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STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiffs-Appellees,

v.

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendant-Appellant.

Supreme Court No. 163949

Court of Appeals Docket No. 354540

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

Filed under AO 2019-6

DEFENDANT-APPELLANT CHEBOYGAN COUNTY ROAD COMMISSION'S SUPPLEMENTAL BRIEF

Jennifer J. Schafer (P49438)
HARRIS LAW, PC
Attorney for Plaintiffs-Respondents
410 Petoskey St.
Petoskey, Michigan 49770
231-347-4444
jennifer@nmilawyers.com

William L. Henn (P61132)
Andrea S. Nester (P76879)
HENN LESPERANCE PLC
Attorneys for Defendant
32 Market Ave., SW, Suite 400
Grand Rapids, MI 49503
(616) 551-1611
wlh@hennlesperance.com
asn@hennlesperance.com

RECEIVED by MSC 7/6/2022 7:30:21 PM

TABLE OF CONTENTS

Index of Authorities 4

Statement of Jurisdiction 10

Statement of the Questions Involved 11

Introduction 12

Statement of Facts 15

A. Trial court hearing and opinion. 19

B. Court of Appeals' opinion. 22

Legal Standard 24

Argument 25

I. Nothing about the sewage disposal system event exception changes the application of the accrual statute or statutory limitations period. Based on these statutes, Plaintiffs' claim accrued in 2015 and the Complaint, filed in 2020, is barred by the statute of limitations. 26

A. Neither the definition of the term "event" nor any of the other prerequisites to imposition of liability under the sewage disposal system even exception to the GTLA alter the claim's accrual or limitations period. 30

B. A claim accrues when each element of the action, including damages, are present. Later damages may result, but do not alter the underlying accrual of a cause of action. Claims of repeated damages based on the same alleged defect, therefore, do not extend the limitations period or accrual date. 34

II. Injunctive relief is not available in a claim premised on "trespass nuisance" or the sewage disposal system event exception to the GTLA. And, perhaps more importantly, the specific relief requested by Plaintiffs is clearly unobtainable. 42

RECEIVED by MSC 7/6/2022 7:30:21 PM

A. There is no trespass nuisance exception to governmental immunity. Both the Legislature and this Court have clearly spoken on this issue. It does not matter what remedy Plaintiffs seek. 42

B. Based on the plain statutory language, injunctive relief is *not* obtainable under the sewage disposal system event exception GTLA. 49

C. Plaintiffs' request for an injunction is the functional equivalent of a claim for a writ of mandamus and Plaintiffs *cannot* satisfy any of the elements necessary to warrant this type of extraordinary relief. Therefore, it was not even necessary for the Court of Appeals to reach the question of whether some hypothetical injunctive relief not at issue in this case is available. 52

1. Plaintiffs do not have any clear legal right to the requested modifications to the drainage system. 56

2. The Road Commission does not have any clear legal duty to revert its drainage system to the pre-2015 design. 57

3. Plaintiffs claim for injunctive relief cannot be used to compel a discretionary act. 58

Conclusion 60

Relief Requested 61

Certificate of Compliance 62

RECEIVED by MSC 7/6/2022 7:30:21 PM

INDEX OF AUTHORITIES

Cases

Anderson v Myers,
268 Mich App 713; 709 NW2d 171 (2005) 52

Attorney General ex rel. *Cook v O'Neill*,
280 Mich 649; 274 NW 445 (1937) 54

Baker v Roscommon County Road Com'n,
329 Mich 671; 46 NW2d 579 (1951) 57

Bates v City of Hastings,
145 Mich 574; 108 NW 1005 (1906) 57

Beals v Michigan,
497 Mich 363; 871 NW2d 5 (2015) 24

Bischoff v County of Wayne,
320 Mich 376; 31 NW2d 798 (1948) 54

Brownstown Tp v Wayne Cnty,
68 Mich App 244; 242 NW2d 538 (1976) 54

Burch v Mackie,
362 Mich 488; 107 NW2d 791 (1961) 52, 53

Carter v Ann Arbor City Attorney,
271 Mich App 425; 722 NW2d 243 (2006) 58

Cedar Point Nursery v Hassid,
141 S Ct 2063; 210 L Ed 2d 369 (2021) 56

Adams v Cleveland-Cliffs Iron Co,
237 Mich App 51; 602 NW2d 215 (1999) 21

Connelly v Paul Ruddy's Equip Repair & Serv Co,
388 Mich 146; 200 NW2d 70 (1972) 37, 38, 41

Diggs v State Bd of Embalmers & Funeral Directors,
321 Mich 508; 32 NW2d 728 (1948) 44, 57, 58

Fane v Detroit Library Com'n,
465 Mich 68; 631 NW2d 678 (2001) 24, 26

Fingerle v City of Ann Arbor,
308 Mich App 318; 863 NW2d 698 (2014) 16, 19

Garg v Macomb Co Cmty Mental Health Services,
472 Mich 263; 696 NW2d 646 (2005) 12, 29, 34, 39

Hadfield v Oakland Cnty. Drain Com'r,
430 Mich 139; 422 NW2d 205 (1988) 47

Hannay v Dep't of Transp,
497 Mich 45; 860 NW2d 67 (2014) 25

Henry v Dow Chem Co,
501 Mich 965; 905 NW2d 601 (2018) .....passim

Henry v Dow Chem Co,
319 Mich App 704; 905 NW2d 422 (2017) 39

Hiers v Brownell,
376 Mich 225; 136 NW2d 10 (1965) 57

Hillsdale Cnty Senior Servs, Inc v Hillsdale Cnty,
494 Mich 46; 832 NW2d 728 (2013) 55

Hinojosa v Dept of Nat Res,
263 Mich App 537; 688 NW2d 550 (2004) 56

In re Reliability Plans of Elec Utilities for 2017-2021,
505 Mich 97; 949 NW2d 73 (2020) 24

Jackson Drain Com'r v Vill of Stockbridge,
270 Mich App 273; 717 NW2d 391 (2006) 47, 48

Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand),
293 Mich App 506; 810 NW2d 95 (2011) 59

Lash v City of Traverse City,
479 Mich 180; 735 NW2d 628 (2007) 14, 44, 45

Li v Feldt (After Remand),
434 Mich 584; 456 NW2d 55 (1990) 48

Li v Feldt (After Second Remand),
439 Mich 457; 487 NW2d 127 (1992) 48

Mack v City of Detroit,
467 Mich 186; 649 NW2d 47 (2002) 44

RECEIVED by MSC 7/6/2022 7:30:21 PM

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

McCormick v Carrier,
487 Mich 180; 795 NW2d 517 (2010) 31

Michigan Assn of Home Builders v City of Troy,
504 Mich 204; 934 NW2d 713 (2019) 14, 44, 45, 46

Minarik v State Highway Commissioner,
336 Mich 209; 57 NW2d 501 (1953) 52, 53

Nawrocki v Macomb Co Rd Com'n,
463 Mich 143; 615 NW2d 702 (2000) 20, 25, 33, 43

Petipren v Jaskowski,
494 Mich 190; 833 NW2d 247 (2013) 49

Pohutski v City of Allen Park,
465 Mich 675; 641 NW2d 219 (2002) 13, 21, 43

Pontiac Fire Fighters Union Local 376 v City of Pontiac,
482 Mich 1; 753 NW2d 595 (2008) 49

Roberts v Mecosta Co Gen Hosp,
466 Mich 57; 642 NW2d 663 (2002) 33

Stanton v Battle Creek,
466 Mich 611; 647 NW2d 508 (2002) 12, 25, 31, 33

Stephens v Dixon,
449 Mich 531; 536 NW2d 755 (1995) 38

Taxpayers for Michigan Constitutional Govt v Dept of Tech, Mgt & Budget,
508 Mich 48; 972 NW2d 738 (2021) 55

Teasel v Dept of Mental Health,
419 Mich 390; 355 NW2d 75 (1984) 56, 59

Terlecki v Stewart,
278 Mich App 644; 754 NW2d 899 (2008) 37, 49

Township of Canton v Wayne Co Rd Comm,
141 Mich App 322; 367 NW2d 385 (1985) 58, 59

RECEIVED by MSC 7/6/2022 7:30:21 PM

Trentadue v Buckler Automatic Lmvn Sprinkler Co,
479 Mich 378 (2007) 19, 36, 38, 39

Trowell v Providence Hosp & Med Centers, Inc,
502 Mich 509; 918 NW2d 645 (2018) 52

Twp of Fraser v Haney,
___Mich___; ___ NW2d ___(Docket No. 160991) 40

Wade v Dep't of Corrections,
439 Mich 158; 483 NW2d 26 (1992) 24

Warda v City Council,
472 Mich 326; 696 NW2d 671 (2005) 52, 58

Wesche v Mecosta Co Road Comm,
480 Mich 75; 746 NW2d 847 (2008) 25

Willett v Charter Tp of Waterford,
271 Mich App 38; 718 NW2d 386 (2006) 27

Wright v Genesee Co,
504 Mich 410; 934 NW2d 805 (2019) 46

Yono v Dept of Transp,
499 Mich 636; 885 NW2d 445 (2016) 36

Statutes

MCL 15.602 14

MCL 46.11 54

MCL 125.1522 ..... 14, 45

MCL 125.3407 40

MCL 224.19 ..... 56, 57, 58

MCL 224.21 57

MCL 600.5805 .....passim

MCL 600.5827 .....passim

RECEIVED by MSC 7/6/2022 7:30:21 PM

MCL 691.1401 ..... 11, 23, 25
MCL 691.1402 25
MCL 691.1405 25
MCL 691.1406 25
MCL 691.1407 ..... 25, 26, 31, 47
MCL 691.1411 ..... 27, 33
MCL 691.1413 25
MCL 691.1416 ..... passim
MCL 691.1417 ..... passim
MCL 691.1418 ..... 50, 51
MCL 691.1419 ..... 26, 27, 31, 50

Rules

MCR 2.116(C)(7) 24
MCR 2.118(A)(4) 17
MCR 2.605(A)(1) 45
MCR 3.310 ..... 23, 45
MCR 3.310(A) 45
MCR 7.303(B)(1) 10
MCR 7.305 10
MCR 7.312(E)(1)(b) 10

Other Authorities

Const. 1963, art. 3, s 2 54
Const. 1963, art. 7, s 8 54

RECEIVED by MSC 7/6/2022 7:30:21 PM

Const. 1963, art. 10, § 2 56

U.S. Const. Art. I..... 54

U.S. Const. Art. II 54

U.S. Const. Art. III, s 1 54

US Const amend. V 56

10A Mich. Pl. & Pr. § 76:88 (2d ed.) 44

RECEIVED by MSC 7/6/2022 7:30:21 PM

RECEIVED by MSC 7/6/2022 7:30:21 PM

STATEMENT OF JURISDICTION

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

Following the Road Commission's timely application, this Court entered an Order granting MOAA on May 25, 2022. This Court has jurisdiction pursuant to MCR 7.303(B)(1) and MCR 7.305. Further, this brief, dated July 6, 2022, is timely filed within 42 days after the Order of MOAA pursuant to MCR 7.312(E)(1)(b).

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STATEMENT OF THE QUESTIONS INVOLVED

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

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

Second Question: Whether Plaintiffs' claim for injunctive relief is barred by the Governmental Tort Liability Act, MCL 691.1401 et seq., and/or other applicable law, or is otherwise not obtainable as the functional equivalent of a claim for a writ of mandamus?

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

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INTRODUCTION

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

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

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

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

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accrued. Again, a claim accrues when the act and injury first occur. Because the claim accrued in 2015, Plaintiffs are barred not only from bringing any claim based on the 2015 "event" but also from bringing any claim based on future injury caused by the exact same alleged defect.

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

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

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

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Unlike the cases from this Court cited by the Court of Appeals, Plaintiffs do not seek to enforce any specific statutory right in this case. In such an instance, injunctive relief based on an underlying alleged tort is not available. This also, again, highlights why the Court of Appeals was wrong to take language out of context from this Court's prior opinions. See also Plaintiffs' Answer, p 18-19. In *Lash*, 479 Mich at 196, this Court explained that the claimant could possibly seek preliminary injunctive relieve to enforce *a specific statutory right*, i.e., lawful application of the residency requirements under MCL 15.602, if he could make a showing that irreparable harm would occur before his claim was considered. Likewise, in *Michigan Assn of Home Builders*, 504 Mich at 225, this Court found injunctive relief *might* be available to enforce the requirements in a separate specific statute regarding limitations on fees associated with building permits. MCL 125.1522(1). Plaintiffs have not cited or claimed any such statutory "right" in this case. As such, neither *Lash* nor *Michigan Assn of Home Builders* support the Court of Appeals' opinion on this issue.

All this being the case, this Court should vacate the entire opinion of the Court of Appeals and find that a claim under the sewage disposal system event exception accrues when the alleged wrongful act and harm first occur, as is the case in any other like incident not pursued under the GTLA exception. This Court should further reaffirm its prior determination that there is no trespass nuisance exception to the GTLA, regardless of the specific remedy sought. Finally, this Court should clarify that injunctive relief will not lie to compel the discretionary acts of any other governmental department under longstanding and well-founded Michigan law, and nothing about seeking to compel discretionary acts as a remedy for an alleged tort changes this conclusion.

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STATEMENT OF FACTS

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

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

> 11. Defendant thereafter made modifications to the drainage system that protected the bicycle path washout

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[1] For the purposes of this appeal, only, the Road Commission does not contest the allegations in Plaintiffs' First Amended Complaint. However, the Road Commission does not admit or concede the accuracy of Plaintiffs' allegations within the context of the larger litigation. The Road Commission also does not agree that the drainage system had any defect or that Plaintiffs can establish causation related to the drain design. The Road Commission was entitled to summary disposition because, even if the factual allegations were true, this lawsuit must be dismissed because it is barred by the statute of limitations and governmental immunity.

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

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

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

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

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> 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.][6]

See also Amd. Complaint, ¶¶ 20, 27, Appellant's App'x, 026A (again alleging that the 2015 damage was caused by modifications to the drainage system and affected "Plaintiffs," collectively). Plaintiffs Complaint further alleged that these design modifications were the proximate cause of erosion damage that "*greatly increased* in approximately 2015 . . .." (emphasis added).[7]

In addition to the 2015 damage, Plaintiffs allege that their parcels sustained further damage from erosion from water on or about May 4, 2018, which damaged three private driveways.[8] Plaintiffs claimed that the 2018 damage was caused by the same "design modifications" that were allegedly made in 2015 and caused damage to the Plaintiffs properties that same year.[9] In other words, Plaintiffs alleged the 2015

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

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

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

[9] Amd. Complaint, ¶¶ 10-13, 20, 27, Appellant's App'x, 025A-027A. Again, the Road Commission does not agree that the drain system "caused" Plaintiffs' alleged damage or that there was any drainage "defect." As noted by the MACDC's amicus brief, the allegations here are similar to those described in the concurrence in *Fingerle v City of Ann Arbor*, 308 Mich App 318, 340; 863 NW2d 698 (2014), aff'd, opinion vacated 498 Mich 910; 870 NW2d 920 (2015), which was adopted by this

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"design modifications" made by the Road Commission first caused damage to "Plaintiffs'" collective properties in 2015 by "increase[ing] the amount and rate" of water to the property, and that these same modifications resulted in further damage in 2018.[10]

Plaintiffs filed their initial Complaint on February 20, 2020. After the Road Commission filed a Motion for Summary Disposition, Plaintiffs filed an Amended Complaint on April 27, 2020, alleging three counts: (1) sewage disposal system event exception, (2) gross negligence, and (3) injunctive relief to abate trespass nuisance. Plaintiffs requested monetary damages under the Sewage Disposal System Event exception to the Governmental Tort Liability Act ("GTLA"). They further requested injunctive relief for abatement of alleged trespass nuisance arising out of the exact same facts, "requiring Defendant to restore the drainage that existed prior to the changes the Defendant made as part of its bike path installation in 2013 and 2015."[11]

The Road Commission withdrew its first motion for summary disposition following Plaintiffs' Amended Complaint (which superseded the original pleadings pursuant to MCR 2.118(A)(4)).[12] On May 13, 2020, the Road Commission filed a second Motion for Summary

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Court. Plaintiffs allege that the prior drain system was preferable. But this does not establish either a defect or that the Road Commission was the proximate cause of the alleged overflow as required to establish liability under the GTLA. See also MACDC's Amicus Brief, pp 12-15.

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

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

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

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Disposition.[13] The Road Commission argued that Plaintiffs' claims were barred by governmental immunity and the statute of limitations. First, the Road Commission asserted that Plaintiffs' claim under sewage disposal system event exception to governmental immunity (MCL 691.1416-1419) was barred by the three-year statute of limitations because the claim accrued in 2015 when Plaintiffs alleged flooding first occurred following the "design modifications."[14] The Road Commission further argued that Plaintiffs' claim for injunctive relief from "trespass nuisance" must also be dismissed as a matter of law because it is barred by the GTLA, which provides that a sewage disposal system event exception claim provides the "sole remedy for obtaining *any form of relief*."[15] Furthermore, Plaintiffs' Complaint sought specifically to have the Court enter an order mandating that Road Commission restore the drainage system that existed before a bicycle path was constructed, i.e., essentially Plaintiffs requested a writ of mandamus, which cannot be issued when the act in question is discretionary.[16] Finally, the Road Commission asserted that the Plaintiffs had failed to plead any facts to support its gross negligence claims, and that claim must also be dismissed.[17]

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[13] See Register of Actions, Appellant's App'x, 019A-022A; Defendant's Second Motion for Summary Disposition, Appellant's App'x 28A-48A.

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

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

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

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

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Plaintiffs filed a response brief on June 1, 2020.[18] Plaintiffs asserted that a new claim occurred every time an overflow occurred, regardless of whether these overflows were the result of the same alleged underlying defect (as alleged in the complaint: a modified design). Plaintiffs further alleged that their claim for trespass nuisance was not precluded by the GTLA, and that injunctive relief was permissible to restore the drainage system to its status prior to the 2015 modifications.[19]

A. Trial court hearing and opinion.

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

> The question of when a claim accrues must be answered by looking to MCL 600.5827, commonly referred to as the "accrual statute." It provides that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id.* When is the wrong "done"? Not when the tortfeasor acts, but when the claimant is harmed. *Henry v Dow Chemical Co,* 501 Mich 965 (2018), citing *Trentadue v Buckler Automatic Lmvn Sprinkler Co,* 479 Mich 378, 387 (2007).
>
> So the real question becomes whether Plaintiffs were first harmed in 2015 or 2018. Based on the allegations in Plaintiffs' complaint, the answer is clear-they suffered some damage to the real property, albeit minor, in 2015. Defendant correctly argues that the claim accrued at that time. "[T]he accrual of the claim occurs when both the act and the injury first occur." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club,* 283 Mich

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

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

App 264, 291 (2009). "Subsequent claims of additional harm caused by one act do not restart the claim previously accrued." *Id.* In *Froling,* the allegedly wrongful filling in of a low area by a neighbor caused several distinct floodings of the plaintiffs property. Defendant aptly compares that situation to this case, in which the allegedly wrongful changes made in 2015 to the drainage system resulted in an overflow in both 2015 and 2018. The claim *first* accrued in 2015.

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

***

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

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> Moreover, one of the requirements for Plaintiffs to avoid governmental immunity is that the sewage disposal system had a defect. "Defect" is defined as "a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). Defendant correctly argues that any such defect occurred once, in 2015 as alleged in Plaintiffs' amended complaint. And Plaintiffs first suffered harm as a result of that defect in 2015. The fact that they later suffered subsequent harm does not restart the limitations period or mean that a new claim has accrued. [Opinion and Order, pp 5-6; Appellant's App'x, 015A-016A.]

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

> Trespass is a tort. *Adams v Cleveland-Cliffs Iron Co,* 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. [Opinion and Order, pp 6-7; Appellant's App'x, 016A-017A].

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

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B. Court of Appeals' opinion.

Plaintiffs timely filed an appeal.[20] The Court of Appeals issued a published opinion on December 2, 2021, reversing the trial court's order of dismissal. Regarding the timeliness of Plaintiffs' complaint, the Court of Appeals concluded that the 2018 claim was a "separate, discrete" backup "event" from the 2015 claim and, therefore, the statute of limitations did not start to run on the latter "event" until 2018. The Court of Appeals also held that the continuing-wrongs doctrine had no relevance to this case:

> 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. [COA Opinion, at 7, Appellant's App'x 007A.]

As such, the Court of Appeals concluded that Plaintiffs' claim was timely.

As to the requested injunctive relief (returning the drainage system to its pre-2015 form), the Court of Appeals held that "governmental immunity does not bar a claim for an injunction to prevent future

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

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nuisance or a judgment to abate an existing nuisance." COA Opinion, at 8, Appellant's App'x 008A. The Court of Appeals also concluded that the GTLA, when read in conjunction with MCR 3.310 did not bar injunctive relief. As such, the Court of Appeals held that the trial court erred in concluding injunctive relief was not available. COA Opinion, at 9, Appellant's App'x 009A.

Finally, the Court of Appeals addressed the Road Commission's arguments regarding mandamus in a footnote, concluding that

> 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. [COA Opinion, at 9, Appellant's App'x 009A.]

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

In an Order dated May 25, 2022, this Court granted MOAA on the issues of "(1) whether the appellees' claims accrued in 2015 and are barred by the applicable statute of limitations; and (2) whether the appellees' claim for injunctive relief is barred by the Governmental Tort Liability Act, MCL 691.1401 *et seq.*, and/or other applicable law, or is otherwise not obtainable as the functional equivalent of a claim for a writ of mandamus."

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LEGAL STANDARD

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

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

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ARGUMENT

In Michigan, immunity for non-sovereign units of government is provided by statute in the Governmental Tort Liability Act ("GTLA"), MCL 691.1401 *et seq.* *Stanton v Battle Creek,* 466 Mich 611, 615; 647 NW2d 508 (2002). This Court has repeatedly articulated that the only exceptions to the broad grant of immunity are set forth in the GTLA itself. *Nawrocki v Macomb Co Rd Com'n*, 463 Mich 143, 157; 615 NW2d 702 (2000) ("although governmental agencies may be under many duties, with regard to the services they provide to the public, only those enumerated within the statutorily-created exceptions are legally compensable if breached").[21]

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. This guiding principle is particularly germane in this case where the question is, essentially, does the GTLA provide greater liability for a governmental actor under the sewage disposal system event exception than a private citizen would have under identical circumstances. The answer to this question is no. This Court should find that a claim under the sewage disposal system event exception accrues when the alleged wrongful act and harm first occur, as is the case in any other like incident not pursued under the GTLA exception. This Court should further reaffirm its prior determination that there is no trespass nuisance exception to the GTLA, regardless of the specific remedy sought. Finally, this Court should clarify that injunctive relief will not lie to compel the discretionary acts of any other governmental department under longstanding and well-founded Michigan law, and nothing about seeking to compel

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

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discretionary acts as a remedy for an alleged tort changes this conclusion. Moreover, a party cannot avoid governmental immunity by requesting that the government undertake specific performance of a discretionary duty in lieu of monetary damages.

As to the outcome of this case, the Court of Appeals' judgment should be reversed, and this matter should be remanded to the trial court for entry of summary disposition in the Road Commission's favor. To survive a C(7) motion raised on the grounds of governmental immunity, Plaintiffs must allege facts warranting the application of an exception. *Fane*, 465 Mich at 74. Plaintiffs did not plead in avoidance of immunity here, and the Road Commission was entitled to dismissal.

I. Nothing about the sewage disposal system event exception changes the application of the accrual statute or statutory limitations period. Based on these statutes, Plaintiffs' claim accrued in 2015 and the Complaint, filed in 2020, is barred by the statute of limitations.

At the outset it is important to distinguish (1) what must occur for a tort claim to "accrue" and (2) what must occur for a claimant to avoid immunity for that same alleged tort claim. Only the latter is addressed by sewage disposal system event exception, and it has no impact on the accrual date.

Except as otherwise provided in the GTLA itself, a governmental agency is immune from tort liability if engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). MCL 691.1416 to MCL 691.1419 carve out a narrow exception to governmental immunity for an overflow or backup of a sewage disposal system onto real property, i.e., a claim that may have been previously pleaded as one sounding in trespass nuisance under the common law but for the comprehensive and exclusive tort immunity and exceptions provided by the GTLA. The specific statutory exception at issue in this case is the sewage disposal system event exception. See MCL 691.1416-1419. Pursuant to this exception,

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> (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(2).]

A governmental agency is *still* "immune from tort liability for the overflow or backup of a sewage disposal system" *unless* the claimant can show that several statutory requirements have been met under MCL 691.1416 through MCL 691.1419.

MCL 691.1417(3) "imposes several requirements for a claimant to *avoid* governmental immunity for a sewage disposal system event." *Willett v Charter Tp of Waterford*, 271 Mich App 38, 49; 718 NW2d 386 (2006) (emphasis added). These additional requirements only prescribe when a claimant can avoid immunity; they do not alter when the underlying claim accrued or *expand* liability beyond what would be otherwise available as to a private individual. The accrual date remains constant regardless of whether immunity is waived. And it remains constant regardless of the statutory definitions of "event" or "damages" or any other term. Ultimately, like any claim under the GTLA, a claimant must also demonstrate that their action is timely.

In fact, the GTLA specifically says this is so. MCL 691.1411(1) provides that "[e]very claim against any governmental agency shall be subject to the general law respecting limitations of actions except as otherwise provided in this section." There is no language whatsoever in the sewage disposal event exception that addresses accrual or limitations. The general law must therefore apply. The statute of limitations for actions for injury to property is three years. MCL 600.5805(2). And MCL 600.5827 provides that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

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Here, dismissal was warranted based on Plaintiffs' pleadings.[22] Accepting the allegations in the Complaint as true, Plaintiffs sustained damage to their collective properties in 2015 due to design modifications to the drainage system made by the Road Commission:

> 11. Defendant thereafter made modifications to the drainage system that protected the bicycle path washout site but actually increased the amount and rate of water directed onto Plaintiffs' properties, including significant extension and enlargement of the culvert outlet onto Plaintiffs' properties.
>
> 12. That Plaintiff, Sunset Resort Association, Inc., contacted representatives of the Defendant and warned the Defendant that the modifications made in 2015 were the cause of the minor damage sustained by Plaintiffs and that more severe damage would likely result if further modifications were not made. Contacts were formalized by a letter and emails in early 2016. [Emphasis added.][23]

See also Amd. Complaint, ¶¶ 20, 27, Appellant's App'x, 026A (again alleging that the 2015 damage was caused by modifications to the drainage system and affected the "Plaintiffs" collectively). Plaintiffs Complaint further asserts that these design modifications were the proximate cause of erosion damage that "*greatly increased* in approximately 2015 . . .." (emphasis added).[24] In addition to the damage in 2015, Plaintiffs allege that their parcels sustained further damage from erosion from water on or about May 4, 2018, stemming from the

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[22] There does not appear to be any dispute that the gross negligence claim was properly dismissed, and no challenge to this ruling has been raised by Plaintiffs on appeal. M Tr, 16; Appellant's App'x, 076A; Opinion and Order, pp 6, 8; Appellant's App'x, 016A, 018A; Plaintiffs' COA Brief, Statement of Questions Presented and Argument sections. Accordingly, this part of the Circuit Court's Opinion should be affirmed.

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

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

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exact same 2015 design "modifications."[25] Plaintiffs Complaint expressly alleges that the design modifications were the cause of the erosion damage caused to the Plaintiffs' properties. [26] In other words, Plaintiffs assert that a change in the design of the drainage system in 2015 increased water flow onto their properties and resulted with at least one flooding event on their collective properties sometime in 2015.

"[T]he accrual of the claim occurs when both the act and the injury first occur." *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264, 291; 769 NW2d 234 (2009). "Subsequent claims of additional harm *caused by one act* do not restart the claim previously accrued." *Id*. (emphasis added). See also *Garg v Macomb Co Cmty Mental Health Services*, 472 Mich 263, 281-282; 696 NW2d 646 (2005); *Henry v Dow Chem Co*, 501 Mich 965, 965; 905 NW2d 601 (2018). All that is required for a claim to accrue is the allegedly negligent act (the design modifications made in 2015), and alleged damage (which Plaintiffs allege first occurred in 2015).[27] Accepting these allegations as true, Plaintiffs' claim accrued in 2015. [28]

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

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

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

[28] Plaintiffs also alleged that a motion on the pleadings was improper or prejudicial. But "the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate." See *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). "In addition, a party

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The Road Commission is not claiming that separate and distinct alleged wrongful *acts* (plural) would not impact the accrual date or limitations periods. But there are no separate "acts" alleged in this case. The only alleged act (singular) was implementation of an allegedly defective design in 2015. The claim accrued in 2015 when Plaintiffs allege a backup occurred and erosion "greatly increased."[29] Plaintiffs' 2020 Complaint was not timely filed and was properly dismissed.

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

The Court of Appeals found, as a matter of first impression, that the injury claimed by Plaintiff in 2018 constituted a separate "event" with its own statute of limitations, regardless of whether it was alleged to have been caused by the same underlying act or defect that caused the injury in 2015.

This opinion is flawed for several reasons. First, it plainly provides private actors with greater protection from lawsuits than governmental

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opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence." *Id.* It is of note that Plaintiffs received a voluminous response to their FOIA request a year before this litigation. They had a significant volume of material upon which to plead their claims. Plaintiffs also had every opportunity to amend their complaint if it did not accurately reflect their purported case. And, in fact, they did file an amended complaint in response to the Road Commission's first motion to dismiss. They did not, however, make any request for amendment to reflect the distinctly different assertions made on appeal. Nor did they move for reconsideration in the Circuit Court. Their associated allegations of error regarding facts outside the record and unpreserved issues of law are without merit.

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

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parties. This is contrary to the purpose and plain language of the GTLA. *Stanton,* 466 Mich at 618.

Second, it ignores the limitations and accrual statutes, which are clearly applicable to sewage disposal event system claims. Nothing in MCL 691.1416 or MCL 691.1417 affects the applicable limitations period or suggests that continuing damages based on the same underlying alleged wrongful act somehow constitute separate accrual dates for purposes of avoiding the statute of limitations.

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

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

> (3) If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:

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

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

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

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

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To that end, it simply does not follow that a claimant who pleads an "event" in order to avoid immunity is thereafter absolved of compliance with the limitations and accrual provisions statutes. To the contrary, MCL 691.1411(1), part of the GTLA, provides "[e]very claim against any governmental agency shall be subject to the general law respecting limitations of actions except as otherwise provided in this section." Nothing in the sewage disposal system event exception "otherwise provid[es]" for a separate accrual provision or limitations periods. And again, to be clear, neither MCL 691.1416(k) nor MCL 691.1417(3) defines when a claim accrues. **There is no separate statute of limitations or accrual definition provided under the sewage disposal system event exception** and "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The claimant must also comply with MCL 600.5805 and MCL 600.5827.[31]

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

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

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The definitions that are glaringly absent from MCL 691.1416 are those for a statute of limitations or accrual. Everything else about the statute pertaining to this exception to governmental immunity describes what must occur for the government to be held liable for this tort—the statute does not redefine when a claim accrues. Here, the claim accrued in 2015 and was properly dismissed by the trial court.

B. A claim accrues when each element of the action, including damages, are present. Later damages may result, but do not alter the underlying accrual of a cause of action. Claims of repeated damages based on the same alleged defect, therefore, do not extend the limitations period or accrual date.

Plaintiffs' allegation of subsequent flooding arising out of the same 2015 design modification does not operate to extend the statute of limitations or otherwise save Plaintiffs' claim. In finding otherwise, the Court of Appeals applied the now-abrogated common law "continuing wrongs" doctrine despite its assertion that this doctrine has no application to the case.

Michigan previously recognized a common law exception to the application of a statutory period of limitations, sometimes referred to as the "continuing wrongs doctrine," when an alleged wrong was of a continuing nature—such as repeated flooding. Under this doctrine, the period of limitations did not begin to run following the occurrence of the first wrongful act; rather, it started only after the continuing wrong was abated. See *Garg v Macomb Co Cmty Mental Health Services*, 472 Mich at 281-282; *Marilyn Froling Revocable Living Tr*, 283 Mich App at 280. However, "*Garg* and its progeny completely and retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of this state, including in nuisance and trespass cases." *Marilyn Froling Revocable Living Tr*, 283 Mich App at 288. Plaintiffs' cause of action—

related to repeated flooding events caused by the same alleged defect—accrued after the first flooding, i.e., when both the "last conduct and first, subsequent corresponding injury occurred." *Id*.

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.[32] The wrong occurred in 2015, the claim accrued in 2015, and Plaintiffs could have brought

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

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

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their claim for that wrong in 2015 or within three years thereafter. They did not. MCL 600.5805; MCL 600.5827. Instead, Plaintiffs filed the instant case until on or about February 20, 2020, over a full year after the statute of limitations expired.[33]

The Court of Appeals previously rejected an argument nearly identical to the one Plaintiffs raise here with regard to the application of the term "event" in *Marilyn Froling Revocable Living Tr*, 283 Mich App at 288-292 based on this Court's Opinion in *Garg*. In *Marilyn Froling Revocable Living Tr*, the plaintiffs asserted claims against several neighbors in connection with flooding on their property that occurred after the defendants made modifications to their properties ending in 1998, first causing flooding in 2001. *Id*. at 273.[34] When the defendants challenged the timeliness of the Complaint (filed more than three years after the flooding began), the plaintiff asserted a claimant may file a claim anytime within three years following the "time of the . . . injury . . ." based on the plain language of the limitation's statute. As such—like

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

[34] As such, *Marilyn Froling Revocable Living Tr* demonstrates not only the proper application of the accrual statute in a situation where there is only one underlying alleged "wrong," but also how the Court of Appeals here improperly gave the narrow exception an expansive application contrary the well-established method of interpreting the GTLA. See *Yono v Dept of Transp,* 499 Mich 636, 646; 885 NW2d 445 (2016). So broad, in fact, that it subjects the government to liability where there otherwise would be none for a private actor

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

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

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

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Of course, it is possible to envision alternate facts that might create a separate claim if private property is repeatedly flooded. Imagine, for example, if a party alleged that a culvert flooded due to a design modification and later due to a blockage caused by debris.[35] But the only way the statute of limitations would "reset" is if there was some change in the sewage disposal system that created a new, separate defect—i.e., a new wrongful act—and which then caused flooding and damage.

While *Marilyn Froling Revocable Living Tr* hits the nail on the head so-to-speak, two more recent decisions of this Court provide further support for the conclusion that the claim accrued in 2015 under the facts as pleaded and illustrate that the logic and conclusion of the Court of Appeals was correct in *Marilyn*.

First, in *Henry v Dow Chem Co*, 501 Mich 965; 905 NW2d 601 (2018). this Court reversed for the reasons stated in the Court of Appeals' dissent, which provided:

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

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

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> *Living Trust v. Bloomfield Hills Country Club*, 283 Mich App 264, 290; 769 NW2d 234 (2009).
>
> The Court in *Trentadue* also expressly rejected the common-law discovery rule, stating that "the statutory scheme is exclusive and thus precludes this common-law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply." *Trentadue*, 479 Mich at 389. **Similarly, in *Garg v Macomb Co Community Mental Health Servs,* 472 Mich 263, 282; 696 NW2d 646 (2005), our Supreme Court held that Michigan does not recognize the "continuing violations" doctrine, explaining that nothing in the statute of limitations "permits a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as 'continuing violations.' To allow recovery for such claims is simply to extend the limitations period beyond that which was expressly established by the Legislature." Thus, in determining when plaintiffs' claims accrued under MCL 600.5827, and mindful of *Trentadue* and *Garg*, we must ascertain when plaintiffs were harmed, not when plaintiffs learned they had been harmed nor when they learned the extent of the harm. We further undertake this analysis mindful of the precept that the claim accrues and the period of limitations begins to run once all elements of the action, including damages, are present.** [*Henry*, 319 Mich App at 733–734 (emphasis added).]

In other words, additional flooding—i.e., additional injury or events—based on the exact same alleged defect does not restart the

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statute of limitations. These subsequent injuries are not "separate, discrete" events.[36]

This Court's recent decision in *Twp of Fraser v Haney*, ___Mich___, ___;___ NW2d ___(Docket No. 160991, February 8, 2022), further demonstrates the difference between a new underlying wrong and a stale one and is consistent with the Road Commission's argument here. In *Haney*, this Court considered whether the continuing wrongs doctrine barred a claim brought by the Township against property owners who were keeping hogs on their property in violation of a local ordinance. This Court concluded that, under the facts at issue, it did not:

> The wrong alleged in plaintiff's complaint is defendants' keeping of hogs on their property. The presence of the hogs on the property constitutes the wrong, and that wrong, along with the attendant harms it causes, is being committed as long as the piggery operates. For example, the fact that defendants had hogs on their property *yesterday* is not a wrong that occurred until yesterday, and any claims arising from harms due to the hogs' presence yesterday could not have accrued until then either. Therefore, because defendants had hogs on their property within the limitations period, claims accrued during that period and plaintiff's action is timely.
>
> Our conclusion is further supported by the plain language of the Zoning Enabling Act. MCL 125.3407 states that a "use" of land in violation of a zoning ordinance is a nuisance per se. "Use" means "[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional ...."[15] A "use" is thus inherently ongoing. And the nature of zoning violations typically makes a limitations period of little

[36] *Henry* also demonstrates that this Court has already approved of *Marilyn* by adoption of a dissent relying on its precedent.

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> relevance to nuisance-abatement actions concerning present or ongoing nonconforming uses. [*Twp of Fraser v Haney*, slip op at 4.]

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

This case is clearly different. Here there is only *one* alleged underlying act: a modification to a roadside drainage ditch that was implemented in 2015. Based on the Complaint, the system was designed in 2015 and installed in 2015. No subsequent modifications are alleged. And it is not a violation of any law to have a drainage system (or not) of any kind. So, the fact that the same drain system existed in 2015, 2018, 2020, or today does not make it a separate alleged wrongful act.

Under MCL 600.5805 and MCL 600.5827, "the accrual of the claim occurs when both the act and the injury first occur, that is when the 'wrong is done.'" In other words, subsequent flooding here did not restart the running of the statute of limitations because "subsequent claims of additional harm caused by *one act* do not restart the claim previously accrued." *Marilyn Froling Revocable Living Tr*, 283 Mich App at 291 (emphasis added). As adopted in *Henry v Dow Chem Co*, 501 Mich at 965: "Once all of the elements of an action for ... injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run. **Later damages may result, but they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred**." Quoting *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972). *Haney* does not change this conclusion. Instead, *Haney* is an example of separate and distinct (even if continuing) wrongful acts.

In other words, additional flooding – i.e., additional injury or events – based on the exact same alleged defect does not restart the statute of limitations. Nothing in *Haney* changes this conclusion.

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

Injunctive relief in the form of specific performance of a discretionary duty as a remedy for an alleged tort is not one that is available to these—or any—Plaintiffs. This Court should find that (1) injunctive relief is not available under the sewage disposal event exception to the GTLA; (2) there is no trespass nuisance exception to the GTLA regardless of the remedy sought and, (3) Plaintiffs specific request seeks mandamus, which is unwarranted here as a matter of law because none of the requisite elements can be established.

A. There is no trespass nuisance exception to governmental immunity. Both the Legislature and this Court have clearly spoken on this issue. It does not matter what remedy Plaintiffs seek.

Plaintiffs have pleaded a claim for "trespass-nuisance." Specifically, the Complaint provides:

> 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**

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> **changes the Defendant made as part of its bike path installation in 2013 and 2015**. [Amd. Complaint, ¶¶ 26-28, Appellant's App'x 026A-027A.]

This claim fails because there is no "trespass-nuisance" exception to governmental immunity. In *Pohutski v City of Allen Park*, 465 Mich 675, 689–690; 641 NW2d 219 (2002), this Court determined that "the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity. Trespass-nuisance simply is not one of the exceptions to immunity set forth in the governmental tort liability act."[37]

This should be the end of the analysis. Plaintiffs' Complaint sets forth a claim for injunctive relief for "trespass nuisance." There is no

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[37] This Court further articulated that this result may leave certain claims without a remedy. But, nevertheless, this Court is

> bound by the clear and unambiguous statutory text; we lack constitutional authority to impose on the people of this state our individual policy preferences regarding the availability of lawsuits arising from the operation of a sewage system. We must "seek to faithfully construe and apply those stated public policy choices made by the Legislature" in drafting the governmental tort liability act. *Nawrocki, supra* at 151, 615 N.W.2d 702. We are mindful that, because immunity necessarily implies that a "wrong" has occurred, some harm caused by a governmental agency may lack a remedy. *Id.* at 157, 615 N.W.2d 702. Although governmental agencies have many duties regarding the services they provide to the public, a breach of those duties is compensable under the statute only if it falls within one of the statutorily created exceptions. [*Pohutski v City of Allen Park*, 465 Mich 675, 689–690; 641 NW2d 219 (2002).]

Of course, plaintiffs *are not* without a remedy in matters properly falling under the sewage disposal system event exception. This is yet another reason why injunctive relief would be unavailable.

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trespass nuisance exception. Plaintiffs did not plead in avoidance of governmental immunity. *Mack v City of Detroit*, 467 Mich 186, 190; 649 NW2d 47, 50 (2002). In suggesting otherwise or determining that injunctive relief might be available under the GTLA, the Court of Appeals was essentially creating a cause of action for Plaintiffs where none was pleaded. Its opinion is contrary to the precedent of this Court and the plain language of the GTLA.

The Court of Appeals found, however, that because the requested relief was an injunction, the claim of "trespass nuisance" was not barred by a lack of any applicable exception under the GTLA. This is incorrect and is irreconcilable with this Court's precedents.

There are cases where this Court has approved of certain types of injunctions to *restrain* the actions of governmental actors or entities. For example, where there is a request that the government cease or pause certain conduct where irreparable injury will result from the acts of public officials in attempting to proceed under an invalid law, or where officials are acting in an unlawful manner. See, e.g., *Diggs v State Bd of Embalmers & Funeral Directors*, 321 Mich 508, 514; 32 NW2d 728 (1948). But see also 10A Mich. Pl. & Pr. § 76:88 (2d ed.) (It is well established that the "judiciary cannot enjoin the discretionary acts of any other governmental department unless the department is acting beyond its legal authority."). The wisdom, propriety, or lawfulness of equitable relief under those circumstances is not an issue raised in this appeal.

And, to that end, neither *Lash v City of Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007), nor *Michigan Assn of Home Builders v City of Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019), support the conclusion that an injunction would be available here. Neither of these cases considered or approved of an injunction in the form of specific performance of a discretionary duty. And, of course, neither addressed trespass nuisance at all.

Instead, *Lash*, 479 Mich at 196 considered a claim that Traverse City had enacted residency requirements for employment contrary to a clear statutory prohibition. The plaintiff, who alleged he had lost an employment opportunity due to the unlawful ordinance, requested

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monetary relief. This Court agreed that the underling residency restriction was unlawful, but found that no private cause of action for monetary damages existed. Nevertheless, this Court explained that the plaintiff was not without a remedy because "Plaintiff could ***enforce the statute*** by seeking injunctive relief pursuant to MCR 3.310, or declaratory relief pursuant to MCR 2.605(A)(1)." *Id*. at 196 (emphasis added). This Court went on to explain that the plaintiff could seek a preliminary injunction to stop the city from enforcing an ordinance contrary to the law and request a declaratory judgment as to the validity of the ordinance in the face of the contrary statutory language. This Court was not, however, endorsing specific performance of a discretionary duty.

The same is the case for *Michigan Assn of Home Builders v City of Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019), in which the plaintiffs brought an action regarding whether the creation of a fee surplus violated the statute, MCL 125.1522. Like in Lash, this Court found that declaratory or injunctive relief could be used to enforce the statute:

> In *Lash[]*, this Court rejected the plaintiff's claim that a private cause of action for monetary damages was the only mechanism by which the relevant statute could be enforced, noting that ***plaintiff could enforce the statute*** **by seeking injunctive relief pursuant to MCR 3.310 or declaratory relief pursuant to MCR 2.605(A)(1). Here, as in *Lash*, plaintiffs could *enforce the statute* by seeking injunctive or declaratory relief**. A preliminary injunction may be granted under MCR 3.310(A) if a plaintiff "can make a particularized showing of irreparable harm that will occur before the merits of the claim are considered." Further, an "actual controversy" exists for the purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights. In this case, plaintiffs' claim is that the City's building inspection fees, which affect plaintiffs' economic interests, were assessed in violation of MCL 125.1522(1). Such a claim

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> would constitute an "actual controversy" for the purposes of an action for a declaratory judgment. Therefore, although plaintiffs do not possess a private cause of action for monetary damages, they may maintain their cause of action for declaratory and equitable relief. [*Michigan Assn of Home Builders*, 504 Mich at 225-226; (emphasis added).]

But Plaintiffs are not seeking to enforce any statute here. Further, unlike *Lash* or *Michigan Home Builders Association*, Plaintiffs' claim cannot be remedied as a declaratory action to enforce a statute. The injunctive relief sought is specific performance of a discretionary duty to which Plaintiffs have no statutory right whatsoever. See also Section II.C below.

It is again important to recall that Plaintiffs are asking for the Road Commission to return the drainage system to its pre-2015 status. In other words, Plaintiffs want the Road Commission to spend money to put in place a specific drain system. But the nature of the claim is asking the government to reach into its coffers to satisfy a monetary claim (i.e., pay for the redesign of the drain according to Plaintiffs demands) and that's the same thing as tort damages.[38] Cf. also *Wright v Genesee Co*, 504 Mich 410, 419; 934 NW2d 805 (2019) (contrasting tort damages to those for unjust enrichment). In fact, the prospect of injunctive relief can be even more untenable than traditional monetary damages. How, exactly, will the relief requested in this case (return to the drainage system in place before installation of the bike path) be enforced without resulting in endless ongoing future litigation, court monitoring, and court interference with discretionary actions? How will courts ensure the public interest—which very well may be directly impacted by injunctions such as the one sought in this case and is *not* inherently reflected in a lawsuit brought by a select group of private persons—is protected? This further highlights the difference between seeking to enjoin unlawful behavior, like in *Lash* or *Michigan Home Builders Association*, and seeking to force the government to

[38] Nevertheless, the GTLA clearly does not provide for this type of remedy. See Section II.B below.

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undertake—and spend its discretionary and limited resources on—specific projects or modifications.[39]

The Court of Appeals has also previously held that seeking an "injunction" for alleged trespass nuisance does not change the nature of the claim or negate the GTLA's narrow exceptions. Specifically, in *Jackson Drain Com'r v Vill of Stockbridge*, 270 Mich App 273, 284-285; 717 NW2d 391 (2006), the plaintiffs argued that *Pohutski* did not apply to bar their claim for injunctive relief based on alleged trespass nuisance. But the Court of Appeals disagreed, and concluded that the *Pohutski "*Court clearly stated that MCL 691.1407 did not permit a trespass-nuisance exception to governmental immunity." Considering the language of MCL 691.1407(1)[40] the Court of Appeals concluded that:

> The plain language of the [GTLA] does not limit the immunity from tort liability to liability for damages. As noted in *Pohutski*, governmental immunity is to be broadly construed, while exceptions to immunity are to be narrowly construed. To construe the statute as plaintiffs urge in the instant case would be to construe governmental immunity narrowly. Moreover, such a construction would judicially impose a term into the statute that the Legislature did not provide, which is not permitted.
>
> In addition, the decisions in both [*Hadfield v Oakland Cnty. Drain Com'r,* 430 Mich 139; 422 NW2d 205

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[39] The Road Commission recognizes that breach of a statutory duty can be a tort. But the nature of a declaratory action (and associated preliminary injunction to enjoin allegedly unlawful or unconstitutional behavior) to determine the rights and responsibilities of the parties is fundamentally different from what Plaintiffs are seeking here.

[40] MCL 691.1407(1) provides "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. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed."

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> (1988)] and [*Li v Feldt (After Second Remand)*, 439 Mich 457; 487 NW2d 127 (1992) (*Li II)*]—with respect to whether a trespass-nuisance action that merely seeks abatement of the nuisance is barred by governmental immunity—were plurality opinions. A plurality opinion of the Supreme Court, in which the reasoning is not supported by a majority of the justices, is not binding on this Court. Moreover, Justice Griffin, in rejecting the reasoning of the lead opinion in *Li II*, adhered to his previous position in *Li v Feldt (After Remand)*, 434 Mich 584, 596; 456 NW2d 55 (1990) (*Li I*). The Court in *Pohutski*, adopted Justice Griffin's opinion in *Li I*. Hence, the Supreme Court impliedly rejected the reasoning of the lead opinion in *Li II*. Therefore, unless an exception to immunity is found in the act itself, plaintiffs' nuisance claim must fail. [*Jackson Drain Com'r*, 270 Mich App at 284-285 (cleaned up).]

Therefore, the *Jackson* Court concluded that the form of the requested relief does not alter the substance of the claim: a trespass nuisance claim sounds in tort and is governed by the GTLA, which contains no trespass nuisance exception.[41] *Id*.

The Road Commission was properly granted summary disposition and the trial court's dismissal should be affirmed.

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[41] "[T]he fundamental purposes of the act were to restore immunity to municipalities, grant immunity to all levels of government when engaged in the exercise or discharge of a governmental function, and prevent judicial abrogation of governmental and sovereign immunity." *Li I*, 434 Mich at 605 (Griffin, J., concurring). The *Jackson* Court did not reach the question of whether an injunction would be permitted under the GTLA, instead finding that the plaintiffs had filed suit against the wrong agencies. The answer to this question, however, is no. See section II.B below.

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

Injunctive relief is not available under the sewage disposal system event exception to the GTLA, either. The sewage disposal system event exception, by its plain language, provides the sole (i.e., only) remedy for these types of claims.[42] And it does not include injunctive relief—or any form of prospective relief—as part of that remedy.

Specifically, MCL 691.1417(2) 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.]

The phrases "*sole remedy*" and "*any form of relief*" bar Plaintiffs' request because they are clearly broad enough to encompass injunctive—and *any form of*—relief. Of course, an "injunction" is a form of relief.[43] It does not matter if the claimant asks for this relief to stop "future" harm; the premise of the request is still a claim under the sewage disposal system event exception and the injunction is a form of relief (i.e., remedy) requested pursuant to this exception.[44]

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[42] "When construing a statute, this Court's obligation is to discern the Legislature's intent as expressed in the statute's plain language." *Petipren v Jaskowski*, 494 Mich 190, 201; 833 NW2d 247 (2013).

[43] An "injunction is a remedy, not an independent cause of action." *Redmond v Heller*, ___Mich App ___, ___; ___NW2d___ (Mich Ct App, May 28, 2020), slip op at 5; *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008).

[44] "[I]njunctive 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." *Pontiac Fire Fighters*

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The term "damages" following this portion, on the other hand, encompasses injuries to property and other types of harm, like personal property damage, which is why it is coupled with "physical injuries." MCL 691.1417(2). Following this section, MCL 691.1417(3) and (4) refer to "property damage or physical injury" several times, which demonstrates that the statute is referring to physical injuries, rather than monetary damages. In other words, "damages or physical injuries" as used in MCL 691.1417(2) are *categories of harm for which relief may be sought*, not remedies.

Of course, other portions of the statute do limit the form of remedy to monetary compensation (economic and noneconomic damages). In fact, this is addressed at length in the first three sections of MCL 691.1418. Specifically, MCL 691.1418(1), provides that "economic damages are the *only compensation for a claim under section 17*." (emphasis added). MCL 691.1418(2) and (3) detail the only exception to that rule (scenarios where noneconomic damages can be claimed). MCL 691.1419(1) further discusses "compensation" to a claimant. Relief not mentioned in MCL 691.1416-1419 is not available for an alleged sewage disposal system event. The remedy of injunctive relief is not available because it is not provided for in MCL 691.1416-1419. It really is difficult to imagine how the Legislature could have been more clear.

MCL 691.1418(4) does not change this conclusion. Specifically, that section provides "*Unless this act provides otherwise*, a party to a civil action brought under section 17 has all applicable common law and statutory defenses ordinarily available in civil actions, and is entitled to all rights and procedures available under the Michigan court rules."

Union Local 376 v City of Pontiac, 482 Mich 1, 8; 753 NW2d 595, 599 (2008). Here, an injunction would be improper because Plaintiffs had an adequate remedy at law, at least in theory, subject of course to the statute of limitations. Moreover, the possibility of future severe weather or a rain event does not constitute an imminent danger of irreparable injury (and certainly not one *caused by* the Road Commission). See MCL 691.1416(*l*). And, finally, none of the required elements for an injunction have been properly pleaded. This claim was properly dismissed. See also MACDC's amicus submission.

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But, with regard to the form of remedy permitted, the act clearly and expressly *does* provide otherwise. In fact, the preceding three sections of MCL 691.1418 detail the only compensation permitted for a claim under this exception. And the exception provides the "***sole*** remedy" for "***any*** form of relief." Clearly, the intent was to provide the sole remedy for these types of claims through the GTLA exception. And the only type of remedy available under MCL 691.1416-1419 is monetary damages. . Such compensation does not include an injunction (and it certainly does not include specific performance).

The Court of Appeals, in concluding that the act did not "expressly" preclude injunctive relief, ignored the plain statutory language, which clearly (and repeatedly) limits and describes the compensation available under the act. Where the Legislature expressly abrogates any common law remedies, (2) provides the sole vehicle for recovery for any harm, and (3) limits that recovery to compensation for damages, there is really nothing left to say. It would have been completely redundant and wholly unnecessary for the Legislature to have yet another section of the statue "expressly" list what remedies were not available.

And, further, injunctive relief is not a "right or procedure." MCL 691.1418(4). It's a remedy—particularly where the type of injunction sought is specific performance of a discretionary act. MCL 691.1417 already provides that the sole remedy is the one provided under GTLA. MCL 691.1417(3). To the extent *any* recovery is available, it is unequivocally governed by the GTLA. And the GTLA does not provide for injunctive relief.

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

Even if the plain language of MCL 691.1417 did not bar Plaintiffs' request for an injunction (which it does), the specific injunction sought by Plaintiff is nevertheless unobtainable.

Plaintiffs in this case are asking the Court to order the Road Commission to restore the prior drainage system. Amd. Complaint ¶ 28, Appellant's App'x 027A. In other words, they are requesting that the Road Commission be forced to perform a specific act in a specific manner. This request is fundamentally seeking a writ of mandamus.[45] See *Warda v City Council*, 472 Mich 326, 337 n 7; 696 NW2d 671 (2005); *Burch v Mackie*, 362 Mich 488, 489-490; 107 NW2d 791 (1961); *Minarik v State Highway Commissioner*, 336 Mich 209, 213; 57 NW2d 501 (1953).

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

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In fact, this Court has already twice rejected a nearly identical requests for injunctive relief.[46]

First, 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." This Court rejected such a claim as the functional equivalent of mandamus, explaining that

> 'No litigant can mandamus a State officer in the circuit court simply by using the term injunction instead of mandamus when it is the latter remedy that he seeks. The circuit judge correctly held that plaintiffs were seeking a mandamus under the guise or misnomer of a mandatory injunction.' [*Id.*, at 493, quoting *Minarik v State Highway Commissioner*, 336 Mich 209; 57 NW2d 501 (1953).]

This Court reached the same conclusion in *Minarik*, where the plaintiffs sought a mandatory injunction against the defendant to require the cleaning out of a ditch and deepening it so as to restore it to the condition existing when dug. *Id.* at 213. Similarly, Plaintiffs cannot get around the requirements for mandamus by claiming their relief, which requests specific performance by the Board of County Road

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[46] Plaintiffs' also assert, without any support, that it is "illegal" for a system to back up or overflow. Plaintiffs' Answer, pp 20-21. Plaintiffs have cited no support for this contention and it is not, in fact, *illegal* for a culvert to overflow. Even if a hypothetical plaintiff were to be deprived of use or occupation of their property due to actions of the government aimed at that property (such as repeated flooding *caused by* the governmental actor)—the proper claim would be one for inverse condemnation. No such claim has been made here and the Road Commission agrees with amicus MACDC's argument that the facts as pleaded certainly would not support such a claim.

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Commissioners (i.e., the Road Commission), is merely injunctive in nature here.

Plaintiffs do not have any clear legal right any specific drainage design. Likewise, the Road Commission does not have a duty to provide any specific drainage design or form.

The Court of Appeals' opinion reflects a fundamental shift in the type of injunctive relief that can be sought by claimants against governmental actors. Simply put, injunctions against a governmental agency are governed by a different set of legal principals than those against private citizens. Courts historically may order a governmental agency or official to perform a duty that is ministerial in nature, only. They may not order the specific performance of discretionary duties.

In fact, the Court of Appeals has previously recognized this very principle:

> Another compelling reason exists for our trepidation to interfere with administrative decisions of the Board of Commissioners. The Separation of Powers doctrine, U.S. Const. Arts. I, II, III, s 1, and Const. 1963, art. 3, s 2, mandates the legislative, executive and judicial branches be preserved distinct and independent of each other. Attorney General ex rel. *Cook v O'Neill*, 280 Mich 649; 274 NW 445 (1937). The Board of Commissioners have constitutionally been granted legislative and administrative powers and duties as provided by law. Const. 1963, art. 7, s 8. This power has been further implemented by legislation granting the Board the power to appropriate money and manage county affairs. MCL 46.11. The judiciary will not control the discretion of administrative bodies acting within the limits vested in them by law, unless the action is so capricious and arbitrary as to evidence a total failure to exercise discretion. *Bischoff v County of Wayne*, 320 Mich 376; 31 NW2d 798 (1948). [*Brownstown Tp v Wayne Cnty*, 68 Mich App 244, 251–252; 242 NW2d 538 (1976).]

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Michigan Courts are not in the business of planning, ordering, and monitoring how a road commission or any other public body designs and builds its culverts (or any other structure or system). How to build and maintain a road and its appurtenances is within the Road Commission's sole discretion. And all maintenance and repairs within the right-of-way are exactly that: discretionary (i.e., not ministerial).[47] Therefore, claimants cannot sue Road Commissions (or other public bodies) to have a specific modification performed.[48] Unlike the cases from this Court cited by the Court of Appeals, Plaintiffs here do not seek to enforce any specific statutory right. In such an instance, injunctive relief based on an underlying alleged tort is not available.

To obtain the "extraordinary remedy" of mandamus, "the plaintiff bears the burden of showing that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result." *Taxpayers for Michigan Constitutional Govt v Dept of Tech, Mgt & Budget*, 508 Mich 48, 81–82; 972 NW2d 738 (2021). "A ministerial act is one in which 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." *Id.*, quoting *Hillsdale Cnty Senior Servs, Inc v Hillsdale Cnty*, 494 Mich 46, 58 n 11, 832 NW2d 728 (2013). "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

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[47] And, again, because Plaintiffs are asking for a public body to pay for certain modifications, this request is really no different from monetary damages for tort.

[48] Under the Court of Appeals decision, however, road commissions and other public entities in this State may soon find they are being hailed into court with a multitude of similar requests. For example, every time a private citizen does not like the outcome of the vote of the board, he or she can file for an injunction.

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reposed in administrative bodies." *Teasel v Dept of Mental Health*, 419 Mich 390, 409-10; 355 NW2d 75 (1984).

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

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

Plaintiffs have not pointed to any statute creating the right to have the drainage system reverted to how it existed prior to the 2015 modifications following installation of the bike path. And none exists. In fact, MCL 224.19 addresses the powers and duties of the Board of County Road Commission, and provides in pertinent part:

> (1) 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*. [Emphases added.]

In other words, the Road Commission's actions regarding how it constructs and maintains the right-of-way is discretionary. See Section II.C.3 below. Plaintiffs simply have not (and cannot) point to any "right" entitling them to this relief.[49]

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[49] Plaintiffs did not plead inverse condemnation in Circuit Court—nor did they ask the Court for leave to amend their Complaint to add this claim. And the remedy for such a claim is monetary damages (i.e., "just compensation"). US Const amend. V; Const. 1963, art. 10, § 2; *Hinojosa v Dept of Nat Res*, 263 Mich App 537, 548; 688 NW2d 550 (2004) (party must prove government's actions were a substantial cause of the decline in "property *value*"). See also *Gym 24/7 Fitness, LLC v State*, ___Mich App___; ____NW2d ___ (Docket No. 355148), at 9, quoting *Cedar Point Nursery v Hassid*, 141 S Ct 2063, 2071; 210 L Ed 2d 369 (2021) (physical

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

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

Likewise, Plaintiffs have not asserted that the Road Commission was under any clear legal duty to take any specific act regarding the drainage system. The Road Commission is vested with the *discretion* to build culverts and maintain the right of way. MCL 224.19; MCL 224.21. It does not have a duty to do so in the specific way as demanded by Plaintiffs (or in any specific manner). Plaintiffs' request is also nonsensical because it seeks to have the Road Commission somehow revert to a system developed prior to the installation of the bicycle path. Assuming this were even possible, the Road Commission has no *duty* to act upon its discretionary authority in the way requested by Plaintiffs and—even if the claim were timely—Plaintiffs cannot prevail in obtaining the injunctive relief sought.[50]

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appropriations such as repeated flooding as a result of building a dam "constitute the clearest sort of taking, and we assess them using a simple, per se rule: The government must pay for what it takes.").

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

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

Finally, a writ of mandamus is inappropriate based on Plaintiffs' allegations because the act to be compelled must be "ministerial." An act is "ministerial" in nature if it is "prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 439; 722 NW2d 243 (2006). In this case, MCL 224.19 provides, in part, that the "board *may* construct bridges and culverts on the line of the road, and repair and maintain roads, bridges, and culverts." In other words, this section affords discretion to the Road Commission. See *Warda v City Council*, 472 Mich 326, 336-337; 696 NW2d 671 (2005) (where "a statute empowers a governmental agency to undertake a discretionary decision, and provides no limits to guide either the agency's exercise of that discretion or the judiciary's review of that exercise, the decision is not subject to judicial review absent an allegation that the exercise of that discretion was unconstitutional."). See also *Township of Canton v Wayne Co Rd Comm*, 141 Mich App 322, 325; 367 NW2d 385 (1985).[51]

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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.* **There has not been any claim alleged or pleaded that would even begin to satisfy these requirements**. Here, the Road Commission modified the drainage system pursuant to its authority under MCL 224.19. And no constitutional claims were ever raised before the Circuit Court. Accordingly, injunctive relief is not available or appropriate.

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

> 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

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Again, in Count III, Plaintiffs allege that the alleged trespass-nuisance "cannot be remedied by money damages alone and only be remedied by injunctive relief requiring Defendant to restore the drainage that existed prior to the changes the Defendant made as part of its bike path installation in 2013 and 2015." Amd. Complaint, ¶28; Appellant's App'x, 027A. However, the methods a road commission employs to maintain the roads, bridges, and culverts under its jurisdiction are left to the discretion of the road commission and this discretion makes mandamus inappropriate. Even if their claims were timely (again, which they are not), Plaintiffs' request for injunctive relief to abate a "trespass nuisance" is neither appropriate nor available.[52]

It's important to note again what Plaintiffs are asking this Court to approve: Plaintiffs are requesting that the Road Commission, a governmental agency, be forced to perform certain discretionary duties in a specific manner as a remedy for an alleged tort. Specifically, Plaintiffs seek injunctive relief mandating that the Road Commission restore the drainage system that existed prior to the installation of the bike path. Amd. Complaint ⁋ 28, Appellant's App'x 027A. And, in the face of such a request, the Court of Appeals has held that Plaintiffs' claim not only may go forward, but that Plaintiffs can avoid governmental immunity all together if this is the form of their requested

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> 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.]

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

relief. The Court of Appeals is plainly incorrect, and its decision is contrary to decades of well-reasoned jurisprudence of this Court.

The contours of this request are the functional equivalent of a writ of mandamus. And, because none of the required prerequisites to obtain this relief can be satisfied, the Road Commission is entitled to dismissal.

CONCLUSION

This Court should vacate the entire opinion of the Court of Appeals and find that a claim under the sewage disposal system event exception accrues when the alleged wrongful act and harm first occur, as is the case in any other like incident not pursued under the GTLA exception. This Court should further reaffirm its prior determination that there is no trespass nuisance exception to the GTLA, regardless of the specific remedy sought. Finally, this Court should clarify that injunctive relief will not lie to compel the discretionary acts of any other governmental department under longstanding and well-founded Michigan law, and nothing about seeking to compel discretionary acts as a remedy for an alleged tort changes this conclusion.

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RELIEF REQUESTED

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

Respectfully submitted,

/s/ *William L. Henn*
William L. Henn (P61132)
Andrea S. Nester (P76879)
HENN LESPERANCE PLC
Attorneys for Defendant
32 Market Ave., SW, Suite 400
Grand Rapids, MI 49503
(616) 551-1611
wlh@hennlesperance.com
asn@hennlesperance.com

Date: July 6, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 15,777 countable words as calculated by the word processing document used in its preparation. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

Respectfully submitted,

/s/ *William L. Henn*
William L. Henn (P61132)
Andrea S. Nester (P76879)
HENN LESPERANCE PLC
Attorneys for Defendant
32 Market Ave., SW, Suite 400
Grand Rapids, MI 49503
(616) 551-1611
wlh@hennlesperance.com
asn@hennlesperance.com

Dated: July 6, 2022