.

Even if injunctive relief were permitted, defendant argues that plaintiffs' request for injunctive relief is barred by the statute of limitations because the underlying claim (the sewage-disposal-system-event claim) is barred by the statute of limitations. For the reasons discussed, plaintiffs' claim under MCL 691.1416 through MCL 691.1419 was timely with respect to the alleged 2018 event. Therefore, plaintiffs' claim is not barred by the statute of limitations.[5]

[5] Defendant also argues that plaintiffs' claim for injunctive relief is, in substance, truly a claim for a writ of mandamus. We determine the nature of a claim by examining its substance rather than its label. *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). However, we are persuaded that 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. See *Taxpayers for Michigan Constitutional Government v State of Michigan*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket Nos. 160658, 160660), slip op at p 27. We therefore disagree that plaintiffs are pursuing a writ of mandamus in disguise. We do not otherwise address the gravamen of defendant's argument that plaintiffs are not entitled to the *particular* injunctive relief specified in their complaint. That argument may be reasserted on remand.

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Thomas C. Cameron
/s/ Michelle M. Rick

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF CHEBOYGAN

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

Plaintiffs,

v

Case No. 20-8790-ND

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendant.
_____/

OPINION AND ORDER

Plaintiffs allege that modifications Defendant made to a storm water drainage system later resulted in a backup and overflow of that system, causing damage to their real property. Defendant moves for summary disposition under MCR 2.116(C)(7), arguing that all of Plaintiffs' claims are barred by governmental immunity. For the reasons set forth in this opinion, Defendant's motion is GRANTED and Plaintiffs' claims are dismissed with prejudice.

Factual Background (As Alleged in Plaintiffs' First Amended Complaint):

Plaintiffs own real property in Cheboygan County. Defendant is a governmental agency that, among other things, constructs and maintains culverts along the line of roadways, as part of a public storm water drainage system. Plaintiffs allege that a drainage system consisting of various roadside ditches and culverts installed by Defendant diverts the natural drainage routes to a drain that flows through their properties on the way to Burt Lake. As part of this system, in 1958 Defendant installed a 24-inch culvert under West Burt Lake Road.

In 2013, a bicycle trail was constructed on the west side of West Burt Lake Road resulting in various modifications of the existing drainage system that flowed through the 24-inch culvert. About a year later, the bicycle path washed out, so in 2015 Defendant made repairs that modified the

drainage system further. Plaintiffs maintain that, although this may have protected the bicycle path, it actually increased the amount and rate of water directed onto their properties. Thus, in early 2016, one of the Plaintiffs notified Defendant in writing "that the modifications made in 2015 were the cause of minor damage sustained by Plaintiffs and that more severe damage would likely result if further modifications were not made." (First Amended Complaint, ¶ 12). Apparently, Defendant did not make any changes as requested by Plaintiffs.

Plaintiffs allege that on or about May 4, 2018, their parcels sustained significant damage from water erosion caused by an overflow and backup of Defendant's storm drainage system. They seek redress for damage to three driveways, vegetation, electrical equipment, and cottages.

Plaintiffs filed suit on February 20, 2020. Their first amended complaint contains three counts. Count One seeks money damages under MCL 691.1417(3); Count Two alleges gross negligence; and Count Three seeks injunctive relief to abate the trespass or nuisance of the water diverted onto their property.

Defendant filed a motion for summary disposition under MCR 2.116(C)(7), which allows for "dismissal of the action . . . because of . . . immunity granted by law." On June 15, 2020, the Court heard oral argument and took the matter under advisement.

MCR 2.116(C)(7) Standards:

Summary disposition may be granted under MCR 2.116(C)(7) where the claim is barred by governmental immunity. *Maiden v Rozwood*, 461 Mich 109 n 3, 118 (1999). A party may, but is not required to, support a (C)(7) motion with affidavits, depositions, or other documentary evidence. *Id.* at 119. Likewise, the opposing party may, but is not required to, submit supportive material. Any supporting proofs must be admissible in evidence in order to be considered. *Id.* "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.* In this case, the parties are relying on the pleadings alone.

Governmental Immunity:

Under the Governmental Tort Liability Act ("GLTA"), MCL 691 1401 *et seq.*, governmental agencies are immune from tort liability when engaged in a governmental function. See MCL 691.1407(1); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156 (2000). This immunity "is expressed in the broadest possible language—it extends immunity to all governmental agencies for

all tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Id.* This necessarily means that some wrongs "will inevitably go unremedied." *Id.* at 157. But there is an important public policy reason behind this—we need government to provide certain services. For example, public entities (and not private persons) are *required* to engage in certain activities, such as building and maintaining roads and water drainage systems. Public entities cannot reduce their liability exposure by refraining from those activities, because they are required to provide those services. *Id.* at 156, quoting *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618-619 (1984). So a governmental agency cannot and does not make decisions in the same way that a private person does—a governmental agency cannot engage in a purely self-interested risk-utility analysis to reduce liability exposure. So although governmental agencies remain politically responsible to the people, they are generally immune from suit for tort.

The Legislature has established some specific exceptions to this general rule. This case involves the interpretation of one of those exceptions. But in reviewing this matter, the Court must be guided by the basic principle that "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Id.* at 158.

The "Sewage Disposal System Event" Exception to Governmental Immunity:

This case involves application of the statutory "sewage disposal system event" exception to governmental immunity, set forth at MCL 691.1416 through MCL 691.1419. The purpose of the detailed provisions of this statutory exception are "[t]o afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages or physical injuries caused by a sewage disposal system event." MCL 691.1417(1). Under this exception, "[a] governmental agency is immune from tort liability for the overflow and 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." MCL 691.1417(2). This awkwardly worded provision further depends on the statutory definitions of the terms "sewage disposal system event" and "appropriate governmental agency" in order to render it understandable. A "sewage disposal system event," simply stated, is "the overflow or backup of a sewage disposal system onto real property" unless it was caused by certain specified conditions outside the control of the governmental agency. MCL 691.1416(k). An "appropriate governmental agency" is basically defined as the governmental agency that owned, operated, or discharged into the sewage disposal

system that resulted in the harm. See MCL 691.1416(b). There are several other statutory requirements that a claimant must satisfy in order to avoid governmental immunity under this exception. The Court of Appeals has helpfully compiled the following list:

> (1) that the claimant suffered property damage or physical injuries caused by a sewage disposal system event [see MCL 691.1417(2) and (3)];
>
> (2) that the governmental agency against which the claim is made is "an appropriate governmental agency" . . . [see MCL 691.1417(2), (3)(a)];
>
> (3) that "[t]he sewage disposal system had a defect" [see MCL 691.1417(3)(b)];
>
> (4) that "[t]he governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect" [see MCL 691.1417(3)(c)];
>
> (5) that "[t]he 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" [see MCL 691.1417(3)(d)];
>
> (6) that "[t]he defect was a substantial proximate cause of the event and the property damage or physical injury" [see MCL 691.1417(3)(e)];
>
> (7) "reasonable proof of ownership and the value of [any] damaged personal property" [see MCL 691.1417(4)(a)]; and
>
> (8) that the claimant provided notice [to the governmental agency of the claim] as set forth in MCL 691.1419 [see MCL 691.1417(4)(b)]. [*Cannon Township v Rockford Public Schools*, 311 Mich App 403, 415-416 (2015), quoting *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 113-114 (2006).]

But even if all of these requirements are met, other provisions of the GTLA would still apply to the case. Here, Defendant argues that Plaintiffs' claim is untimely and thus barred by the statute of limitations. To the extent that this is really a limitations issue and not a governmental immunity issue, MCR 2.116(C)(7) nonetheless allows for dismissal where the claim is barred by the applicable statute of limitations.

Is Plaintiffs' Tort Claim Untimely?

The GTLA provides that claims against governmental agencies are still subject to the applicable limitations period. MCL 691.1411(1). For damages to real property, that limitations period is three years "after the claim first accrued." MCL 600.5805(1) & (2).

Defendant argues that Plaintiffs' tort claim first accrued sometime in 2015 when there was some minor damage on their property allegedly as a result of the modifications Defendant made to the drainage system. Thus, their action, filed in February 2020 for subsequent damages resulting in 2018, was untimely because it was filed more than three years after the 2015 accrual date. Plaintiffs respond that the statutory definition of a "sewage disposal system event" means that every time there is an overflow or backup of a sewage disposal system, a different claim accrues that begins a new three-year limitations period.

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 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 Lawn 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 plaintiff's 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.

Plaintiffs rely on MCL 691.1416(k), which defines a "sewage disposal system event" as "the overflow or backup of a sewage disposal system onto real property." And MCL 691.1417(2) provides that an "appropriate governmental agency" can be liable for damage caused by a "sewage disposal system event." According to plaintiffs, the overflow in 2015 constituted an "event," and the overflow in 2018 constituted a separate and distinct "event."

There is some appeal to Plaintiffs' position, as it is seemingly consistent with the statutory definition of an "event." But the GTLA must be read as a whole, and it subjects tort claims against a governmental agency to the general law regarding limitations. MCL 691.1411(1). 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 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.

Accordingly, Defendant is entitled to summary disposition of Plaintiffs' tort claim under the "sewage disposal system event" exception to governmental immunity. Thus, Count One of Plaintiffs' First Amended Complaint is dismissed.

Plaintiffs' Remaining Claims:

Plaintiffs also brought a claim alleging gross negligence, but they have conceded Defendant's point that the gross negligence exception does not apply to agencies. Thus, Count Two of Plaintiffs' First Amended Complaint is also dismissed.

Finally, Plaintiffs assert a claim for injunctive relief to abate the trespass and/or nuisance. The alleged trespass/nuisance is the diversion of water onto their properties as a result of Defendant's allegedly improper modifications to the drainage system. Plaintiffs insist that their

claim for injunctive relief is not subject to the GTLA. But "an injunction is a remedy, not an independent cause of action, [so] [b]ecause a remedy must be supported by an underlying cause of action, [a] trial court [may] not enter an injunction premised on untimely claims." *Raymond v Heller*, ___ Mich App ___ (2020) (Docket No. 347505), issued May 28, 2020, slip op at 5. Trespass is a tort. *Adams v Cleveland-Cliffs Iron Co*, 237 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.*" [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.

Conclusion:

Plaintiffs' claim for property damage resulting from an overflow or backup of a drainage system first accrued when the alleged wrong committed by Defendant resulted in harm to Plaintiffs in 2015. Plaintiffs' action was brought more than three years after that date, beyond the limitations period. The limitations period did not start anew when Plaintiffs suffered additional subsequent damage in 2018 stemming from the same defect. Defendant is entitled to summary disposition as a matter of law. Therefore, IT IS HEREBY ORDERED that Plaintiffs' entire cause of action against Defendant is DISMISSED WITH PREJUDICE.

This order resolves the last pending claim and closes the case.

DATE: 7-30-20

HON. AARON J. GAUTHIER (P60364)
53rd Circuit Judge

State of Michigan
In the 53rd Circuit Court for the County of Cheboygan

SUNRISE RESORT ASSOC., GREGORY SOMERS, MELISSA SOMERS, KARL BERAKOVICH,

Plaintiff,

vs.

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendants.

Case No.: 20-8790-ND

Honorable AARON J GAUTHIER

Proof of Service

I certify that I provided (via regular mail) true copies of the Opinion and Order dated 07/30/2020, to the following:

To: EVASHEVSKI LAW OFFICE
ATTN TOM EVASHEVSKI
838 N. STATE ST.
P.O. BOX 373
ST. IGNACE, MI 49781

HENN LESPERANCE PLC
WM HENN & BENJAMIN DOST
32 MARKET AVE., SW, STE. 400
GRAND RAPIDS, MI 49503

Dated this 3rd day of August 2020

Kirsten Thater
Circuit Court Clerk

P 001 SUNRISE RESORT ASSOC,,,
ATY:SCHAFER,JENNIFE
P-49438 231-347-4444
SERVICE/ANS 01/10/22 APP

VS D 001 CHEBOYGAN COUNTY ROAD COMM,,,
5302 S. STRAITS HWY.
INDIAN RIVER MI 49749
ATY:HENN,WILLIAM L.
P-61132 616-551-1611
DISPOSITION 07/30/20 DIS MAJ
SERVICE/ANS 04/20/20 ANS

P 002 SOMERS,GREGORY,P,
ATY:SCHAFER,JENNIFE
P-49438 231-347-4444

P 003 SOMERS,MELISSA,L,
ATY:SCHAFER,JENNIFE
P-49438 231-347-4444

P 004 BERAKOVICH,KARL,,
ATY:SCHAFER,JENNIFE
P-49438 231-347-4444

Actions, Judgments, Case Notes

Num	Date	Judge	Chg/Pty	Event Description/Comments	
1	02/20/20	GAUTHIER		SUMMONS AND COMPLAINT	CLK KT
				RECEIPT# 00107198 AMT $175.00	
				FOR CIVIL LAWSUIT	CLK
3	03/30/20		D 001	RETURN OF SERVICE	CLK RP
				VIA SHERIFF'S SERVICE-	CLK
				ACKNOWLEDGMENT SIGNED.	CLK
				(FILED 3/31/20)	CLK
2	03/31/20		D 001	APPEARANCE	CLK RP
				ATTORNEY: P-61132 HENN	CLK
				POS.	CLK
4	04/09/20		P 001	JURY DEMAND FILED	CLK RP
				RECEIPT# 00107698 AMT $85.00	
				POS.	CLK
5	04/20/20			PROOF OF SERVICE FILED	CLK RP
				RE: DEMAND FOR JURY TRIAL ON	CLK
				ATTY HENN.	CLK
6			D 001	ANSWER FILED	CLK RP
				DEF CHEBOYGAN COUNTY ROAD	CLK
				COMMISSION'S ANSWER TO	CLK
				COMPLAINT & AFFIRMATIVE	CLK
				DEFENSES. POS.	CLK
7			D 001	MOTION FILED	CLK RP
				RECEIPT# 00107750 AMT $20.00	
				DEF CHEBOYGAN COUNTY RD	CLK
				COMMISSION'S MOTION FOR	CLK
				SUMMARY DISPOSITION. BRIEF	CLK
				IN SUPPORT. POS. (NO HEARING	CLK
				DATE)	CLK
8	04/23/20		D 001	DEF CHEBOYGAN COUNTY RD	CLK RP
				COMMISSION'S RELIANCE ON JURY	CLK
				DEMAND. POS.	CLK
9	04/27/20		P 001	ALL PLS' FIRST AMENDED	CLK RP

			COMPLAINT. POS.		CLK
10	04/28/20		NOTICE SENT FOR: 05/18/20 9:30 AM MOTION HEARING		CLK KJC
			DEFENDANT'S MOTION FOR SUMM. DISP. *** ALL PARTIES TO APPEAR BY ZOOM VIDEO ONLY *** SEE ENCLOSED INSTRUCTIONS		CLK CLK CLK CLK
11			NOTICE TO APPEAR W/ PROOF OF SERVIC FOR DEF'S MOTION FOR SUMMARY DISPOSITION 5/18/20 @ 9:30A- VIA ZOOM.		CLK RP CLK CLK CLK
12	05/07/20	P 001	PLS' BRIEF IN OPPOSITION TO DEF'S MOTION FOR SUMMARY DISPOSITION; POS		CLK KT CLK CLK
13	05/12/20		REMOVE NEXT EVENT: 05/18/20 9:30 AM MOTION HEARING		CLK KJC
14			NOTICE SENT FOR: 07/13/20 9:00 AM PRE-TRIAL HEARING		CLK ML
16			NOTICE TO APPEAR W/ PROOF OF SERVIC FOR PRE-TRIAL HEARING 7/13/20 @ 9:00A.		CLK RP CLK CLK
17	05/13/20	D 001	MOTION FILED		CLK RP
			RECEIPT# 00107864 AMT $20.00		
			DEF'S CHEBOYGAN CNTY RD COMMISSION SECOND MOT FOR SUMMARY DISP. BRIEF IN SUPPORT. NOH 6/15/20 @ 9:00A. POS.		CLK CLK CLK CLK CLK
18		D 001	DEF'S CHEBOYGAN COUNTY RD. COMMISSIONS ANSWER TO PL'S FIRST AMENDED COMPLAINT & AFFIRMATIVE DEFENSES. POS.		CLK RP CLK CLK CLK
19	06/01/20	P 001	PLS' BRIEF IN OPPOSITION TO DEF'S 2ND MOTION FOR SUMMARY DISPOSITION; POS		CLK KT CLK CLK
15	06/04/20		NOTICE SENT FOR: 06/15/20 10:30 AM MOTION HEARING		CLK DR
			DEF'S MO FOR SUMMARY DISP. *TIME CHANGE*ALL PARTIES TO APPEAR BY ZOOM VIDEO ONLY* SEE ATTACHED ZOOM INSTRUCTIONS		CLK CLK CLK CLK
20			NOTICE TO APPEAR W/ PROOF OF SERVIC MOTION HRG 06/15/20 10:30AM DEF'S MOT FOR SUMMARY DISP VIA ZOOM		CLK KT CLK CLK CLK
21	06/09/20	D 001	DEF'S INITIAL DISCLOSURES;POS		CLK KT
22	06/11/20	D 001	DEFENDANT CHEBOYGAN COUNTY ROAD COMMISSION'S REPLY TO PLAINTIFF'S RESPONSE TO SECOND MOTION FOR SUMMARY DISPOSITION. POS.		CLK RP CLK CLK CLK CLK
23	06/12/20		REMOVE NEXT EVENT: 07/13/20 9:00 AM PRE-TRIAL HEARING		CLK DR
24			NOTICE SENT FOR: 07/06/20 9:00 AM PRE-TRIAL HEARING		CLK DR
			Rescheduled by Court.		CLK
25			NOTICE TO APPEAR W/ PROOF OF SERVIC		CLK KT

			PRE-TRIAL HRG 07/06/20 9AM		CLK	
			RESCHEDULED		CLK	
26	06/15/20		REMOVE NEXT EVENT: 07/06/20 9:00 AM PRE-TRIAL HEARING		CLK	KJC
27			MOTION HEARING		CRT	KJC
			UNDERADVISEMENT		CRT	
			- RETURNED 7/30/20		CRT	
			SUMMARY DISPOSITION		CRT	
28			MOTION HEARING		CRT	RP
			DEF'S MOT FOR SUMMARY DISP &		CRT	
			PRE-TRIAL EARLY-REMOVE 7/6 DTE		CRT	
			-PRES T. EVASHEVSKI FOR PL &		CRT	
			W. HENN FOR DEF. SEWAGE EVENT		CRT	
			CASE-EXCEPTION TO TORT LIAB.		CRT	
			DISMISS GROSS NEGLIGENCE CNT-		CRT	
			W/PREJUDICE OR W/O. PRE-TRIAL:		CRT	
			PLDG YES. INTIAL DISC-14 DYS.		CRT	
			DISC 6 MOS. WIT & EX 90 DYS.		CRT	
			YES TO BOTH MEDIATION & CASE		CRT	
			EVAL. SETTLEMENT CONF 2/2021.		CRT	
			JURY TRIAL 3 DYS. MOTION		CRT	
			TAKEN UNDER ADVISEMENT.		CRT	
29			ORDER		CLK	RP
			CIVIL SCHEDULING. (FILED		CLK	
			6/24/20)		CLK	
30	06/29/20	P 001	ALL PLAINTIFFS' INITIAL		CLK	RP
			DISCLOSURES. POS.		CLK	
37	07/30/20		MISCELLANEOUS ACTION BY JUDGE		CRT	KJC
			RETURN FROM UNDERADVISEMENT		CRT	
38		999	MISCELLANEOUS ACTION BY JUDGE		CRT	RP
			DISMISSED		CRT	
39		999	CIVIL JUDGEMENT ORDER		CLK	RP
			OPINION & ORDER. POS.		CLK	
34	08/18/20	P 001	REQUEST FOR TRANSCRIPT BY		CLK	RP
			ATTY EVASHEVSKI 6/15/20 @		CLK	
			10:30A-DEF'S MOTION FOR		CLK	
			SUMMARY DISPOSITION.		CLK	
36	08/20/20	P 001	APPEAL FEES PAID		CLK	RP
			RECEIPT# 00109062 AMT	$25.00		
			ALL PLAINTIFFS' CLAIM OF		CLK	
			APPEAL TO THE COURT OF		CLK	
			APPEALS. STATEMENT & REQ		CLK	
			FOR TRANSCRIPT. ROA. CHECKLIST		CLK	
			ON APPEAL. POS.		CLK	
35	08/25/20		REPORTER/RECORDER CERTIFICATE		CLK	RP
			OF ORDERING-TRANSCRIPT ON		CLK	
			APPEAL-COMPLETE TRANSCRIPT		CLK	
			OF 6/15/20. (DUE 11/18/20)		CLK	
40	11/18/20		NOTICE OF FILING OF TRANSCRIPT		CLK	RP
			& AFFIDAVIT OF MAILING OF		CLK	
			DEF'S MOTION FOR SUMMARY		CLK	
			DISPOSITION & PRE-TRIAL HRG		CLK	
			6/15/20 (PGS 26)		CLK	
41	02/23/21		COURT OF APPEALS REQUEST		CLK	KT
			FILE SENT VIA UPS GROUND		CLK	
			#1Z 424 520 03 1013 020 8		CLK	
42	12/02/21		OPINION & ORDER		CLK	RP

			PER CURIAM-PUBLISHED-FROM THE	CLK
			COURT OF APPEALS REVERSING &	CLK
			REMANDING THIS CASE BACK	CLK
			TO CIRCUIT COURT. POS.	CLK
43	01/10/22	P 001	APPEARANCE	CLK KT
			ATTORNEY: P-49438 SCHAFER	CLK
			POS	CLK
44		P 001	FROM: EVASHEVSKI,TOM H.,	CLK KT
			TO: SCHAFER,JENNIFER J.,	CLK
45		P 002	RE-ASSIGNED EVASHEV TO SCHAFER	CLK KT
46		P 003	RE-ASSIGNED EVASHEV TO SCHAFER	CLK KT
47		P 004	RE-ASSIGNED EVASHEV TO SCHAFER	CLK KT
.....			END OF SUMMARY	

STATE OF MICHIGAN

IN THE 53RD JUDICIAL CIRCUIT COURT FOR COUNTY OF CHEBOYGAN

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

Plaintiffs,

-vs-

File No. 20-8790-ND

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendant.

TOM H. EVASHEVSKI (P31207)
Evashevski Law Office
Attorney for Plaintiffs
838 North State Street, P.O. Box 373
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(906)643-7740

WILLIAM L. HENN (P61132)
BENJAMIN M. DOST (P76555)
Henn Lesperance PLC
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bmd@hennlesperance.com

PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COME Plaintiffs, by counsel, and plead as follows:

1. Plaintiff, Sunrise Resort Association, Inc., is a Michigan non-profit corporation, comprised of shareholders, Richard and Moira Keefer, husband and wife, and William and Cathy Perry, husband and wife, conducting business in Cheboygan County, Michigan and owning real estate described as:

WESTERLY (Road) PARCEL: The West 152.00 feet of the South 145.00 feet of the North 520.00 feet of that part of Government Lot 1, of Section 17, Town 36 North, Range 3 West, that lies East of the existing County Road and West of Burt Lake. Burt Township, Cheboygan County, Michigan.

REMAINING (Lake) PARCEL: The South 145.00 feet of the North 520.00 feet; EXCEPT: The West 152.00 feet thereof of that part of Government Lot 1, Section 17, Town 36 North, Range 3 West, that lies East of existing County Road and West of Burt Lake. Burt Township, Cheboygan County, Michigan.

2. Plaintiffs, Gregory L. Somers and Melissa L. Somers, are husband and wife, owning real estate in Cheboygan County, Michigan, described as follows:

The South 140 feet of the North 660 feet of that part of Government Lot 1, Section 17, Town 36 North, Range 3 West, that lies East of the County Road. Burt Township, Cheboygan County, Michigan.

3. Plaintiff, Karl Berakovich, owns real property in Cheboygan County, Michigan described as follows:

BBG 660PT S of Int of the N line of Govt Lot 1 and Burt Lake; TM S 100 ft TH to County RD TH N 100 FT TH E to POB. SI 17 T 36N R 3W.
More Specifically 3934 West Burt Lake Road, Cheboygan, Michigan.

4. The Plaintiffs' parcels of real estate described previously herein adjoin each other, and each is accessed by way of a private driveway commencing at West Burt Lake Road and proceeding to each of the Plaintiff's respective parcels and structures.

5. Defendant is a duly organized governmental entity that operates a public storm water drainage system in Cheboygan County and has jurisdiction and control of said public system.

6. The drainage system diverts and directs the natural drainage routes from a large area north and West of Plaintiffs' properties by way of roadside ditches and various culverts, all of which lead directly to a drainage that flows through the Plaintiffs' properties, on the way to Burt Lake.

7. A very large part of the Defendant's drainage system enters the Plaintiffs' properties by way of a 24 inch culvert located underneath West Burt Lake Road that was installed in approximately 1958 by the Defendant.

8. Upon information and belief, in 1958, the Plaintiffs' properties were already improved with cottages and were accessed by driveways owned by the Plaintiffs' predecessors-in-title, said driveways having two or more 15 inch culverts underneath the driveways to allow drainage under the driveways.

9. In approximately 2013 a bicycle trail was constructed on the west side of West Burt Lake Road resulting in various modifications to the existing drainage system that drains through the aforementioned 24 inch culvert under West Burt Lake Road and onto Plaintiffs' properties.

10. In 2014 the bicycle path was washed out at, among other places, a location south of the 24 inch culvert under West Burt Lake Road that drains onto Plaintiffs' 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 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.

13. On or about May 4th, 2018 the Plaintiffs' respective parcels of real estate sustained significant damage by way of erosion caused by an overflow and backup of Defendant's storm water drainage system, said damage partially destroying three private driveways, vegetation, electrical equipment and cottages.

14. Between 1958 and 2015, the county drainage system running through Plaintiffs' properties operated without incident and without damage to Plaintiffs', or their predecessors in title, properties.

COUNT I. CLAIM PURSUANT TO MCL 691.1417(3)

15. Plaintiffs hereby incorporate paragraphs 1 through 14 inclusive.

16. The overflow and backup referenced previously in this complaint was an "event" as defined by MCL 691.1416(k).

17. The defects in Defendant's sewage disposal system included but were not limited to directing an unreasonable amount of storm water onto Plaintiffs' properties by making alterations to the drainage system that caused more water to be directed through the Plaintiffs' properties than had occurred for decades prior to the event.

18. Plaintiffs warned Defendant of this defect prior to the event and Defendant knew, or in the exercise of reasonable diligence, should have known, about the defect and the danger it posed to Plaintiffs' properties.

19. Defendant failed to take reasonable steps to repair the defect after being duly advised and warned by Plaintiffs.

20. The defect was the proximate 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.

21. Plaintiffs provided timely notice of the event in compliance with MCL 691.1419 by way of correspondence directed to Defendant by Plaintiffs' counsel dated June 15th, 2018.

22. The economic damage sustained by Plaintiffs that was caused by the event is in excess of $25,000.00.

COUNT II. GROSS NEGLIGENCE

23. Plaintiffs hereby incorporate paragraphs 1 through 22 inclusive.

24. Defendant's changes to the drainage system exhibited a reckless and substantial lack of concern amounting to "gross negligence" as defined in MCL 1407(2)(c).

25. The economic damages sustained by Plaintiffs as a result of this gross negligence is in excess of $25,000.00.

COUNT III. INJUNCTIVE RELIEF TO ABATE TRESPASS/NUISANCE

26. Plaintiffs hereby incorporate paragraphs 1 through 25 inclusive.

27. The Defendant's modifications to the drainage system, which substantially increased the amount of water directed onto and through Plaintiffs' properties, is an ongoing trespass and private nuisance creating a continuous danger of property damage and personal injury to the Plaintiffs.

28. Said ongoing trespass/private nuisance cannot be remedied by money damages alone and can 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.

PRAYER FOR RELIEF

NOW THEREFORE, Plaintiffs respectfully request that this Court enter a judgment against Defendant and in favor of Plaintiffs awarding money damages to the Plaintiffs as well as injunctive relief for the continuing trespass/private nuisance, including costs and attorney fees.

Dated: April 22, 2020

Tom H. Evashevski (P31207)
EVASHEVSKI LAW OFFICE
Attorney for Plaintiffs
838 N. State Street
St. Ignace, MI 49781
(906)643-7740

STATE OF MICHIGAN

IN THE 53RD JUDICIAL CIRCUIT COURT FOR COUNTY OF CHEBOYGAN

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

Plaintiffs,

-vs- **File No. 20-8790-ND**

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendant.

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bmd@hennlesperance.com

PROOF OF SERVICE

On the date below I personally served a copy of Plaintiffs' First Amended Complaint on:

Renee Pelon
Cheboygan County Clerk
Cheboygan County Building
870 S. Main Street
Cheboygan, MI 49721

William L. Henn
Attorney at Law
32 Market Ave., SW, Suite 400
Grand Rapids, MI 49503

I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: April 22, 2020

Dawn M. Saffian

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF CHEBOYGAN

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

Plaintiff,

v

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendants.

Case No.: 20-8790-ND

HON. AARON GAUTHIER

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BRIEF IN SUPPORT OF DEFENDANT CHEBOYGAN COUNTY ROAD COMMISSION'SECOND MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Plaintiffs assert that they may recover from the Cheboygan County Road Commission (the "Road Commission") for erosion of their property allegedly caused by modifications made in 2015 to a storm water drainage system.

Plaintiffs' case must be dismissed for several reasons. First, Plaintiffs have alleged in Count I of their Amended Complaint that the flooding and erosion on their properties constitutes a sewage disposal system event claim. However, the statute of limitations for such a sewage disposal system event exception claim is three years from the alleged negligent act and first

corresponding damage. Here, Plaintiffs have based their claim on the Road Commission's modification to a drainage system in 2015 and flooding that also occurred in 2015. Plaintiffs had to file a sewage disposal system event exception claim within three years, sometime in 2018, at the latest, in order for such a claim to be timely. Because Plaintiffs did not file this case until 2020, it is untimely and must be dismissed as a matter of law.

Count II of Plaintiffs' Complaint is barred by governmental immunity. A governmental entity, like the Road Commission, is immune from tort liability unless a claim meets one of the six narrowly construed exceptions to governmental immunity. Simply put, there is no statutory exception for gross negligence against a governmental agency. The reference of "gross negligence" in the GTLA only applies to an officer, employee, member, or volunteer, not an agency like the Road Commission. Therefore, Count II of Plaintiffs' Complaint must be dismissed as a matter of law.

Count III of Plaintiffs' Complaint seeks injunctive relief and to have the Road Commission restore the drainage system that existed before a bicycle path was constructed. Count III 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." Count III must also be dismissed because a Court cannot enjoin the discretionary acts of a governmental agency unless it has abused its discretion by acting without authority or with a constitutionally impermissible motive. Here, Plaintiffs have not alleged that the Road Commission abused its discretion in those ways. In addition, case law is clear that a Court cannot order a governmental agency to perform a discretionary act (like maintaining a road or culvert) in a specific way. The Road Commission has discretion in how it maintains culverts under its jurisdiction under MCL 224.19, and that exercise of discretion is not subject to judicial review. Finally, Plaintiffs' request

is the functional equivalent of a writ of mandamus, which would be inappropriate in this case because the Road Commission has discretion in how to maintain roads and culverts. Therefore, Plaintiffs are not entitled to the injunctive relief they seek as a matter of law.

FACTUAL BACKGROUND

For the purposes of this motion only, which is based on the pleadings, the material facts are not in dispute.[1] Plaintiffs own real property in Cheboygan County. (Plaintiffs' Amended Complaint, ¶¶ 1-3). 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. (Amd. Complaint, ¶ 6).

In approximately 2013, a bicycle trail was constructed on the west side of West Burt Lake Road resulting in various modifications to the existing drainage system. (Amd. Complaint, ¶ 9). In 2014, the bicycle path washed out, including at the 24-inch culvert under West Burt Lake Road that drains onto Plaintiffs' properties. (Amd. Complaint, ¶ 10). Plaintiffs then allege that the Road Commission made modifications to the drainage system, and additional flooding occurred in 2015:

> 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.]

On or about May 4, 2018, Plaintiffs allege that their parcels sustained damage from erosion from water, which damaged three private driveways, vegetation, and other things. (Amd.

[1] In reciting the facts pleaded in the Complaint, the Road Commission does not concede their accuracy. Rather, the Road Commission accepts those facts as true for this motion only, as it must under the applicable standard of review for an MCR 2.116(C) (7) and (8) motion based on the pleadings alone.

Complaint, ¶ 13).

Plaintiffs then filed a Complaint on or about February 20, 2020, and after the Road Commission filed a Motion for Summary Disposition, Plaintiffs filed an Amended Complaint alleging three counts: (1) sewage disposal system event exception, (2) gross negligence, and (3) injunctive relief to abate trespass nuisance.

STANDARD OF DECISION

When considering a motion brought under MCR 2.116(C)(7), "all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party, unless contradicted by any affidavits, depositions, admissions, or other documentary evidence submitted by the parties." *Pierce v Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005). However, such materials should only be considered to the extent that they would be admissible as evidence. MCR 2.116(G)(6). "If no material facts are in dispute, or if reasonable minds could not differ regarding the legal effects of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Pierce*, 265 Mich App at 177.

LEGAL ARGUMENT

I. PLAINTIFFS' SEWAGE DISPOSAL SYSTEM EVENT EXCEPTION CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS AND GOVERNMENTAL IMMUNITY

A. Courts construe the immunity conferred upon governmental agencies broadly but construe the statutory exceptions to that immunity narrowly.

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.* Section 7 of the GTLA confers government agencies with sweeping immunity from tort liability when engaged in a governmental

function. MCL 691.1407(1); *Stanton v Battle Creek,* 466 Mich 611, 615; 647 NW2d 508 (2002). Specifically, MCL 691.1407(1) provides in pertinent part:

> Except as otherwise provided in this act, ***a governmental agency is immune from tort liability*** if the governmental agency is engaged in the exercise or discharge of a governmental function. (Emphasis added).

The immunity under §7 is as broad as possible—extending to all governmental agencies for all tort liability. *Nawrocki v Macomb Co Rd Comm,* 463 Mich 143, 156; 615 NW2d 702 (2000) (consolidated with *Evens v Shiawassee Co Rd Comm'rs*). The Legislature granted government agencies such broad immunity "to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by government immunity." *Mack v Detroit*, 467 Mich 186, 203 n18; 649 NW2d 47 (2002).

In furthering the Legislature's purpose of preventing a drain on the state's financial resources, 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.

The only exceptions to the broad grant of immunity are set forth in the GTLA itself. *Mack,* 467 Mich at 157 ("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"). [2]

B. Plaintiffs' sewage disposal system event exception claim is barred by the 3-year statute of limitations.

Count I of Plaintiffs' Complaint, which is a sewage disposal system event exception claim,

[2] 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 fn 34; 860 NW2d 67 (2014).

must be dismissed because it is barred by the 3-year statute of limitations.

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." MCL 600.5805(2) provides the statute of limitations for actions for injury to property, and provides "[e]xcept as otherwise provided in this section, the period of limitations is **3 years** after the time of the death or injury for all actions to recover damages for the death of a person or for injury to a person or property." (Emphasis added).

MCL 600.5827, often referred to as the "accrual statute" provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

In *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264, 273; 769 NW2d 234 (2009), the plaintiffs asserted claims of nuisance and trespass against several neighbors in connection with flooding on their property. Specifically, one of the plaintiffs testified that the last act of any of the three neighboring defendants at issue occurred in 1998. *Id.* at 291. The plaintiffs alleged that they next experienced flooding in June 2001. *Id.* Therefore, the Court reasoned that the claim accrued in June 2001. *Id.*

The defendant neighbors moved for summary disposition, arguing that the three-year period of limitations barred the plaintiffs' trespass and nuisance claims. *Id.* at 274-275. 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.'" On that basis, 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 court properly granted the neighbors summary disposition on the ground that the Froling Trust's claim was untimely. [*Id*. at 291-292.]

Significantly, the Court held that subsequent flooding did not restart the running of the statute of limitations:

> the subsequent flooding in May 2004 could only have been the continued result of the neighbors' completed conduct. 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.]

In this case, 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, meaning the claim accrued at that time under MCL 600.5805 and MCL 600.5827. Plaintiffs had three years from the date of the damage in 2015 to file a sewage disposal system event exception claim, meaning the claim had to be filed in 2018 at the absolute latest. *Marilyn Froling Revocable Living Tr*, 283 Mich App at 291-292. Plaintiffs, however, did not file the instant case until on or about February 20, 2020, over a full year after the statute of limitations expired.

Plaintiffs' allegation of subsequent flooding does not operate to extend the statute of limitations or otherwise save Plaintiffs' claim. In *Marilyn Froling Revocable Living Trust*, the Court concluded "that *Garg* [*v Macomb Co Comm Mental Health Services*, 472 Mich 263; NW2d 646 (2005), amended 473 Mich 1205; 699 NW2d 697 (2005)] and its progeny completely and retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of this state, including in nuisance and trespass cases." *Marilyn Froling Revocable Living Tr*, 283 Mich App at 288. Therefore, the continuing wrongs doctrine has been abrogated, and Plaintiffs'

allegations of subsequent flooding do nothing to alter the statute of limitations analysis, just as the allegations of subsequent flooding in *Marilyn Froling* did nothing to extend the statute of limitations. Accordingly, Plaintiffs' sewage disposal system event exception claim is time barred by the statute of limitations and must be dismissed as a matter of law.

C. Plaintiffs' sewage disposal system event exception claim must be dismissed for Plaintiffs' failure to serve timely notice.

Even if Plaintiffs' sewage disposal system event exception claim had been timely filed, it would still have to be dismissed as a matter of law because Plaintiffs failed to provide timely notice of their claim, as required by MCL 691.1419.

"A governmental agency is 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 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 legal theory." MCL 691.1417(2); *Willett v Charter Tp of Waterford*, 271 Mich App 38, 49-50; 718 NW2d 386 (2006).

MCL 691.1417(3) provides:

> (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.
>
> (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 addition, a claimant must also comply with MCL 691.1419, which provides in pertinent part:

> (1) Except as provided in subsections (3) and (7), ***a claimant is not entitled to compensation under section 17 unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered***. The written notice under this subsection ***shall contain the content required by subsection (2)(c)*** and shall be sent to the individual within the governmental agency designated in subsection (2)(b). To facilitate compliance with this section, a governmental agency owning or operating a sewage disposal system shall make available public information about the provision of notice under this section.
>
> (2) If a person who owns or occupies affected property notifies a contacting agency orally or in writing of an event before providing a notice of a claim that complies with subsection (1), the contacting agency shall provide the person with all of the following information in writing:
>
> > (a) A sufficiently detailed explanation of the notice requirements of subsection (1) to allow a claimant to comply with the requirements.
> >
> > (b) The name and address of the individual within the governmental agency to whom a claimant must send written notice under subsection (1).
> >
> > (c) The required content of the written notice under subsection (1), which is limited to the ***claimant's name, address, and telephone number, the address of the affected property, the date of discovery of any property damages or physical injuries, and a brief description of the claim***.

Here, Plaintiff failed to provide proper notice within 45 days after the alleged physical damage.[3] Plaintiffs' pleadings make clear that Plaintiffs failed to comply with MCL 691.1419. Specifically, Plaintiffs allege that they sustained minor damage in 2015. (Amd. Complaint, ¶ 12). Plaintiffs' Amended Complaint further alleges:

> 20. The defect was the proximate 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.

[3] Plaintiffs cannot satisfy several other elements of a sewage disposal system event exception claim, which will be addressed in a future motion for summary disposition, if necessary.

> 21. Plaintiffs provided timely notice of the event in compliance with MCL 691.1419 by way of correspondence directed to Defendant by Plaintiffs' counsel dated ***June 15th, 2018***.

(Amd. Complaint, ¶¶ 20-21) (emphases added).

Put more simply, Plaintiffs allege that the flow of water increased in 2015 and that damage occurred in 2015. However, Plaintiffs allege that they did not provide notice until 2018, well beyond the 45-day window required by MCL 691.1419. Simply by looking at the pleadings, Plaintiffs cannot demonstrate that they complied with the required notice provision. Accordingly, Plaintiffs' sewage disposal system event exception claim must be dismissed for failure to provide timely notice under MCL 691.1419(1) as a matter of law.

II. PLAINTIFFS' GROSS NEGLIGENCE CLAIM MUST BE DISMISSED BECAUSE THERE IS NO GROSS NEGLIGENCE EXCEPTION FOR A GOVERNMENTAL AGENCY

Count II of Plaintiffs' Complaint against the Road Commission must be dismissed because Plaintiffs have failed to plead in avoidance of governmental immunity as there is no gross negligence exception to governmental immunity for a governmental agency.

"[B]y its terms, the GTLA provides that unless one of the five statutory exceptions applies, a governmental agency *is* protected by immunity. The presumption is, therefore, that a governmental agency *is* immune and can only be subject to suit if a plaintiff's case falls within a statutory exception. As such, it is the responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions." *Mack v City of Detroit*, 467 Mich 186, 201; 649 NW2d 47 (2002) (emphasis in original).[4]

"[W]hen a party files suit against a governmental agency, it is the burden of that party to plead his or her claim in avoidance of governmental immunity." *Hannay v Department of Transp*,

[4] At the time *Mack* was decided, there were five statutory exceptions to governmental immunity.

497 Mich 45, 58; 860 NW2d 67 (2014). "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Mack*, 467 Mich at 204.

Plaintiffs have failed to plead in avoidance of governmental immunity because the language in the GTLA addressing gross negligence applies only to individuals, not agencies. Accordingly, Plaintiffs have not pleaded one of the six statutory exceptions to governmental immunity.

MCL 691.1407(1) provides in pertinent part, "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1) is a sweeping abolition of common law liability as to governmental agencies, and liability may only attach if a claim satisfies one of the statutory exceptions to immunity articulated within the GTLA.

Plaintiffs' count of gross negligence against the Road Commission must be dismissed. While "gross negligence" is mentioned in the GTLA, it applies only to *individuals*, not agencies like the Road Commission. MCL 691.1407(2) provides:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, ***each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability*** for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> > (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
> >
> > (b) The governmental agency is engaged in the exercise or discharge of a governmental function.

> (c) ***The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage***. [Emphases added.]

In other words, only an *individual*, and not a governmental agency like the Road Commission, can be liable for gross negligence under the clear, unambiguous language of MCL 691.1407. This analysis was confirmed in *Gracey v Wayne County Clerk*:

> Plaintiffs also assert that the Wayne County Board of Canvassers can be found grossly negligent. We disagree. ***The gross-negligence exception to governmental immunity states that it applies to officers, employees, members, or volunteers of governmental agencies***. M.C.L. § 691.1407(2); M.S.A. § 3.996(107)(2). The cardinal rule of statutory construction is to ascertain and give effect to the intention of the Legislature. ***The exception does not state that it applies to the governmental agencies themselves***. Express mention in a statute of one thing implies the exclusion of other similar things. Elsewhere, this Court held that an exception to governmental immunity applied to governmental agencies where the statute, the since-repealed version of the Emergency Medical Services Act, applied to "persons." Here, had the Legislature intended to include governmental agencies in the gross negligence exception to governmental immunity, it easily could have used the appropriate, general language. [Citations omitted; emphases added.]

Gracey v Wayne Cty Clerk, 213 Mich App 412, 420; 540 NW2d 710 (1995), overruled on other grounds in *Am Transmissions, Inc v Attorney Gen*, 454 Mich 135; 560 NW2d 50 (1997).

Gracey is clear that the GTLA does not waive governmental immunity for allegations of gross negligence against a governmental entity like the Road Commission. As a result, there is no gross negligence exception to governmental immunity, and Plaintiffs' gross negligence claim against the Road Commission must be dismissed as a matter of law.

III. THE JUDICIARY CANNOT ENJOIN THE DISCRETIONARY ACTS OF A GOVERNMENTAL AGENCY UNLESS THE AGENCY ABUSES ITS DISCRETION

Count III of Plaintiffs' Complaint must be dismissed as well. Plaintiffs allege that there is more water directed onto their properties, which amounts to a "trespass and private nuisance." (Plaintiffs' Complaint, ¶27). Plaintiffs' Complaint further alleges that the "trespass/private nuisance cannot be remedied by money damages alone and can 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." (Plaintiffs' Complaint, ¶28). For several reasons, this Count must be dismissed as well.

A. Plaintiffs' request for injunctive relief is barred by MCL 691.1417.

First, Count III is barred by MCL 691.1417(2), which provides:

> (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 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.]

As MCL 691.1417(2) provides "the sole remedy for obtaining any form of relief … regardless of the legal theory," Plaintiff's claim for injunctive relief is barred by the plain, unambiguous language of the GTLA.

B. The judiciary cannot enjoin the discretionary actions of any governmental department unless the department is acting beyond its legal authority.

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*, the 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 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.*

In this case, the Road Commission had authority to install and maintain the roads and culvert near Plaintiffs' properties. Specifically, MCL 221.19(1) 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.

Therefore, the Road Commission did not abuse its discretion because it had statutory authority to act. Nor is there any allegation in the case that the Road Commission's action was based on a constitutionally impermissible motive. Therefore, as a matter of law, the Road Commission cannot be enjoined.

C. Where a statute permits a governmental agency to undertake a discretionary decision, that decision is not subject to judicial review.

The judiciary's limited authority to review discretionary acts of a separate branch of government is further explored in *Warda v City Council*, 472 Mich 326; 696 NW2d 671 (2005). In *Warda*, a police officer was charged with the felony of false certification stemming from two false reports related to salvage vehicle inspections. *Id.* at 329. After the police officer was acquitted of the felony at trial, he requested payment of attorney fees incurred in defending the criminal charges from the city council. *Id.* The police officer relied on MCL 691.1408(2), which provides that a governmental agency "may" pay for the services of an attorney when a criminal action is commenced against an employee of a governmental agency.[5] *Id.* The city council denied

[5] MCL 691.1408(2) provides:
When a criminal action is commenced against an officer or employee of a governmental agency based upon the conduct of the officer or employee in the course of employment, if the employee or officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct, the

the police officer's request for reimbursement of attorney fees under MCL 691.1408, and the police officer sued. *Id.*

After determining that the city council was a governmental agency within the meaning of MCL 691.1408, the Court held that the "use of the word 'may' in § 8 makes clear that the decision to pay an officer's attorney fees is a matter left to the discretion of the municipality." *Id.* at 332.

The issue before the Court, therefore, was "the nature of [the] Court's power to review a purely discretionary action taken by a governmental agency." *Id.* Ultimately, the Court held that 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." *Id.* at 336-337. In the context of attorney fees in *Warda*, the Court noted that the council's decision to deny attorney fees would have been subject to judicial review if it had been based on an unconstitutional reason, like race or religion. *Id.* at 335. The Court also noted that in enacting MCL 691.1408, part of the GTLA which precludes governmental liability, "the Legislature demonstrated an appreciation of this limitation on judicial power." *Id.* at 335. In sum, the Court held that it was not empowered to review the council's discretionary decision. *Id.* at 340-341.

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, just as MCL 691.1408 provided the city council discretion in *Warda*. As a result, the decisions made by the Road Commission are

governmental agency may pay for, engage, or furnish the services of an attorney to advise the officer or employee as to the action, and to appear for and represent the officer or employee in the action. An officer or employee who has incurred legal expenses after December 31, 1975 for conduct prescribed in this subsection may obtain reimbursement for those expenses under this subsection.

"not subject to judicial review absent an allegation that the exercise of that discretion was unconstitutional." *Id*. at 337. Again, there is no allegation in this case that the decisions concerning the bicycle path or culverts were based on an unconstitutional reason. Therefore, the discretionary authority of the Road Commission is not subject to judicial review because "[a]bsent a showing that the governmental agency exercised its discretion in an unconstitutional manner, the courts are without the power to review such decisions." *Id*. at 340.

D. A Court may not order a governmental agency to perform a discretionary act in a specific way.

Even if the Court determined that it could enjoin the Road Commission's decision, despite there being no abuse of discretion, the Court could not order the Road Commission to perform its discretionary act in a specific way. Again, in Count III, Plaintiffs allege that the alleged trespass-nuisance "can 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).

Should Plaintiffs obtain that relief, the Court would be compelling the Road Commission to maintain a specific drainage system. 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 therefore are beyond the reach of injunctive relief. In addition, the Court would be requiring the Road Commission to maintain a drainage system that was not designed to accommodate water runoff from the bicycle path.

Simply put, the Road Commission cannot be compelled to maintain the culvert in a specific way. For example, in *Township of Canton v Wayne Co Rd Comm*, 141 Mich App 322, 325; 367 NW2d 385 (1985), the Wayne County Road Commission notified township authorities that it would discontinue its dust palliative program which minimized dust levels on local gravel roads.

The plaintiffs, made up of several townships, sought a writ of mandamus and requested that the court compel the road commission to properly maintain the roads by continuing that dust program. *Id*. at 326. The Court noted that the "road commission has a broad, general duty to keep all county roads in reasonable repair so that they shall be reasonably safe and convenient for public travel" under MCL 224.21. *Id*. at 328. The Court then held that "the methods employed by the road commission in maintaining the roads are left to their discretion." *Id*. The Court went on to examine MCL 224.19, which provides that the "board of county road commissioners ***may*** grade, drain, construct, gravel, shale, or macadamize a road under its control…." *Id*. at 328-329 (emphasis added). Addressing the use of the permissive "may" in MCL 224.19, the Court held:

> 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.]

Importantly, the *Canton* Court went on to say "[b]ecause the methods used to maintain gravel roads and reduce their dust levels are within the discretion of the road commission, the issuance of a writ of mandamus ordering the *specific* dust program was improper." *Id*. at 330 (emphasis in original).

In other words, *Canton* stands for the proposition that a Court cannot order that a road commission perform a discretionary duty in a specific manner. Rather, county road commissions have discretion in how those duties are discharged, and Courts cannot interfere with that discretion to compel a Road Commission to exercise it in a particular way. The *Canton* Court specifically relied on the use of "may" in MCL 224.19. 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).

Similarly, in the instant case, the Road Commission cannot be compelled to execute its discretionary duty regarding the drainage path under its jurisdiction in a specific manner.[6] How a Road Commission maintains its road, culverts, and bridges is left to the discretion of the Road Commission, as evidenced by the use of "may," in MCL 224.19, the same statute examined in *Canton*. However, by granting the injunctive relief sought here and requiring that the Road Commission "restore the drainage that existed prior to the changes the Defendant made as part of its bike path installation in 2013 and 2015," the Court would be ordering that the Road Commission execute its discretionary duty in a specific manner. (Complaint, ¶ 28). Such an order would be similar to the relief sought in *Canton* – the continuance of a specific dust program – because it would interfere with the Road Commission's discretion as it relates to roads and culverts. Plaintiffs' request is also nonsensical because it was developed prior to the installation of the bicycle path. Because this type of discretionary decision is left to the Road Commission, the Court cannot interfere, and Plaintiffs are not entitled to injunctive relief.

E. Plaintiffs' claim for an injunction is the functional equivalent as a claim for a writ of mandamus.

Plaintiffs in this case are asking the Court to order the Road Commission to restore the prior drainage system. This type of relief, even if labeled as injunctive relief, is actually a writ of mandamus.

Plaintiffs' request for injunctive relief is similar to the relief sought in *Warda*. Specifically,

[6] Though not relevant to the instant motion, much of the drainage path is on private property outside the Road Commission's jurisdiction.

the *Warda* Court noted that while the plaintiff "did not label his complaint as one for mandamus, he was in essence seeking a writ of mandamus from the circuit court to compel the city council to pay his attorney fees." *Id*. at 337 fn 7. The plaintiff had not shown that he had a clear legal right to reimbursement, nor that the city council had a clear legal duty to reimburse him, both of which are required showings for the issuance of a writ of mandamus. *Id*.

Plaintiffs in the instant case are essentially seeking a writ of mandamus – though not specifically pleaded as such – just like the plaintiff in *Warda*. While the plaintiff in *Warda* was seeking reimbursement under a statute that gave discretion to the city council, Plaintiffs in the instant case are essentially seeking an Order from this Court compelling the Road Commission to restore the prior drainage system.

However, a writ of mandamus is an extraordinary remedy and would not be appropriate to compel this type of specific relief. "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).

A writ of mandamus would be 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). Again, case law and the statute imposing the duty to maintain culverts on the Road Commission gives the Road Commission discretion. This discretion makes a writ of mandamus inappropriate. *Canton*, 141 Mich App at 330.

Accordingly, because a Court may not order a governmental agency to perform a discretionary task in a specific way, and Court may not review a discretionary decision of an agency absent a question of constitutionality, Plaintiffs are not entitled to an injunction as a matter of law and Count III must be dismissed.

REQUEST FOR RELIEF

For the foregoing reasons and authorities, Plaintiffs' Complaint must be dismissed with prejudice under MCR 2.116(C)(7) as a matter of law.

Dated: May 12, 2020

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STATE OF MICHIGAN

IN THE 53RD JUDICIAL CIRCUIT COURT FOR COUNTY OF CHEBOYGAN

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

Plaintiffs,

-vs- **File No. 20-8790-ND**

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendant.

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PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S SECOND MOTION FOR SUMMARY DISPOSITION

Introduction

Plaintiffs filed a three Count complaint arising from the incident that occurred in 2018 when a road commission drainage system overflowed and backed up resulting in significant damage to Plaintiffs' real property located on Burt Lake in Cheboygan County.

Count I of the original Complaint was entitled "Negligence" but clearly set forth allegations of a claim specifically authorized by statute (MCL 691.1417(3)). Count II alleged gross negligence. Count III requested injunctive relief to abate trespass/nuisance.

Concurrent with its answer and affirmative defenses, the Defendant Road Commission filed a Motion for Summary Disposition essentially arguing that Count I should be dismissed because it was entitled "Negligence", therefore being subject to governmental immunity. Count II, Defendant submitted, should be dismissed because gross negligence needs to be asserted against an individual, not an entity. Count III, Defendant argued, should be dismissed because the judiciary cannot interfere with the discretion of a governmental agency.

Plaintiffs then amended its complaint for the sole purpose of re-titling Count I from "Negligence" to "Claim Pursuant to MCL 691.1417(3)". Plaintiffs did not believe that was necessary but it would avoid a needless argument. Thereafter, the Defendant withdrew its Motion for Summary Disposition and filed a new Motion for Summary Disposition.

The new Motion for Summary Disposition challenges Count I on the basis that the statutory claim is time barred. The new motion also seeks dismissal of Counts I and III for the reasons asserted in the first motion, as well as a new argument that claims for injunctive relief are barred by MCL 691.1417(2).

Plaintiffs do not disagree with Defendant with regard to Count II and it will be voluntarily dismissed without prejudice. This brief will address Defendant's Motion for Summary Disposition with regard to Plaintiffs' Count I and Count III.

Count I.

A. Plaintiffs' statutory claims for sewer disposal system events are not time barred.

Defendant correctly asserts the law as to when the statute of limitations begins to run. MCL 600.5805(1) states:

> *"A person shall not bring or maintain an action to acquire damages for injuries to persons or property unless, after the claim has first accrued, to the Plaintiff or to someone through whom the Plaintiff claims, the action is commenced within the period of times described by this section".* (Emphasis added)

When the case involves damage to property, the period of limitations is three years. MCL 600.5805(10).

"(10) The period of limitations is three years after the time of the death or injury for all other actions to recover damages for a death of a person or for injury to a person or property."

The Defendant then relies heavily on the case of *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264 (2009). The facts in *Froling* involved a single wrongful act (filling a low area in a way that prevented the neighbor's property from naturally draining onto the filled low area, thereby preventing the natural drainage from a neighbor's property onto the filled low area). The wrongful filling of the low area was followed by several distinct floodings of the neighbor's property, each of which was caused by the same wrongful act of the Defendant.

The *Froling* opinion essentially held that the statute of limitations began to run at the first point in time when all elements of a claim were present. Notably, the court refused to use the continuing wrongs doctrine and held;

"...In other words, after the last of the neighbors allegedly acted negligently in 1998, the harm first occurred, or accrued, in June 2001. Accordingly, the subsequent flooding in May, 2004, could only have been the continued result of the neighbor's completed conduct. Subsequent claims of additional harm caused by one act do not start the claim previously accrued. For purposes of accrual, there need only be one wrong and one injury to begin the running of the statute of limitations. In sum, the accrual of the claim occurs when both the act and the injury first occur, that is when the 'wrong is done'."
Froling, supra (page 291).

The Defendant apparently believes the Froling holding applies to the case at hand. It does not. MCL 691.1416-1419 provides a specific cause of action as an exception to the general governmental immunity doctrine.

(1) To afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages or physical injuries caused by a sewage disposal system event, a claimant and a governmental agency subject to a claim shall comply with this section and the procedures in sections 18 and 19.
(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 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(1) and (2).

An "event" is defined at MCL 691.1416(k) as a specific occurrence, or happening, in the form of "*….the overflow or backup of a sewage disposal system onto real property.*"

MCL 691.1417(3) then provides what specific elements must be proven to bring a statutory claim as an exception to governmental immunity.

> *(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****.* (Emphasis added)
> *(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.*
> *(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.*
> *(4) In addition to the requirements of subsection (3), to obtain compensation for property damage or physical injury from a governmental agency, a claimant must show both of the following:*
> *(a) If any of the damaged property is personal property, reasonable proof of ownership and the value of the damaged personal property. Reasonable proof may include testimony or records documenting the ownership, purchase price, or value of the property, or photographic or similar evidence showing the value of the property.*
> *(b) The claimant complied with section 19.*

To summarize, a claim accrues upon the happening of "an event", provided all other elements exist "at the time of the event". Each event gives rise to a potential claim, and each claim is limited to the damage caused by that event. Defendant appears to argue that there can be no more than one event in any given sewage disposal system. The statute imposes no such limit. Defendant also appears to argue that there can be only one claim related to a given defect. The statute imposes no such limit.

Pursuant to the statute, Plaintiffs claim is that an event occurred in 2018 resulting in damages. Whatever happened in 2015 is not the basis of any claim. The relevance of the 2015 occurrence relates only to the fact that Defendant was warned and, therefore, should have known about a defect.

Plaintiffs' Count I seeks compensation for property damages caused by an event that occurred on May 4th, 2018. That was the first date at which time all elements of the action were present, and that is

when the statute of limitations began to accrue. This claim was filed on February 20th, 2020, well within the limitations period.

B. Defendant's Motion is Premature.

Even if the Defendant's position on the statute of limitations was correct, that position is dependent on a number of factual matters that are not addressed in the pleadings. Specifically, Defendant seems to allege that paragraph 12 of Plaintiffs' complaint, which alleges "minor damage" sustained by Plaintiffs' properties in 2015, was in fact an "event". As mentioned earlier, an event requires an overflow or a backup, neither of which are mentioned in Plaintiffs' complaint. As also mentioned earlier in this brief, if an event had occurred, there are a number of elements necessary under the sewage disposal system statute that must be present at the time of the event. Again, those additional elements are not acknowledged, or even mentioned, in Plaintiffs' complaint.

Therefore, Defendant is asking this court to make factual determinations before discovery has even started and are not contained in any pleadings.

It is fundamental that facts are construed in favor of the non-moving party with regard to motions for summary disposition. *Pierce v City of Lansing*, 265 Mich App 174 (2005).

Count III.

A. Plaintiffs' claim for Injunctive Relief is not barred by MCL 691.1417.

Defendant cites MCL 691.1417(2) for the purpose of arguing that it prohibits Plaintiff's injunctive relief sought by Count III. In so doing, the Defendant relies in the language at the end of the subsection which states that the statutory claim is *"...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"*.

Claims for injunctive relief do not involve damages. This particular injunctive relief claim does not involve physical injuries. Therefore, Count III is clearly not barred.

B. Plaintiffs are not requesting this court to interfere with the Defendant's discretionary authority.

Defendant's current motion appears to make the same arguments regarding Count III as it made in its first motion. Again, the Defendant mischaracterizes Plaintiffs' pleadings. Plaintiffs are not asking the court to reengineer Defendant's entire drainage system. Plaintiffs do not seek the functional equivalent of a writ for mandamus. Instead, Plaintiffs seek injunctive relief to restore the amount and velocity of surface water imposed upon Plaintiffs' land prior to the bike path. In other words, everything Defendant did to alter the amount and velocity of water in 2015 forward should be enjoined.

It is fundamental that public authorities do not have the right to direct the natural course of surface water so as to impose servitude onto adjoining property. As stated in *Peacock v Stinchcomb*, 189 Mich 301 (page 307),

> "While one has a right to drain and dispose of the surface water upon his land, yet he cannot lawfully concentrate such water and pour it through an artificial ditch or drain in unusual quantities and greater velocity, upon the adjacent proprietor."

In the context of diverting water for the purposes of improving a highway, it was stated in *Bennett v County of Eaton*, 340 Mich 330 (1954) (citing *Smith v Township of Eaton*, 138 Mich 511):

"The principal question in controversy is whether, for the purposes of improving a highway, public authorities have a right to divert the natural course of surface water so as to impose upon the land of one person the servitude which naturally belongs upon the land of another. This question is answered in the negative by our own decisions."

There is no doubt that the road commission has the right to install culverts to drain surface water, but that authority is clearly limited.

> "Highway commissions have the right to have the surface water, falling or coming naturally upon the highway, drain through the natural and usual channel upon and over the lower lands…"
> *Tower v Township of Somerset*, 143 Mich 195 (pages 201,202).

However, in *Bennett v County of Eaton*, supra, it was stated:

> "The principle of law enunciated in the *Tower* case cannot be construed to give public authorities the right to divert surface water, that would in the natural state disperse over a large area, and cast such a concentrated form upon the lands of the abutting owner to his damage without compensation to him."

Finally, it was stated in *Sweeney v Hillsdale County Board of Road Commissioners*, 293 Mich 624:

> "Plaintiff is entitled to the use of his premises in the usual and ordinary way and this right to the use of his premises is exclusive, and the highway commissioners have no right to interfere with such reasonable use. The authority vested in the board of county road commissioners never gave them any authority to appropriate the freehold of plaintiff, a private citizen, and, if they have done so, he is entitled to an injunction to protect his premises either by the restoration of the same to the state in which they were prior to the action of the highway authorities or by the highway authorities taking action to procure a right of way for drainage across the premises of Stevens, or otherwise." (Emphasis Added).

Paragraph 17 of Plaintiffs' complaint alleges that the Defendant's directed storm water through the drainage system that caused more water onto Plaintiffs' properties than had been the case for decades before. Paragraph 27 of the Plaintiffs' complaint alleges that Defendant's modifications increased the amount of water directed upon the Plaintiffs' properties causing a trespass and private nuisance.

Conclusion

Plaintiffs will voluntarily dismiss Count II. The Motion for Summary Disposition with regard to Counts I and III should be denied.

Respectfully submitted,

Dated: 5-26-20

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF CHEBOYGAN

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

Plaintiff,

v

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendants.

Case No.: 20-8790-ND

HON. AARON GAUTHIER

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DEFENDANT CHEBOYGAN COUNTY ROAD COMMISSION'S REPLY TO PLAINTIFF'S RESPONSE TO SECOND MOTION FOR SUMMARY DISPOSITION

1. **Plaintiffs' sewage disposal system event exception claim is time barred.**

Plaintiffs first argue that their sewage disposal system event exception claim is not time barred because, according to Plaintiffs, "[e]ach event gives rise to a potential claim," and they have alleged flooding in 2018. (Plaintiffs' Response, p 4).

Under Plaintiffs' theory, some actionable defect that caused flooding in 1990, for example, would be timely if the flooding continued periodically to present day. Perhaps without realizing, Plaintiffs are arguing that the continuing wrongs doctrine—which has been explicitly abrogated—should apply to save their claim in this case. Plaintiffs base their argument on the phrase "at the time of the event" found in MCL 691.1417(3), rather than the actual statutes that govern the accrual

period (MCL 600.5827) and statute of limitations (MCL 600.5805). To be clear, MCL 691.1417(3) does not contain a period of limitations by which a claim must be filed or specify when a claim accrues, and Plaintiffs' assertion that it does is incorrect. Instead, MCL 691.1417(3) merely provides the necessary elements for a sewage disposal system event exception claim.

Again, a claim accrues with an allegedly negligent act and flooding:

> For the purposes of accrual, there need ***only be one wrong and one injury to begin the running of the period of limitations***. In sum, the accrual of the claim occurs when both the act and the injury first occur, that is when the "wrong is done." [Emphasis added.]

Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club, 283 Mich App 264, 291; 769 NW2d 234 (2009).

The statute of limitations does not reset each time Plaintiffs' property floods. Such a holding would require an application of the continuing wrongs doctrine, which has been overturned. Again, *Marilyn Froling* is crystal clear on this point:

> Subsequent claims of additional harm caused by one act do not restart the claim previously accrued. [*Id.*]

Here, Plaintiffs' own Amended Complaint asserts that "the modifications made in 2015 were the cause of the minor damage sustained by Plaintiffs." (Am. Complaint, ¶ 12). Because Plaintiffs allege a defect in the system and flooding/damage in 2015, their claim accrued in 2015. 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, and which then caused flooding and damage. Additional flooding based on the same alleged defect does not restart the statute of limitations. *Marilyn Froling*, 283 Mich App at 291.

Next, granting summary disposition does not require any findings of fact because Plaintiffs' own Amended Complaint asserts that "the modifications made in 2015 were the cause

of the minor damage sustained by Plaintiffs." (Am. Complaint, ¶ 12). All that is required for a claim to accrue is the allegedly negligent act (which Plaintiffs' have alleged occurred in 2015 with the reconstruction of the bicycle path), and alleged damage (which Plaintiffs allege first occurred in 2015). The scale or scope of the damage is of no import to determining when a claim first accrued given Plaintiffs' own allegations.

Plaintiffs also argue that no additional elements are mentioned regarding the 2015 flooding, and, therefore, claim that they have not alleged a sewage disposal system event at that time. By that standard and logic, Plaintiffs have not alleged a claim in 2018, either, because they do not allege that the Road Commission was an "appropriate governmental agency" under MCL 691.1417(3)(a). Plaintiffs cannot have it both ways. If the alleged flooding in 2015 was a result of the Road Commission's drainage modifications, and it was sufficient to give the Road Commission notice of the defect, as alleged by Plaintiff, then it started the running of the statute of limitations.

2. MCL 691.1417 bars Plaintiff's request for injunctive relief.

Next, Plaintiffs argue that MCL 691.1417 does not bar Plaintiffs' request for injunctive relief because they are not seeking damages. Plaintiffs' argument is based on a misreading of MCL 691.1417 and misunderstanding of the word "damages." Specifically, Plaintiffs interpret "damages" as "monetary damages," rather than property damage, which is how it is used. 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. "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. Relief not mentioned in MCL 691.1416-1419 is not available for an alleged sewage disposal system event. Injunctive relief is not available because it is not provided for in MCL 691.1416-1419.

3. <u>An injunction should not enter.</u>

Even if the plain language of MCL 691.1417 did not bar Plaintiffs' request for an injunction, one still should not enter. 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, the 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.

Minarik v State Highway Commissioner, 336 Mich 209, 213; 57 NW2d 501 (1953).

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 rely on in this case. The *Burch* Court 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.

Finally, 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, among other reasons. Moreover, Plaintiffs have not alleged a real and imminent danger of irreparable injury.

Accordingly, Defendant Cheboygan County Road Commission respectfully requests that this Honorable Court grant its Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and dismiss Plaintiffs' claims with prejudice.

Dated: June 9, 2020

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF CHEBOYGAN

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

Plaintiffs,

vs. File No. 20-8790-ND

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendants.
_____/

DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND PRETRIAL HEARING

BEFORE THE HONORABLE AARON J. GAUTHIER, CIRCUIT JUDGE

Cheboygan, Michigan - Monday, June 15, 2020

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Kathy A. Wisniewski, CER-4946
Certified Court Recorder

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Cheboygan, Michigan

Monday - June 15, 2020 - 10:53 a.m.

THE COURT: Good morning. Alright, so we're here in the matter of, ah, Sunrise Resort Association versus Cheboygan County Road Commission, File 20-8790ND. Counsel would you please state your appearance on the record?

MR. HENN: Good morning, your Honor. Bill Henn, on behalf of the Cheboygan County Road Commission.

MR. EVASHEVSKI: Tom Evashevski, on behalf of the plaintiffs.

THE COURT: Alright, and we are, um, conducting this hearing over zoom, ah, it's a Motion for Summary Disposition. I note that we also have a Pretrial scheduled for July 6th, so while we're here, I thought we'd probably just do the pretrial and enter the scheduling order, and, ah, we are in the process of opening the courtroom, but we, ah, don't have anybody here today and we've not, ah, formally opened the courtroom yet, so we're providing public access on the courts you-tube channel. Do, ah, does the plaintiff have any objection to that procedure, Mr. Evashevski?

MR. EVASHEVSKI: No, your Honor.

THE COURT: Mr. Henn?

MR. HENN: No, objection.

THE COURT: Alright, so, ah, why don't we go ahead and, ah, start right in with the motion. Mr. Henn it's your

motion. I have reviewed, ah, your Motion and Brief and Plaintiffs', ah, Response and Brief in, in Opposition to that, I will say, ah, in, in my years of practice, ah, somewhat doing some property law and, and even some cases for the road commission on appeal and dealing with different governmental immunity exceptions, this is my first, ah, sewage disposal system event exception case, and, ah, as I was trying to do some research, ah, I could only find about three or four cases interpreting that exception at all. Ah, so this is, ah, I commend both of you for educating me sufficiently about this, ah, not commonly used exception to the Governmental Court Liability Act, so, ah, with that go ahead, Mr. Henn.

MR. HENN: Thank you, your Honor. I am cognizant of the fact that you've, ah, received the briefs and ---. You didn't mention, however ---, so I wanted to make sure that the court had received that? Ah, we would've filed that late last week. Um, I think the court rule is four days ahead of the hearing, so…

THE COURT: Right. You know, I don't think that I did. Let me see.

MR. HENN: We would have overnighted it on June 9th.

THE COURT: Okay. I see that it is received in the court file, and, ah, a copy did not get into my hands and I have not reviewed it, ah, it's five pages. I can either, I mean I can tell you both, I've, I've read a lot of the briefs, um, enough

to, ah, know somewhat what was going on, but it was probably my intention to take this matter under advisement today. Um, and I'll review that with the --- at that time or if you wish Mr. Henn, ah, we can take a, ah, short break and allow me to read this brief before your argument? Um, I'll leave it up to you?

MR. HENN: I don't believe it's necessary before, your Honor. I just wanted to make sure that something hadn't happened and that you did not receive it for some reason.

THE COURT: No.

MR. HENN: If it's there, then I'm sure that you can review it at your leisure.

THE COURT: Okay, and I will do that. I apologize, Mr. Henn. It is my practice to, ah, try to review all the, all the pleadings before the motion hearing, so my apologizes. Go ahead.

MR. HENN: Well, your Honor, let me just dive into the arguments. We really have three separate sections to our motion. The first deals with the sewage disposal system event exception plan. Ah, and our position is that, that plan is barred by the three year statute of limitations that applies, ah, by virtue of MCL 691.1411, ah, and 600.5805 and really the issue is, ah, the application of the continuing wrongs doctrine or I guess I would say when the plaintiffs' claim in this case accrued. Ah, we're of the, of the position that,

when you look at the pleadings, plaintiffs have alleged that there were some changes to, ah, this, what they're calling a sewage disposal system. We're accepting it as --- for purposes of this motion, but assuming that that's true, they're claiming that some changes were made to it around 2015, after there had been a wash out, ah, on that road in 2014, and that in 2015 they experienced some, ah, some flooding on their property as a result they're alleging of those changes. So our position is that for purposes of the statute of limitations for a sewage disposal system event exception claim you have to figure out well when was that claim first approved? It approves when there is, ah, some sort of bad act that's being complained of combined with, ah, the damages that are incurred by, ah, the plaintiff. In this case on the face of the pleadings themselves that date was in 2015, the three year period therefore would've expired in 2018, ah, this claim was not brought until, um, early 2020.

THE COURT: Now, Mr. Henn, in terms of, in terms of general principles, I mean I think your, ah, your argument there is, um, solid, ah, but Mr. Evashevski, I think is relying on, ah, the statutory language in particular referring to the, to the liability flowing from an event, and does that language, ah, make a change to the general tort doctrines of the continuing wrongs issue?

MR. HENN: I don't believe it does, your Honor, because

when you look at, when you look at the way courts have analyzed how statute of limitations run, ah, there was at one time a --- , continuing wrongs doctrine, ah, that allowed, um, in certain contexts, I believe initially it, this, this --- was whether it was just within the civil rights contexts or not but it allowed, um, statutes of limitations to be extended based on the occurrence of certain injuries. Um, after the *Marilyn, Marilyn Froling Revocable Trust Case* it was clear, ah, as a matter of Michigan Law that continuing wrongs doctrine is abolished in all contexts not just in civil rights cases. And when you look at *Marilyn Froling* that is a very similar case to what you have here. Now granted that was not a sewage disposal system event exception case, ah, that was a dispute between private parties. But when they really, the sewage disposal system event exception statute, when you look at it was implemented, ah, as a replacement for the common law, trespassing, nuisance claims which, ah, had been ruled by the Michigan Supreme Court in the *Grohowski* (sic) case, ah, to be barred by governmental immunity. Ah, so this was essentially a legislative fix to replace the fact or to, um, give plaintiff's a cause of action, a limited cause of action that was similar in some respects to the old common law trespass and nuisance, ah, causes of action, ah, for events that, you know, involved flooding of municipally managed, ah, sewage disposal systems. So I mean given the parallel, given

the similarities between the statutory cause of action and what was, you know, the common law cause of action, I think that this, the statute of limitation analysis would work, ah, the same way. Ah, and you know in *Froling* they were complaining about, ah, some changes that had been made, ah, in, I think as late as 2001. Ah, they were trying to sue for, ah, flooding on their property that occurred, um, and, and they filed suit in November 2004 and the statute of limitations would've run in June of 2004 and the fact that there was some subsequent flooding after 2001, didn't restart that statute of limitations period because it related to the same complained of action by, ah, the defendants. Ah, some changes that they had made on their property that affected how the water ran onto, ah, the plaintiff's property. That's exactly what we have here. That is the same scenario, um, what the plaintiffs are complaining about is some action that took or that was undertaken by the road commission in 2015 that caused some damage in 2015 fast forward, um, four years, three years their complaining about essentially the same alleged defect. They're not saying that anything has changed in that sewage disposal system, um, but, ah, they are claiming that there is a continuing injury, and our position is that, ah, under the way or our position is that the court should adopt the statute of limitations analysis that was employed in *Marilyn Froling Revocable Trust*.

THE COURT: Okay.

MR. HENN: Ah, we would, we also made an argument that the notice was, ah, ineffective because really under the statute you have to provide notice within 45 days of an event. Ah, they provided notice in 2018, but really the, the original event that started the running of the statute of limitations was in 2015.

THE COURT: So, Mr. Henn…

MR. HENN: And so…

THE COURT: Mr. Henn would you agree that your argument on the notice, um, really is, ah, dependent on your prevailing on the, ah, continuing wrongs statute of limitations issue anyway? I mean if Mr. Evashevski's right…

MR. HENN: I think that's correct.

THE COURT: Yes, that if the event was in 2018, then, ah, they did provide a notice. Okay. Okay, go ahead.

MR. HENN: I agree with that, your Honor.

THE COURT: So as to the injunctive relief, go ahead with that.

MR. HENN: Yes, well, let me take, if I could for just a second, address the gross negligence count. I know that the plaintiff has said that they would voluntarily dismiss that. Ah, I noticed in their brief that they said without prejudice. My only push back on that is that it should be with prejudice because clearly, ah, there's no gross negligence claim that's

available against a government entity under Michigan law, so we would simply ask the court to dismiss that with prejudice not without prejudice. Um, injunctive relief, ah, you know, this is, um, an interesting issue because really the, the road commission is given by statute discretion over how it repairs and how it maintains its roadways. I don't think there could be any real dispute about that and when you look at the law then, ah, there are, ah, the --- cases that say that courts don't have jurisdiction, ah, to order a government entity like the road commission to perform a discretionary act in a particular way. Um, and that's really when you get down to the part where the plaintiffs are asking that's what they want the court to do. They want you to order the road commission to, ah, change the drainage system, ah, because of a series of ditches and culverts along that road in a manner that, ah, the plaintiffs' desire rather than, ah, in a manner that the road commission --- discretion is determined, ah, was necessary. Um, yes, we cited the cases that say basically what, what they're asking for here is a Writ of Mandamus, um, and that is, you know, to order a court, to order a government entity to perform a task in a particular way. You can't get a Writ of Mandamus where there's an act of --- remedy number one. Our position is that they have a statutory remedy although in this case it's, ah, not available to them because the statute of limitations is expired, but nevertheless it was available

to them, so this was not, ah, an appropriate case for a Writ of Mandamus. Also, this is not a --- task. Ah, this is a discretionary act, ah, in terms of how the road commission prepares, maintains, constructs, ah, that particular drainage system and, so, you know, all of these things, so this is not the sort of case where a court could order injunctive relief. Ah, we also relied upon the sewage disposal system exception itself 691.14172, ah, which says that, ah, that, that statute provides the sole, ah, remedy for obtaining any form of relief arising from, ah, an event, and so I think that language is clear. Any form of relief would include, ah, an injunction, it would include, include a declaration, it would include, a money damage award. Ah, and, you know, the plaintiff's in their, in their arguments suggest that that applies only to damage awards. But when you look at, in other words money awards. When you look at the way that, that provision is worded, ah, damages refers to property damage because it's paired with the phrase physical injuries, so they're talking about bodily injury on the one hand and damages which would be damages to the property. Ah, and I think the key language there is any form of relief. So, ah, literally read that would encompass anything, so in other words if it's not provided for in the sewage disposal system event exception, it's not a sort of relief, ah, that can be obtained by a plaintiff arising from the sewage disposal system event. With

that, I don't think I have anything further unless the court has any questions.

THE COURT: Okay, thank you, Mr. Henn. Mr. Evashevski response?

MR. EVASHEVSKI: Briefly, your Honor. Um, I have to admit I, I don't have much experience with this statute either, so I'm, but I've read the act and it's plain language, ah, appears to allow a claimant, ah, any time an event occurs to evaluate whether a, a claim is --- or not. Um, it, it talks about, um, if a claimant believes an event has caused property damage they can seek compensation for property damage. Ah, each, so therefore there is no claim until and unless there's an event and in a case where there is an event then the plaintiff, as we did, needs to evaluate whether they feel the statutory elements, ah, to allow --- claim exists, and, ah, that analysis is going to involve different facts with every event. So, ah, you know, it just seems that the plain language allows us to seek damages arising from an event, um, the event that we're hanging our hat on occurred in 2018. We have three years from May whatever of 2018 to file a claim for that, for the damages arising out of that event only. Not for any previous event, ah, if there was any. Ah, and, you know, again not being terribly familiar with this, ah, frankly Mr. Henn is. He's very experienced in it, but, ah, when I first got the brief I had to really, ah, analysis

it and think about it and what, what troubled me the most practically about the road commission's decision is that, ah, let's, let's say 2015 was an event, I'm not positive it was, but it may have been. Ah, it was, it was minor, ah, ah, we, we had no knowledge, my clients had no knowledge that, ah, the road commission was aware of any defect, ah, or what, what caused it, ah, but they did, my clients did go to the road commission, and, and essentially say, hey somethings going on there, you've got to get a --- out of your system, and we've never had, ah, this minor damage like we sustained in 2015, you better look into it. At that time, ah, we had no, no way of knowing if the road commission knew or should have known about a defect. We didn't know if there was a defect, ah, we didn't know if they took reasonable steps. Um, and, and frankly the, the damage was so minor, ah, you know to think we were going to file a circuit court action over, you know, a few hundred bucks damage or something like that, just was out of the question. Ah, 2018 event, it was a completely different story. Ah, the road commission had been warned, ah, the damages were devastating, ah, and so each, each event causes a potential claimant to evaluate different facts, different factors before deciding whether to file a claim. Ah, and if I, I understand what the road commission is claiming here, ah, by my client's deciding not to file suit after the 2015 incident, they're free to do whatever they

want, um, forever and ever after, after this. Um, so it, this doesn't, it just doesn't make sense. It didn't, didn't pass the --- test in, in my book. Ah, then on, on issue number, count number two…

THE COURT: So, Mr., Mr. Evashevski, if I could, if I could first ask you about the first issue. So, we'll go with Mr. Henn's position that, what if the negligent act in question had occurred two decades earlier, and then there was an event, you know, is it your position that the length of time, how long ago the negligence was is, is not pertinent here?

MR. EVASHEVSKI: Um, I, I guess I'd answer it this way. Yes, if, if, um, I mean negligence is not really the standard. It's close, but if, if we found out that there was a, a defect that arose ten years ago and the road commission knew about it and did nothing, but the event occurred yesterday, I would think, I would think that, ah, a plaintiff would have a claim, in that, in that situation, ah, because you evaluate the circumstances at the time of the event. Ah, it, it says right in, ah, Subsection Three of, of 1417, it said, if the claimant shows that all the following existed at the time of the event. So, ah, whatever, ah, improper or unreasonable action by the road commission, when that occurred, um, I think the way the statute is set up, it just says at the time of the event you look and see if the, if the governmental agency knew or should

have known about the defect and whether they had taken reasonable action. You know, when they…

THE COURT: So, Mr. Evashevski, these ah, these --- rights it's not a negligence. Is there a defect that they have notice of it and did the defect cause the harm, that feels like something I have a little more experience with, the Highway Exception. So, um would it be your position then, so, ah, I'll just go with a case I had years ago, somebody riding a bike on a road and there were so many pot holes, they wrecked their bike and sustained a serious head injury. But let's say they, they fell over on their bike and stubbed their toe and so they didn't do anything about that, and then three years later their riding their bike and the road commission has still not repaired the road, and they hit a pot hole, maybe a bigger pot hole, and they, ah, they suffer a serious injury. Well, now they're saying, well now, you look at, I had an event. I had an injury, did the road commission fail to maintain the road? Did they have knowledge of it? Did that cause the, ah, the injury? Would that be similar to this where, gee, you know, we had a little bit of flooding, no big deal, now we do have, a flooding, it's an event, we look at, was that caused by a defect from the road commissions, ah, sewage disposal system? Um, did they have knowledge of that defect and was it the approximate cause? Is it a similar analysis to a Highway Exception case in that regard?

MR. EVASHEVSKI: Well, I have to admit I'm not familiar with the Highway Exception, ah, but I, I would suggest that we, we have to review the elements of this particular exception, ah, on its own, and again the triggering event is an event and, ah, you have to evaluate it as of the time of the event. I don't know how we get around that.

THE COURT: Okay, alright, thank you. Go ahead as to the other issues?

MR. EVASHEVSKI: Ah, with regard to Count 2, yes, ah, as soon as that was pointed out, I, I agree that we need to dismiss that. Ah, I don't know what we're going to find in discovery. I, I don't think that it should be dismissed with prejudice because we haven't had a chance to find out, ah, even what individuals made these, any of the relevant decisions, so I, I would request that it be dismissed without prejudice, but either way I'll dismiss it.

THE COURT: Okay.

MR. EVASHEVSKI: It shouldn't have been filed. Um, um, and then with, with, Count 3, ah, again I don't have any disagreement, ah, with Mr. Henn that, that the discretionary authority of the road commission, ah, is really exempt from, from judicial remedies or oversites. But that's not what I'm alleging here. I'm alleging, ah, ah, a nuisance trespass --- for diverting water, ah, ah, in an increased amount onto my client's property. Um, while the road commission does have,

ah, discretion on how it, ah, maintains its roads, its ditches, and its culverts. Um, it's still subject to the, the limitation that you can't trespass on private property. Ah, and what I'm alleging in this, in, in Count 3 is that they are trespassing, that, that it is a nuisance and I'm seeking injunctive relief only for that. Um, with regard to the claim that the Sewage Disposal System Act prohibits this claim, ah, ah, that's, that's just contrary to again, clear language in the act. It, it talks about the sole remedy for obtaining any form of relief for damages, and, um, damages are money damages. I mean you look in Black's Law Dictionary and it defines damages as a noun as being pecuniary compensation on indemnity which may be recovered in the courts. Ah, in the act itself as Subparagraph Three of Section 17, it says, ah, if a claimant seeking damages believes an event caused by property damage or physical injury, the claimant may seek compensation for property damage or physical injury. Um, so it's just, I mean I don't know what else to say other than damages are financial damages, and we acknowledge that is our sole, our sole remedy for financial damages is through the Sewage Disposal Act. Um, that has now a bearing on, ah, the Count 3 where we seek injunctive relief, and in injunctive relief claims, I think have been clearly, ah, at this point clearly --- by the Supreme Court, ah, to not be within the --- rule of governmental immunity. Um, there was, there's an, an

unpublished claim that really went through a nice analysis of that issue of *Worley versus Banggor Township*, of which was, um, unpublished case number 340636 and they went through this analysis and pointing out that while the court is going kind of back and forth on whether injunctive only claims fell within the purview of governmental immunity. The most recent case, ah, Lash v. Traverse City at, at, ah, 479 Mich 180, ah, has, has stated pretty clearly that, ah, they are not subject to governmental immunity. That's all, that's all we're trying to do here. We're not trying to, ah, ask for mandamus or tell the road commission what it must do, but, ah, to the extent they have caused, ah, an additional water to be thrust upon our property, we want that stopped.

THE COURT: Okay, thank you, Mr. Evashevski. Mr. Henn any reply?

MR. HENN: Yes, just a few points, ah, briefly, your Honor. To address the sewage disposal system event exception claim, I, when you look at how that series of statutes came about, I mean it really was, ah, a legislative effort to give plaintiffs a limited cause of action against municipalities arising from flooding events. Ah, and when you look at what happened in the Grohowski (sic) case, which was a supreme court case that ruled, ah, that common law trespass nuisance claims, ah, cannot be brought against, ah, government entities. Um, the, the legislature was giving plaintiffs a

limited cause of action in lieu of what it traditionally been litigated, but what was barred under Grohowski (sic), and I just find it very difficult to believe that the legislature in passing, ah, that series of statutes or enacting that limited, um, cause of action would give plaintiffs greater ability to sue municipal entities then plaintiffs would have against private parties. So in other words under the common law, the, the continuing wrongs doctrine is abolished by *Marilyn Froling Revocable Trust*. Ah, to suggest that, that doesn't carry over or that isn't parallel, that isn't parallel to claims against, ah, municipal entities, um, doesn't make sense to me. I mean, in other words, you would have greater ability to sue a municipal entity for, ah, flooding events than you would, ah, a private party. I don't believe that's the nature of the governmental immunity statutes generally. There supposed to be ---, ah, they limit liability, ah, they don't, ah, they don't create additional liability on government entities. So anyway that's just an observation of the history of how that statute came about.

THE COURT: But Mr. Henn, what about, ah, when I read the elements of this exception there does seem to be some similarities or parallelisms with the Highway Exception. You know what if due to a highway defect I suffer a minor injury, and I decide, ah, you know, it's a minor, I'm not going to do anything about it. Um, am I then barred if I'm injured

seriously, more seriously a few years later on by the same highway defect with the continuing wrongs doctrine --- that claim under the highway exception?

MR. HENN: Well, I, I don't think the parallel to the Highway Exception, ah, really works because I think you're claiming at, I mean, I think of the example you gave, your Honor, those are distinct injuries. Um, whereas in the flooding contexts, in the way that the flooding cases have, have been analyzed unless there's some sort of change to the system or to the land that, ah, drains the water onto the plaintiffs' property, those, those continuing acts of flooding are treated as just, you know, additional, ah, I suppose additional injuries but not different in kind from the original injury that started the statute of limitation…

THE COURT: Okay.

MR. HENN: Um, and, I, I guess what that highlights is another point I wanted to make which was under the sewage disposal system event exception defect is defined in a variety of different ways. It can be a construction defect, it can be a design defect, it can be a maintenance defect or it can be an operational defect. With respect to defects arising from construction and design, we would submit that those happen once. The construction happened at one specific point and time, the design happened at one specific point and time. That doesn't change. Ah, there is no variable down the road.

Ah, especially in a case like this where plaintiff's aren't alleging that there was any new act related to design or construction that caused the flooding in 2018. What they are alleging is that, ah, the way this was designed and constructed, something about the way this was designed and constructed in 2015 caused them harm in 2018. The problem is it also caused them harm in 2015 and they didn't do anything about it, and so, you know, if you talk about fairness, ah, I don't believe that the statute is intended to allow a plaintiff to sit on his or her hands and possibly increase the, the amount of damage that they suffer down the road. Ah, I think that's part of the point of a statute of limitations is to keep claims fresh, ah, and, to, ah, to prevent plaintiffs from making their own situation worse. Ah, and then holding, you know, the government accountable for it, ah, when they in fact hadn't taken any legal action at the time that they first, that they first incurred the injury. So, you know, I view a case like this as very different than a case you know, if they were alleging a maintenance defect and we see, ah, sewage disposal systems claims against those entities that run sewage disposal systems arise from blockages. You know road commissions have lots of culverts under their jurisdiction. Sometimes these culverts get plugged up with debris, sometimes they freeze, ah, and that can cause an overflow of, ah, a sewage disposal system. I mean those,

those are events that happen, ah, that can happen at any time, but it could become plugged in 2017 and it could become plugged again for a different reason in 2019, ah, and again, you know, in 2022, ah, but those are all distinct defects. They arise at different points and time. Here you have one defect that's alleged. It occurred at one point and time, that is never going to change. Ah, and so our position is that under the statute and under, ah, under the --- Common Law cases dealing with this sort of flooding, ah, they do have to bring their claim within three years from the time that the defect arises and they experience their first, ah, aspect of damages, their first flooding and subsequent events, ah, don't restart that statute of limitation.

THE COURT: Okay, thank you.

MR. HENN: So that would be our position.

THE COURT: Okay, thank you, Mr. Henn. Ah, thank you both again for, ah, your fine briefs, ah, in this matter and, um, I will take this matter under advisement and issue a written opinion then. Ah, for purposes of the pretrial, while I have you both there, why don't we go ahead and do that and we can take if off from the July 6th docket. Are the amendments, are the pleadings satisfactory, ah, or do the parties seek permission to amend without --- the court, or…

MR. EVASHEVSKI: They're, they're fine with me.

THE COURT: Okay.

MR. HENN: I believe they're satisfactory, your Honor.

THE COURT: Okay, is this a case that is subject to, ah, initial disclosures and have they been filed by both parties?

MR. EVASHEVSKI: I just received, ah, initial, ah, filings from the defendant. I have not filed it, but I will shortly.

THE COURT: Okay, how much time do you need? Can you serve those within 14 days?

MR. EVASHEVSKI: Sure.

THE COURT: Okay. How long do, ah, do you need for discovery?

MR. EVASHEVSKI: Oh, I'm, I'm guessing six months. I, I, you know, I don't litigate a whole lot, Judge, and ah, I don't know are we, are we taking live depositions Bill?

MR. HENN: I would imagine, yes.

MR. EVASHEVSKI: Okay.

MR. HENN: They may be by zoom, I don't know how live they're going to be…

THE COURT: Yes, I'll give you six months for discovery. Um, witness and exhibit lists within 90 days?

MR. EVASHEVSKI: That's fine.

THE COURT: Okay, and, um, would case evaluation after the close of discovery, ah, be helpful to the parties or facilitated mediation or both or any thoughts on that?

MR. HENN: Your Honor, we're not opposed to both. We, we

like case evaluations as a last measure before trial if facilitation fails to resolve the case.

THE COURT: Okay.

MR. HENN: We, we find that the incentives that are provided in, ah, the various potential sanctions, ah, can be helpful in resolving a case, but as I said we don't oppose doing facilitation first and then case evaluation after that if it's not successful.

THE COURT: Okay, well we'll schedule…

MR. EVASHEVSKI: That, that makes, I was just going to say that makes great sense to me.

THE COURT: Okay, well we'll schedule a case evaluation after the close of discovery then, and the court will enter an order for facilitated mediation, but I'll probably hold off on that. Usually I like that at the very beginning of a case, but maybe I'll hold off, ah, until I issue a ruling on your, on your motion which I hope to do within the next couple weeks. I, I mean I'm not going to sit on it for a couple months. Um, I just want to take another look at those statutes and some cases. Ah, so why don't we then schedule this for a, ah, a settlement conference at a date that would give us time to get discovery done and then the case eval so that would be, let's see, that would be probably more like next February. Um, so I don't have particular dates for that yet, so we'll, we'll schedule that later. Is this, ah, for

the damages claim at least, is there a jury demand filed, Mr. Evashevski?

MR. EVASHEVSKI: Yes, there is.

THE COURT: Okay, and estimated length of time for trial?

MR. EVASHEVSKI: Two or three days. Bill you know more than I do?

MR. HENN: And I was going to say three or four.

MR. EVASHEVSKI: Okay.

THE COURT: Okay, well we'll pick three for now, and we'll talk about that number as it gets closer obviously. Alright, so we'll enter a scheduling order along those lines, um, but I'll get a ruling out on the Motion for Summary Disposition, ah, I hope within the next couple weeks, um, and then, then we'll go from there.

MR. EVASHEVSKI: Thank you, your Honor. Thank you Bill.

THE COURT: Alright.

MR. HENN: Thank you, your Honor.

THE COURT: Thank you both.

(At 11:30 a.m., proceedings concluded)

I certify that this transcript, consisting of 26 pages, is a complete, true and correct transcript of the proceedings and testimony taken in this case on Monday, June 15, 2020.

Date: November 18, 2020

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