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STATE OF MICHIGAN
IN THE SUPREME COURT

SUNRISE RESORT, INC., a Michigan corporation, GREGORY P. SOMERS, MELISSA L. SOMERS, and KARL BERAKOVICH,

Plaintiffs-Respondents,

v.

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendant-Applicant.

Supreme Court No.: 163949

Court of Appeals Case No.: 354540
Circuit Court Case No.: 20-8790-ND

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RESPONSE OF SUNRISE RESORT ASSOCIATION, *et al.*, TO CHEBOYGAN COUNTY ROAD COMMISSION'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Index of Authorities ii

Statement of Jurisdiction iv

Counter-Statement of Questions Presented v

Introduction 1

Counter-Statement of Facts 4

Argument 9

I. Plaintiffs' statutory claim pursuant to the "Sewage Disposal System Event" Act, MCL §§ 691.1416 – 691.1419, ("SDSE Act"), accrued at the time of the "event" in 2018, so that Plaintiffs brought their 2020 Complaint within the applicable statute of limitations. 9

A. Standards of Review 9

B. The SDSE Act defines the accrual of a cause of action pursuant to the Act as being the occurrence of each "event" of an SDS backup or overflow. 10

C. The *Froling* "continuing wrongs" doctrine is simply not applicable to this type of case, as this Court recently recognized in *Haney*. 15

II. Plaintiffs' request for injunctive relief is expressly permitted by the SDSE Act and is not prohibited by the doctrines of immunity or mandamus. 16

A. Standards of Review 16

B. The SDSE Act permits requests for injunctive relief. 16

C. *Pohutski* did not eliminate injunctive relief as an exception to governmental immunity for trespass-nuisance claims. 17

D. Plaintiffs are not seeking a writ of mandamus, where Defendant CCRC has no discretion to wrongfully flood Plaintiffs' properties. 18

Relief Requested 22

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INDEX OF AUTHORITIES

Cases:

Badeen v PAR, Inc, 496 Mich 75, 81, 853 NW2d 303 (2014).....11

Beals v Michigan, 497 Mich 363, 370; 871 NW2d 5 (2015) 10

Bennett v Eaton County, 340 Mich 330; 65 NW2d 794 (1954) 20, 21

Connelly v Paul Ruddy's Equip Repair & Serv Co, 388 Mich 146; 200 NW2d 70 (1972) 13, 14

Dextrom v Wexford Co, 287 Mich App 406; 789 NW2d 211 (2010).....10

Henry v Dow Chem Co, 319 Mich App 704; 905 NW2d 422 (2017) 13

In re Reliability Plans of Elec Utilities, 505 Mich 97, 118; 949 NW2d 73 (2020) ……..10

Lash v City of Traverse City, 479 Mich 180; 735 NW2d 628 (2007) 2, 18, 19

Marilyn Froling Rev Liv Tr v Bloomfield Hills Country Club, 283 Mich App 264; 769 NW2d 234 (2009) 3, 8, 15, 20

Michigan Ass'n of Home Builders v City of Troy, 504 Mich 204; 934 NW2d 713 (2019) 11, 18, 19

Miner v Ogemaw County Road Commission, -- F Supp 3d -- (ED Mich, March 29, 2022) 19

Morley v Twp of Bangor, *unpublished*, Mich Ct App Op No 340636 (Apr 25, 2019) 19

Nawrocki v Macomb Co Rd Comm, 463 Mich 143; 615 NW2d 702 (2000).....8

Odom v Wayne Co, 482 Mich 459, 466; 760 NW2d 217 (2008) 10

Pohutski v City of Allen Park, 465 Mich 675; 641 NW2d 219 (2002).....2, 9, 11, 17, 18

Stephens v Dixon, 449 Mich 531; 536 NW2d 755 (1995).....13

Stephens v Worden Ins Agency, LLC, 307 Mich App 220; 859 NW2d 723 (2014) 10

Stringwell v Ann Arbor Public School Dist, 262 Mich App 709; 686 NW2d 825 (2004) 21

Township of Fraser v Haney, Mich Supr Ct Op No 160991 (Feb 8, 2022) ....._____

Trentadue v Buckler Automatic Lawn Sprinkler Co, 479 Mich 378; 738 NW2d 664 (2007) 13

Willett v Charter Twp of Waterford, 271 Mich App 38; 718 NW2d 386 (2006). 11, 12

Sweeney v Bird et al, 293 Mich 624; 292 NW 506 (1961) 21

Statutes:

MCL § 691.1416 ..... *passim*

MCL § 691.1417 ..... *passim*

MCL § 691.1418 17

MCL § 691.1419 .....8, 10, 11

MCL § 600.5805 .....9, 13, 15

MCL § 600.5827 13

MCL § 224.19 20

MCL § 125.1522 19

MCL § 15.602(2) 18

Court Rules:

MCR 2.116(C)(7).....10, 21

MCR 3.310.....17, 18, 19

MCR 2.605(A)(1) 19

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STATEMENT OF JURISDICTION

Plaintiffs-Respondents concur in Defendant-Applicant's Statement of Jurisdiction.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Did Plaintiffs' statutory claim pursuant to the "Sewage Disposal System Event" Act, MCL §§ 691.1416 – 691.1419, ("SDSE Act"), accrue at the time of the "event" in 2018, so that Plaintiffs brought their 2020 Complaint within the applicable statute of limitations?

Plaintiffs answer: Yes.

Defendant answers: No.

The Trial Court answered: No.

The Court of Appeals answered: Yes.

II. Is Plaintiffs' request for injunctive relief expressly permitted by the SDSE Act and not prohibited by the doctrines of immunity or mandamus?

Plaintiffs answer: Yes.

Defendant answers: No.

The Trial Court answered: No.

The Court of Appeals answered: Yes.

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INTRODUCTION

Michigan's Sewage Disposal System Event Act, MCL §§ 691.1416 – 691.1419, (the "SDSE Act") provides a straight-forward statutory remedy for property owners damaged by the combination of a sewage disposal system DEFECT with a sewage disposal system EVENT. Both of these defined terms, among others, are necessary elements to assert a cause of action pursuant to the SDSE Act. Despite Defendant Cheboygan County Road Commission's ("Defendant CCRC") best efforts to ignore these defined terms and plain language of the SDSE Act, both these elements must be present before a cause of action accrues. Moreover, if both of these elements – together with the other elements required under the SDSE Act – are present, the SDSE Act also permits a property owner to seek injunctive relief to stop and prevent further damage from occurring.

By Defendant CCRC's reasoning, a government agency should be free to construct a defective sewage disposal system, be notified that it has constructed a defective sewage disposal system (after damage so minor that it would not even be worth the filing fee for a property owner to bring a lawsuit), wait a few years without taking any action to fix the defect, and then not only completely avoid liability for catastrophic damages to the property owner from the next event, but also evade responsibility for fixing the defect to prevent even more damages from occurring in the future. This cannot be the public policy that this Court wishes to endorse.

Indeed, this Court recently rejected such illogical reasoning (based on misapplications of the Court's holdings in *Garg* and *Marilyn Froling*, on which Defendant CCRC relies) in its recent decision, *Township of Fraser v Haney,* Mich Supr Ct Op No 160991 (Feb 8, 2022), ***Plaintiffs' Appendix,*** Exhibit A. In that case, the presence of hogs on a commercial property constituted a "wrong" as a zoning violation. This Court explained that the fact that hogs were present on the

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property in 2006 had nothing to do with the fact that the hogs were also present on the property "yesterday." The township could still bring a timely nuisance action because "any claims arising from the harms due to the hogs' presence yesterday could not have accrued until then." *Haney,* p 6. The "wrong" – a zoning ordinance violation – could accrue more than once and could even accrue "continually" each day as long as it existed. "[A] plaintiff's failure to timely sue on the first violation in a series does not grant a defendant immunity to keep committing wrongful acts of the same nature. A plaintiff is free to bring a new action each time a defendant commits a new violation." *Haney*, p 9 (citing 1A AMERICAN LAW OF TORTS (December 2021 update), § 5:33 ("The continuing tort theory does not apply when tortious instances, though similar, constitute distinctly separate transactions.")).

In the case at hand, the existence of a defect in a sewage disposal system is an ongoing "wrong" that is not somehow immunized simply because it is never repaired. **Each time the existing defect combines with a "sewage disposal system event," causing damage to a property owner, a new cause of action accrues under the plain language of the SDSE Act, and the damaged property owner may bring a claim.** As noted in *Haney*, "Defendants here are not free to continue committing zoning-ordinance violations simply because plaintiff did not bring an action against their first zoning violation. Whether Michigan recognizes the continuing-wrongs doctrine has no bearing on a plaintiff's ability to bring an action for claims that accrued within the statutory period of limitations." *Haney,* p 9. By the same reasoning, Defendant CCRC is not free to continue allowing a defective sewage disposal system to exist simply because these Plaintiffs did not immediately sue upon the happening of the most minimal damage. The SDSE Act and this Court's recent opinion in *Haney* require a different, more logical, result. That result is to deny Defendant CCRC's Application for Leave and to summarily affirm the Court of Appeals' decision

that Plaintiffs timely brought their Complaint in 2020 after the 2018 event, and they are permitted to seek injunctive relief to prevent the same wrongful acts from occurring in the future.

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COUNTER-STATEMENT OF FACTS

Plaintiffs, SUNRISE RESORT, INC., ("Sunrise"),[1] GREGORY and MELISSA SOMERS, ("the Somers"), and KARL BERAKOVICH, ("Mr. Berakovich"), each own real property along West Burt Lake Road ("the Road") in Cheboygan County, on the shore of Burt Lake. The 3 parcels of property all adjoin each other on the east side of the Road, between the Road and the lakeshore. Each property is accessed by a private driveway connecting to the Road. **Applicant's Appendix,** pp. 023A – 028A, Plaintiffs' Amended Complaint, ("Complaint"), ¶¶ 1 – 4.

Defendant, Cheboygan County Road Commission, ("CCRC"), is the government entity responsible for a public storm water drainage system (the "Drainage System") running along and under the Road. A large part of that Drainage System near Plaintiffs' properties was originally a 24-inch culvert placed underneath the Road in 1958 to alter natural drainage routes from areas north and west of the Road (and Plaintiffs' properties) under the road bed to protect the Road. The Drainage System re-directs the water flow from the northwest to flow southeast through Plaintiffs' properties and into Burt Lake. Smaller, 15-inch culverts also exist under each of Plaintiffs' driveways with the goal to protect the driveways from the re-directed flow of water. Complaint, ¶¶ 5 – 8.

In 2013/2014, Cheboygan County constructed a paved bicycle trail ("the Bike Trail") along the west side of the Road. At that time, the CCRC made modifications to the Drainage System to protect the Bike Trail as well as the Road. Not long after completion in 2014, the Bike Trail washed out in several places, including just south of the 24-inch culvert running under the Road onto Plaintiffs' properties. The CCRC made further modifications to the Drainage System, which

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[1] Sunrise is comprised of friends, Richard and Moira Keefer and William and Cathy Perry, for the purpose of owning and sharing the lakefront vacation property.

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appeared to better protect the Bike Trail, but which significantly increased the volume and speed of the waterflow onto and across Plaintiffs' properties. In 2015, minor water damage occurred on Plaintiffs' property, causing a member of Sunrise to write to the CCRC in 2016, stating that Plaintiffs' believed the 2015 Drainage System modifications apparently caused the 2015 minor damage and warning that future problems caused by the Drainage System were likely. Complaint, ¶¶ 9 – 12.

On May 4, 2018, during extremely heavy rains, the Drainage System backed up and overflowed, resulting in a massive rush of water running through the Plaintiffs' 3 properties. The waterflow partially destroyed the 3 driveways, leaving canyon-like trenches behind, washed out/destroyed vegetation and electrical equipment, and damaged Plaintiffs' cottages with piles of washed-out sediment and debris. Complaint, ¶ 13.

After notifying the CCRC on July 15, 2018, of the May 4 event and resulting damage and receiving no relief, Sunrise, the Somers, and Mr. Berakovich joined together as Plaintiffs and filed their Complaint in the Cheboygan County Circuit Court on February 20, 2020. The original Complaint alleged 3 counts: Negligence (based on MCL § 691.1417(3)), Gross Negligence, and Injunctive Relief to Abate Trespass/Nuisance. With its Answer to the Complaint on April 20, 2020, the CCRC filed a Motion for Summary Disposition of the entire Complaint, prompting Plaintiffs to file their First Amended Complaint on April 27, 2020. The First Amended Complaint set forth the same 3 Counts, retitling Count I: Count I – Claim Pursuant to MCL 691.1417(3); Count II – Gross Negligence; and Count III – Injunctive Relief to Abate Trespass/Nuisance.

On May 13, 2020, the CCRC again filed an Answer together with Defendant's Second Motion for Summary Disposition ("CCRC Motion"). **Applicant's Appendix,** pp 028A-048A, CCRC Motion for SD. In its Motion, Defendant contended that the applicable 3-year statute of

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limitations barred all Plaintiffs' Count I claims, arguing that Plaintiffs' claims accrued with the 2015 damage, and there could be only one claim per defect in a sewage disposal system. Defendant also argued that governmental immunity barred Plaintiffs' claim for Gross Negligence in Count II. Finally, Defendant argued that money damages under the SDSE Act were the sole remedy available to Plaintiffs and the statute of limitations barred the SDSE claim, precluding any injunctive relief.

Plaintiffs responded that the SDSE Act defined an SDS "event" as the accrual of a cause of action, and the May 4, 2018 "event" fell within the statute of limitations for the February 2020 filing of the Complaint. Moreover, Plaintiffs had a valid claim for injunctive relief to prevent the likely occurrence of future SDS events causing damage to Plaintiffs' properties. **Applicant's Appendix,** pp 049A-055A, Pltfs.' Response to CCRC Motion ("Response").

The trial court conducted a hearing on the CCRC Motion on June 15, 2020. The parties' arguments mirrored those in their briefs, and the court took the matter under advisement. **Applicant's Appendix,** pp 061A-086A, Motion Hrg. Transcript.

On July 30, 2020, the trial court issued its Opinion and Order. **Applicant's Appendix,** pp 011A-018A, Opinion and Order ("Opinion"). The court began its analysis with the principle that "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." (Opinion, p. 3, quoting *Nawrocki v Macomb Co Rd Comm,* 463 Mich 143, 158; 615 NW2d 702 (2000)). The court then properly determined the "sewage disposal system event" exception to governmental immunity ("SDSE Exception") set forth in MCL §§ 691.1416 – 691.1419, **Plaintiffs' Appendix,** Exhibit B, applied to this case. (Opinion, pp. 3 – 4). The court went on, however, to erroneously apply a "continuing wrongs" analysis based on *Froling*, 283 Mich App at 291, and determined that Plaintiffs' claims pursuant to the SDSE Act

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accrued in 2015, at the time of the minor damage. (Opinion, pp. 4 – 6). As a result, the court held that the 3-year statute of limitations found in MCL § 600.5805(1) and (2) barred Plaintiffs' claim filed on February 20, 2020. The court dismissed all Plaintiffs' Count I claims with prejudice. (Opinion, p. 6).[2]

The trial court further held that the *Pohutski* case entirely eliminated the "trespass-nuisance" exception to governmental immunity, and any claim pursuant to the SDSE Act was barred by the statute of limitations. The court then dismissed Plaintiffs' Count III with prejudice. (Opinion, pp. 6 – 7).[3] Plaintiffs appealed to the Court of Appeals, which reversed and remanded. **Applicant's Appendix,** pp 001A-010A, COA Opinion.

The Court of Appeals expressly recognized that a claim under the SDSE Act certainly is subject to the recognized accrual statute, MCL § 600.5857: "Under MCL 600.5857, the period of limitations runs from the time *the claim* accrues. A cause of action generally 'accrues when all of the elements of the cause of action have occurred and can be alleged in a proper complaint.'" ***Applicant's Appendix***, p. 005A. [Citations omitted.] The Court of Appeals then properly applied the accrual statute to the facts in this case:

> A plain reading of plaintiffs' complaint shows that it is premised on a specific, discrete backup event that occurred on May 4, 2018, and that plaintiffs are seeking to recover for damages that occurred only on that occasion. Because the event upon which plaintiffs' claim is based did not occur until 2018, and plaintiffs suffered no harm from that event until 2018, they could not have brought their claim any earlier. Therefore, plaintiffs' claim accrued in 2018.

---

[2] Plaintiffs agreed to dismiss their Count II – Gross Negligence voluntarily without prejudice after reviewing the CCRC Motion, but the trial court dismissed Count II with prejudice as part of its ruling on the Motion. (Opinion, p. 6).

[3] The trial court did not address Defendant CCRC's argument that Plaintiffs' Count III actually sought a writ of mandamus over Defendant's exercise of discretionary authority. The trial court based its decision on Count III on the elimination of the trespass-nuisance exception to governmental immunity and the court's analysis of the statute of limitations as applied to the SDSE Exception.

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Applicant's Appendix, p. 006A. The Court of Appeals then rejected Defendant CCRC's attempt to characterize this as a "continuing wrongs" case, concluding "that the abrogation of the continuing-wrongs doctrine has no relevance in this case," because the 2018 event was a discrete and separate occurrence from the 2015 incident.

The Court of Appeals additionally recognized that after *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), "our Supreme Court subsequently held that, even when 'a statutory private cause of action for monetary damages does not exist, a plaintiff may nonetheless maintain a cause of action for declaratory and equitable relief.' *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019); see also *Lash v Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007)." Accordingly, the Court of Appeals simply followed existing law set out by this Court in concluding that "governmental immunity does not bar a claim for an injunction to prevent future nuisance or a judgment to abate an existing nuisance." **Applicant's Appendix,** p. 008A.

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ARGUMENT

I. Plaintiffs' statutory claim pursuant to the "Sewage Disposal System Event" Act, MCL §§ 691.1416 – 691.1419, ("SDSE Act"), accrued at the time of the "event" in 2018, so that Plaintiffs brought their 2020 Complaint within the applicable statute of limitations.

A. Standards of Review

This Court reviews the applicability of governmental immunity as a question of law subject to de novo review on appeal. *Beals v Michigan,* 497 Mich 363, 370; 871 NW2d 5 (2015). This Court also reviews de novo questions of statutory interpretation. *In re Reliability Plans of Elec Utilities,* 505 Mich 97, 118; 949 NW2d 73 (2020).

A court may grant summary disposition under MCR 2.116(C)(7) if the moving party is entitled to "immunity granted by law." *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217, 221 (2008). A court may also grant summary disposition pursuant to MCR 2.116(C)(7) when undisputed facts establish that the plaintiff's claim is barred by the applicable statute of limitations. Generally, the burden is on the defendant who asserts the statute of limitations defense to prove facts that bring the case within the statute. *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 227; 859 NW2d 723, 728 (2014).

When reviewing a motion pursuant to subsection (C)(7), the court "must accept all well-pleaded allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211, 224 (2010). Further, the court must consider "any affidavits, depositions, admissions, or other documentary evidence" submitted. *Id.* at 429. In the case at hand, the trial court decided the CCRC Motion on the basis of the pleadings alone.

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B. The SDSE Act defines the accrual of a cause of action pursuant to the Act as being the occurrence of each "event" of an SDS backup or overflow.

Appellate courts review de novo questions of statutory interpretation. *Badeen v PAR, Inc*, 496 Mich 75, 81, 853 NW2d 303, 306 (2014).

> "The role of this Court in interpreting statutory language is to 'ascertain the legislative intent that may reasonably be inferred from the words in a statute.'" "The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the Legislature's intent." "'[W]here the statutory language is clear and unambiguous, the statute must be applied as written.'" "'[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.'" Neither will this Court "rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature."

Michigan Ass'n of Home Builders v City of Troy, 504 Mich 204, 212–13, 934 NW2d 713, 718 (2019) (internal citations omitted).

> "We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain Legislative intent only if the statutory language is ambiguous." *Pohutski*, [465 Mich App] at 683. . . .. A statute should not be interpreted to render any statutory language surplusage or nugatory. *Id.* at 684, 641 N.W.2d 219.

Willett v Charter Twp of Waterford, 271 Mich App 38, 48, 718 NW2d 386, 393 (2006).

> The Legislature promulgated MCL 691.1416 through MCL 691.1419 "[t]o afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages ... **caused by a sewage disposal system event** ...." MCL 691.1417(1). Under MCL 691.1417(2), "[a] governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency." **A "sewage disposal system event" is defined, in pertinent part, as "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k).** An "appropriate governmental agency" is defined as "a governmental agency that, at the time of the sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage ...." MCL 691.1416(b).

Id. (emphasis added).

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MCL § 691.1417(3) provides that a "claimant may seek compensation" – i.e., a cause of action under the Act accrues – only if the claimant can show "that all of the following **existed at the time of the event**:"

> (a) The governmental agency was an appropriate governmental agency.
>
> (b) The sewage disposal system had a defect.
>
> (c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.
>
> (d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
>
> (e) The defect was a substantial proximate cause of the event and the property damage or physical injury.

A "defect" is defined as "a construction, design, maintenance, operation, or repair defect." MCL § 691.1416(e). A "defect" alone resulting in damage, however, is not sufficient to create a cause of action. **For accrual of a claim, the SDSE Act plainly requires a defect PLUS government agency knowledge and a failure to correct PLUS an "event" of backup or overflow of a sewage disposal system, all combined to result in damage to a plaintiff.** Accordingly, all of the **elements** necessary to plead a cause of action do not exist until the **element** of an "event" – the overflow or backup – occurs, regardless of how long the "defect" may have existed. Moreover, another "event" gives rise to another cause of action. As noted in *Willett*, 271 Mich App at 54:

> The definition of "event" does not exclude a backup caused by an effort to remedy (or to find the cause of) a prior or existing backup. MCL 691.1416(k). The trial court therefore erred in concluding as a matter of law that the alleged additional backups, allegedly caused by opening manhole covers, were not "events."

Stated another way, the "wrong" giving rise to a claim under the SDSE Act is NOT the "defect." The defect is only one part of the "wrong." The applicable statute of limitations in this

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case is MCL 600.5805(10), which states that "the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property." The time of accrual for claims subject to the limitations period of MCL § 600.5805(10) is generally defined by MCL § 600.5827, which provides that the limitations period begins to run "from the time the claim accrues," and "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." See also *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 388; 738 NW2d 664, 669–70 (2007).

> 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, 738 NW2d 664 (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.**

Henry v Dow Chem Co, 319 Mich App 704, 733–34; 905 NW2d 422, 437–38 (2017), *rev'd in part,* [COA dissent of Gadola, J., adopted], 501 Mich 965; 905 NW2d 601 (2018) (emphasis added).

Defendant CCRC argues that the word "event" in the SDSE Act means the same thing as "injury" or "damage." The CCRC's argument is illogical for 3 simple reasons:

1. The CCRC's interpretation renders the word "event" in the statute nugatory (meaningless) and surplusage. There would be no reason to use the word "event" at all when the statute already uses "injury" and "damage."

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2. The CCRC's word substitution makes the plain language of the SDSE Act nonsensical:

"(e) The defect was a substantial proximate cause of the ***damage or injury*** and the property damage or physical injury."

3. It ignores the specific definition for an SDS "event" set forth in the statute:

MCL § 691.1416:

> (k) **"Sewage disposal system event" or "event" means the overflow or backup of a sewage disposal system onto real property.** An overflow or backup is not a sewage disposal system event if any of the following was a substantial proximate cause of the overflow or backup:
>
> (i) An obstruction in a service lead that was not caused by a governmental agency.
> (ii) A connection to the sewage disposal system on the affected property, including, but not limited to, a sump system, building drain, surface drain, gutter, or downspout.
> (iii) An act of war, whether the war is declared or undeclared, or an act of terrorism. [Emphasis added.]

In short, the SDSE Act does not tie the accrual of each cause of action to ***a defect***; the Act ties each cause of action to ***an event.*** A cause of action accrues when all of the elements required for that claim exist and can be pled in a Complaint. *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972), The SDSE Act requires 6 elements to be present for a cause of action to accrue (and stated alternatively, a cause of action exists each time the 6 elements are present):

(a) An appropriate government agency;

(b) An SDS defect;

(c) Knowledge or reason to know of defect;

(d) Failure to repair / correct /remedy;

(e) An event of SDS backup or overflow onto real property; and

(f) Property damage or physical injury.

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As set forth in the plain language of MCL § 691.1417(3), the defect must be combined with government entity knowledge and failure to correct, as well as the ultimate occurrence of a backup or overflow of the system – a "sewage disposal system event" – to comprise an actionable "wrong" once damages – harm to the plaintiff – occur. Because an "event" is the final "piece" of the wrong that must occur for a cause of action under the SDSE Act to accrue, each new "event" – combined with the other elements required by the statute – gives rise to a new cause of action and "restarts the clock" on the statute of limitations. In the instant case, the indisputable SDS Event of May 4, 2018, created a cause of action accruing on that date, from which the 3-year statute of limitations of MCL 600.5805(10), began to run. Consequently, Plaintiffs timely filed their Complaint on February 20, 2020.[4]

C. The *Froling* "continuing wrongs" doctrine is simply not applicable to this case, as this Court recently recognized in *Haney*.

The *Froling* Court held:

> Subsequent claims of additional harm caused by one act do not start the claim previously accrued. For purposes of accrual, there need only be one wrong and one injury to begin the running of the statute of limitations. In sum, the accrual of the claim occurs when both the act and the injury first occur, that is when the 'wrong is done'.

Froling, 283 Mich App at 291. Defendant CCRC has twisted this rule into its "one claim per defect" argument, contending that, for each defect in a sewage disposal system, there can be only one claim brought when the first, most insignificant damage occurs to property, and, thereafter,

[4] Even if the statute of limitations does not run as to each new SDSE, the event giving rising to the current cause of action occurred on May 14, 2018, at which time all elements of an "event" existed pursuant to MCL 691.1417(3). The minor damage in 2015 served as nothing other than **notice** to the CCRC to consider whether modifications to the Drainage System had indeed created a problem for Plaintiffs' properties. Plaintiffs (and the court) could only speculate, however, because the trial court dismissed all Plaintiffs' claims without permitting any discovery at all.

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the defect can continue to exist and continue causing new damages, but the property owner will never again have any remedy.

The "continuing wrongs" doctrine, however, has no application to claims involving discrete and separate tortious acts or omissions. *Kincaid v Cardwell*, 300 Mich App 513, 525, 834 NW2d 122, 129 (2013). The SDSE Act plainly defines its SDS Events as discrete and separate occurrences, each being a distinct element giving rise to a new cause of action. This Court recently confirmed this and rejected the illogical "one claim per defect" type of reasoning, in its recent decision in *Haney*. As discussed above (in Grounds to Deny Leave), this Court held: "[A] plaintiff's failure to timely sue on the first violation in a series does not grant a defendant immunity to keep committing wrongful acts of the same nature. A plaintiff is free to bring a new action each time a defendant commits a new violation." *Haney*, p 9 (citing 1A AMERICAN LAW OF TORTS (December 2021 update), § 5:33 ("The continuing tort theory does not apply when tortious instances, though similar, constitute distinctly separate transactions.")).

As also noted in *Haney*, "Defendants here are not free to continue committing zoning-ordinance violations simply because plaintiff did not bring an action against their first zoning violation. Whether Michigan recognizes the continuing-wrongs doctrine has no bearing on a plaintiff's ability to bring an action for claims that accrued within the statutory period of limitations." *Haney,* p 9. By the same reasoning, Defendant CCRC is not free to continue allowing a defective sewage disposal system to exist simply because these Plaintiffs did not immediately sue upon the happening of the most minimal damage. The SDSE Act and this Court's recent opinion in *Haney* require a different, more logical, result: Each time the existing defect combines with a "sewage disposal system event," causing damage to a property owner, a new cause of action accrues under the plain language of the SDSE Act, and the damaged property owner may bring a

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claim. The alternative would be for property owners to run to the courthouse on every drop of water that falls on their property from a sewage disposal system, in order to preserve their right to a claim. Flooding the courthouses in this way is not good public policy and it is precisely why the legislature tied the accrual of a cause of action under the SDSE Act to the happening of a "sewage disposal system event" significant enough to warrant an exception to governmental immunity. Without such an "event," as defined in the statute, there is no cause of action that accrues.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY DISPOSITION TO DEFENDANT ON PLAINTIFFS' COUNT III, WHERE PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF IS PERMITTED BY THE SDSE ACT AND IS NOT PROHIBITED BY THE *POHUTSKI* DECISION.

A. Standards of Review

The standards of review set forth in Argument Section I(A) apply here.

B. The SDSE Act permits requests for injunctive relief.

MCL § 691.1417(2) provides:

> 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 legal theory.

The trial court interpreted this section to mean that a plaintiff can only seek compensatory damages under MCL § 691.1417. (Opinion, p. 7). MCL § 691.1418(4), however, 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.** [Emphasis added.]

MCR 3.310 provides for injunctive relief in any action before the circuit court. While the SDSE explicitly provides for economic damages as a remedy for past damages/injuries, nothing in the statute prohibits injunctive relief to **stop** current wrongs/injuries or **prevent** likely future

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injuries. "Relief for damages or injuries caused by" an SDSE is a remedy for something that occurred **in the past.** The injunctive relief sought by Plaintiffs is to prevent a new SDSE from occurring **in the future.** The Michigan Court Rules in MCR 3.310 permit injunctive relief, which the SDSE plainly recognizes above. Accordingly, the SDSE does not prevent Plaintiffs' claim for injunctive relief; to the contrary, it expressly appears to allow it.

Moreover, the Michigan Supreme Court has now recognized twice that the *Pohutski*[5] decision governs plaintiffs seeking **compensatory damages** for torts, not injunctive relief. Defendant CCRC's attempts to factually distinguish *Lash v City of Traverse City*, 479 Mich 180; 735 NW2d 628 (2007), and *Michigan Ass'n of Home Builders v City of Troy*, 504 Mich 204, 224–26; 934 NW2d 713, 725 (2019),[6] are unavailing when it comes to that simple premise of law.

C. *Pohutski* did not eliminate injunctive relief as an exception to governmental immunity for trespass-nuisance claims.

In the Michigan Supreme Court case of *Lash v City of Traverse City*, 479 Mich 180; 735 NW2d 628 (2007), the plaintiff sued Traverse City for monetary damages, alleging that the city denied him employment because he did not meet the city's residency requirement and the residency requirement violated MCL § 15.602(2) (limits on residency requirements for public employees). *Lash*, 479 Mich at 182-83. The Supreme Court determined that the city's residency requirement did violate MCL § 15.602(2); however, the Court also held that nothing in that statute permitted the plaintiff to maintain a private cause of action for damages against the city. *Lash*, 479 Mich at 183. In response to the plaintiff's contention that a private cause of action for damages was the only mechanism to enforce the statute, the Court opined that, despite governmental immunity:

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5 *Pohutski v City of Allen Park,* 465 Mich 675; 641 NW2d 219 (2002).

6 See also *Morley v Twp of Bangor*, unpublished per curiam opinion of the Court of Appeals, issued Apr 25, 2019 (Docket No 340636) pp 6-7 (applying *Lash* in the context of a trespass-nuisance claim), attached as Exhibit 8 to Plaintiffs' Brief on Appeal.

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> [P]laintiff's claim that a private cause of action for monetary damages is the only mechanism by which the statute can be enforced is incorrect. 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 638.

The Supreme Court also recently confirmed its *Lash* analysis:

> Even though a statutory private cause of action for monetary damages does not exist [due to governmental immunity], a plaintiff may nonetheless maintain a cause of action for declaratory and equitable relief. In *Lash v City of Traverse City*, 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. . . . 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 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 Ass'n of Home Builders v City of Troy, 504 Mich 204, 224–26; 934 NW2d 713, 725 (2019). See also **Plaintiffs' Appendix,** Exhibit C, *Morley v Twp of Bangor*, unpublished per curiam opinion of the Court of Appeals, issued Apr 25, 2019 (Docket No 340636) pp 6-7. (applying *Lash* in the context of a trespass-nuisance claim).

The United States District Court, Eastern District, in *Miner v Ogemaw County Road Commission,* (ED Mich, March 29, 2022), at *7, **Plaintiffs' Appendix,** Exhibit D, recently recognized and relied on *Lash* and *Morley*, finding that where the Ogemaw County Road Commission installed a drain culvert under a roadway, apparently diverting water onto and flooding the plaintiff's land, governmental immunity posed no bar to the plaintiff seeking injunctive relief:

> Yet "Plaintiff could enforce the statute by seeking injunctive relief pursuant to [Michigan Compiled Laws § 3.310]," or declaratory relief pursuant to [Michigan

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> Compiled Laws § 2.605(A)(1)]." *Lash v. Traverse City*, 479 Mich. 180, 735 N.W.2d 628, 638 (2007); *see also Morley v. Twp. of Bangor*, No. 340636, 2019 WL 1867640, at *7 (Mich. Ct. App. Apr. 25, 2019) (unpublished) (per curiam) ("An action to abate a nuisance is 'equitable in nature.' " (quoting *Ypsilanti Charter Twp. v. Kircher*, 281 Mich.App. 251, 761 N.W.2d 761 (2008))). In this way, Defendant Ogemaw is not immune from Plaintiff's trespass claim if he seeks declaratory or injunctive relief.

Accordingly, Plaintiffs can maintain an action seeking injunctive relief to abate and prevent the trespass-nuisance of Defendant CCRC in redirecting and concentrating surface waters onto Plaintiffs' properties, and the trial court erred in dismissing Plaintiffs' Count III with prejudice.

D. Plaintiffs are not seeking a writ of mandamus, where Defendant CCRC has no discretion to wrongfully flood Plaintiffs' properties.

Defendant CCRC's argument that Plaintiffs seek a disguised "writ of mandamus" is entirely misplaced. Indeed, to make this argument, the CCRC cryptically states, "The **contours** of this [injunctive relief] request are the **functional** equivalent of a writ of mandamus." (Def. Brief, p 46) (emphasis added). Stated another way, the CCRC is apparently aware that Plaintiffs' request for injunctive relief is actually the **opposite** of a writ of mandamus. A writ of mandamus is a court order requiring an executive-branch official to do something that is a **clearly-defined duty, authorized by law.** Plaintiffs in this case seek an injunction requiring the CCRC to stop doing something – diverting floods of water onto Plaintiffs' properties – that the CCRC has **no legal authority to do** – destroy Plaintiffs' properties. This is not a matter of Plaintiffs asking the court to direct the CCRC to choose **one permissible, discretionary option** over a second permissible, discretionary option. Plaintiffs are asking the court to enjoin the CCRC from acting on an **illegal option** – further damaging and destroying the Plaintiffs' properties.

Plaintiffs are not requesting to enjoin any lawful, discretionary authority or duty of the CCRC. Rather, Plaintiffs request injunctive relief to stop and prevent conduct that Defendant has no authority to engage in. Indeed, if this Court affirms summary disposition as to Plaintiffs' claim

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for monetary damages based on *Froling*'s "continuing wrongs" doctrine, Plaintiffs are left with no ability to protect their property from current waterflow damage and future SDS Events, other than injunctive relief.

Pursuant to MCL § 224.19(1), the Board of County Road Commissioners has the power (and duty) to "grade, drain, construct, gravel, shale, or macadamize a road under its control, make an improvement in the road, . . . extend and enlarge an improvement. . . . [or] construct bridges and culverts on the line of the road, and repair and maintain roads, bridges, and culverts." Nothing in the CCRC's statutory authority grants it the right to **divert, concentrate, or increase the flow of surface waters** to such an extent that it regularly overflows onto and floods the Plaintiffs' properties and literally imposes a servitude on those private properties. *See Bennett v Eaton County*, 340 Mich 330; 65 NW2d 794 (1954). Indeed, the Michigan Supreme Court in *Sweeney v Bird et al*, 293 Mich 624; 292 NW 506 (1961), held:

> The authority vested in the board of county road commissioners never gave them any authority to appropriate the freehold of plaintiff, a private citizen, and, if they have done so, he is entitled to an injunction to protect his premises either by the restoration of the same to the state in which they were prior to the action of the highway authorities or by the highway authorities taking action to procure a right of way for drainage across the premises of Stevens, or otherwise.

Defendant CCRC correctly states: "Plaintiffs do not have any clear legal right to any specific drainage design." (Def. Brief, p 48). Plaintiffs do, however, have a clear legal right – under the SDSE Act and *Bennett, supra* and *Sweeney, supra* – to not have Defendant CCRC continually flood their properties by allowing a known defect to sit and wait for more "sewage disposal system events" to come along and repeatedly damage Plaintiffs' property. Simply put, Defendant CCRC has no discretion to knowingly engage in wrongful conduct (i.e., refusing to fix a defect in a sewage disposal system that is known to have caused damage). Defendant CCRC

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certainly has discretionary options on how to fix the defect, but leaving the defect and continuing to flood Plaintiffs' properties is not a legitimate option.

Defendant CCRC also argues the substantive merits of any future injunctive relief, ignoring the significant issue that Plaintiffs have been denied any discovery to even begin to prove their case. The CCRC brought its Motion for Summary Disposition as a MCR 2.116(C)(7) challenge based on governmental immunity immediately after the filing of the Amended Complaint. Without any discovery whatsoever, summary disposition of the entirety of Plaintiffs' case on the merits was entirely premature and unjust. *Stringwell v Ann Arbor Public School Dist*, 262 Mich App 709, 714; 686 NW2d 825, 828 (2004).

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Plaintiffs Sunrise Resort, Inc., Gregory P. Somers, Melissa L. Somers, and Karl Berakovich respectfully request this Honorable Court:

A. Deny Defendant CCRC's Application for Leave to Appeal; and/or

B. Affirm the decision of the Court of Appeals; and/or

C. Grant such further or alternative relief as the Court determines to be just and equitable.

Respectfully submitted,

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Dated: July 27, 2022

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