STATE OF MICHIGAN
IN THE SUPREME COURT

APPLICATION FOR LEAVE TO APPEAL FROM
MICHIGAN COURT OF APPEALS

BEFORE: Ronayne Krause, P.J., and Cameron and Rick, JJ.

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

Plaintiffs-Appellees,

v

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendant-Appellant,

Supreme Court No. 163949

Court of Appeals No. 354540

Cheboygan Circuit Court No. 20-8790-ND

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

MICHIGAN ASSOCIATION OF COUNTY DRAIN COMMISSIONERS, MICHIGAN TOWNSHIPS ASSOCIATION, AND MICHIGAN ASSOCIATION OF COUNTIES

Stacy L. Hissong (P55922)
Stephen J. Rhodes (P40112)
Fahey Schultz Burzych Rhodes PLC
Attorneys for *Amici Curiae* MACDC, MTA, and MAC
4151 Okemos Road
Okemos, Michigan 48864
(517) 381-0100

Dated: August 2, 2022

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

This case concerns 2001 PA 222, MCL 691.1416 to MCL 691.1419 ("Act 222") of the governmental tort liability act ("GTLA"), which provides a narrow and exclusive remedy against a "governmental agency"[1] for a "sewage disposal system event." [2]

Plaintiffs Sunrise Resort Association, Inc., *et al.* ("Plaintiffs") filed an Act 222 complaint against Defendant Cheboygan County Road Commission (the "Road Commission"), essentially alleging that the Road Commission modified a drainage system in or before 2015, which caused some damage to Plaintiffs, and then "[o]n or about May 4th, 2018 the Plaintiffs' respective parcels of real estate sustained significant damage by way of erosion caused by an overflow and backup of Defendant's storm water drainage system . . . ." (App 025A; First Amended Complaint, ¶¶ 11–13).[3] The Circuit Court granted summary disposition under MCR 2.116(C)(7) (statute of limitations) in favor of the Road Commission.

---

[1] MCL 691.1416(b) defines "appropriate governmental agency" as "a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury"

[2] MCL 691.1416(k) states:

> "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.

[3] "App ___" refers to the Appendix to the Road Commission's application for leave to appeal.

On December 2, 2021, the Michigan Court of Appeals issued *Sunrise Resort Ass'n, Inc. v Cheboygan County Rd Comm*, ___ Mich App ___ ; ___ NW2d ___ (2021) (2021 WL 5750630), reversing the Circuit Court's grant of summary disposition in favor of the Road Commission, and essentially holding that (1) Plaintiffs' claim accrued in 2018 (rather than in 2015 when a prior incident occurred), so Plaintiffs timely filed their Complaint in 2020 under the three-year limitations period; and (2) injunctive relief is an available remedy.

On January 13, 2022, the Road Commission filed a timely application for leave to appeal ("App for Lv") to this Court. On February 10, 2022, Plaintiffs filed a response opposing the App for Lv ("Plaintiffs' Response"). On March 1, 2022, the Road Commission filed a reply.

On March 23, 2022, the Michigan Association of County Drain Commissioners ("MACDC") filed an *amicus curiae* brief in support of the Road Commission's App for Lv, focusing on the second issue indicated above (the availability of injunctive relief). On May 25, 2022, the Court issued an Order directing the Clerk to schedule oral argument on the application, and the parties to address two issues. The Court broadly restated the second issue as "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." The Order further states:

> Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

On July 6, 2022, the Road Commission filed a supplemental brief. On July 27, 2022, Plaintiffs filed a supplemental brief.

MACDC is now joined by the Michigan Townships Association ("MTA") and Michigan Association of Counties ("MAC") in filing this supplemental *amici curiae* brief in accordance with

this Court's May 25, 2022 Order. See also, MCR 7.312(H)(2); *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921).[4] MACDC, MTA and MAC concur with the Road Commission in asking this Court to grant its application for leave to appeal, and ultimately (or perhaps through a peremptory order under MCR 7.205(E)(2)) vacate the Court of Appeals' opinion, and articulate guiding principles to correct and clarify Michigan law. This brief attempts to avoid repetition and present new material for this Court's consideration.

[4] Pursuant to MCR 7.312(H)(4), MACDC, MTA, and MAC state that counsel for a party did not author this brief in whole or in part, and no such counsel or party or any other person other than MACDC contributed to the preparation and submission of this brief.

STATEMENT OF QUESTION PRESENTED

This Court's May 25, 2022 Order broadly restated the Road Commission's second issue as:

I. 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?

Road Commission answered:	Yes
Sunrise, *et al*. answered:	No
Circuit Court answered:	Yes
Court of Appeals answered:	No
Amici Curiae MACDC, MTA, and MAC answer:	Yes

INTRODUCTION

A. *Amici Curiae* MACDC, MTA, and MAC represent State-wide interests that are impacted by the Court of Appeals' decision.

MACDC is a Michigan-wide organization comprised of elected and appointed Drain Commissioners, Public Works Commissioners, and Water Resources Commissioners (collectively, "Drain Commissioners") from each of Michigan's 83 counties. Drain Commissioners are local officials charged with administering Michigan laws governing the construction and maintenance of drains, surface water and stormwater management, flood protection, and soil erosion and sedimentation control. Drain Commissioners are responsible for building, improving and maintaining billions of dollars' worth of essential drainage infrastructure to serve Michigan citizens. The MACDC is dedicated to protecting the public health, welfare and safety of Michigan's citizens, the environmental quality of their lands and waters, and the protection and restoration of Michigan's water resources. The MACDC pursues these goals by promoting its members' professional development and continuing education, as well as facilitating its members' involvement and representation in issues of common and public concern in Michigan's legislature and courts.

The MTA was formed in 1953, is now the largest community of local government officials in the state, and one of the largest in the nation. More than 99% of Michigan townships are MTA members. The MTA's member services include advocacy of township interests before state and federal lawmakers and decision-makers, in accordance with the MTA's mission to advance local democracy by fostering township leadership and public policy essential for a strong and vibrant Michigan.

The MAC was founded in 1898 and is the only state-wide organization dedicated to representing all county commissioners in Michigan. The MAC is the counties' voice at the state and federal level, supporting key issues affecting counties.

B. This case merits the Court's attention to correct and clarify the law concerning the scope of governmental immunity and the availability of injunctive relief.

MACDC, MTA, and MAC are particularly interested in the availability of injunctive relief in this type of case. The Court of Appeals stated that "[i]n this case, plaintiffs requested injunctive relief to avoid damages caused by a future sewage-disposal event," and then asserted (as if summarizing pre-existing law) that "injunctive relief is an available remedy" (App 009A; Slip Op., p 9). The Road Commission brought the issue to the Court's attention, and MACDC, as *amicus curiae*, further emphasized its importance. The Court broadly restated the issue as "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" (May 25, 2022 Order).

MACDC maintains the positions set forth in its March 23, 2022 *amicus curiae* brief. MTA and MAC now expressly concur in those positions, and further emphasize the importance of correcting and clarifying the law in this case. More specifically:

This issue involves legal principles of major significance to the state's jurisprudence (MCR 7.305(B)(3)) and the Court of Appeals' decision is erroneous and will cause material injustice. MCR 7.305(B)(5)(a). The Court of Appeals essentially expanded governmental immunity and created a new cause of action in a published opinion that threatens profound effects across Michigan as binding precedent (MCR 7.215(J)) unless this Court takes some action to restore the correct law.

MACDC is particularly concerned because the Court of Appeals' broad new interpretation of Act 222 goes beyond road commissions to impact drains (physical stormwater systems),[5] and drainage districts (legal entities that finance drain costs)[6] broadly across Michigan because a drainage district is an Act 222 governmental agency (defined in footnote 1). MTA and MAC are similarly concerned because other governmental entities including townships and counties could also be impacted under Act 222's broad "sewage disposal system" definition, which includes, among other things, storm water drain systems.[7]

The Court of Appeals' ruling that injunctive relief is an available remedy for "future damages" is contrary to Act 222, which does not distinguish between "existing" and "future" damages" as the Court did, but instead plainly states that Act 222 "provide[s] 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).

---

[5] "The word 'drain,' whenever used in this act, shall include the main stream or trunk and all tributaries or branches of any creek or river, any watercourse or ditch, either open or closed, any covered drain, any sanitary or any combined sanitary and storm sewer or storm sewer or conduit composed of tile, brick, concrete, or other material, any structures or mechanical devices, that will properly purify the flow of such drains, any pumping equipment necessary to assist or relieve the flow of such drains and any levee, dike, barrier, or a combination of any or all of same constructed, or proposed to be constructed, for the purpose of drainage or for the purification of the flow of such drains, but shall not include any dam and flowage rights used in connection therewith which is used for the generation of power by a public utility subject to regulation by the public service commission." MCL 280.3.

[6] "Any drainage district heretofore or hereafter established shall be a body corporate with power to contract, to sue and to be sued, and to hold, manage and dispose of real and personal property, in addition to any other powers conferred upon it by law." MCL 280.5.

[7] MCL 691.1416(j) defines "sewage disposal system" as "all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency"

The Court's vague assertion that injunctive relief is an available remedy also neglects that there is no underlying cause of action to support such a remedy (other than the one that the Court just essentially created). It is also fundamentally improper and makes no sense to issue an injunction to avoid future damages because it would concern a speculative event, which if it ever happens, would have a remedy in damages under Act 222. The purported request for injunctive relief is even not really for an injunction because it attempts to compel a governmental entity to take specific action, which is an improper request for a writ of mandamus.

Moreover, a person with Plaintiffs' indicated concerns (about potential future flooding) could pursue a potential remedy under the Drain Code or perhaps through inverse condemnation (both of which have well-established and well-reasoned procedures and other requirements). The Court of Appeals injunctive-remedy decision disregards entire bodies of law in favor of vaguely (but in a binding published opinion) inviting a flood of new litigation.

Moreover, the Court of Appeals opinion violates the constitutional separation of powers by improperly interjecting Courts into discretionary decision-making regarding public works projects requiring public funding.

Therefore, and as further discussed in MACDC's March 23, 2022 *amicus curiae* brief and below, the Court should correct and clarify the law.

STATEMENT OF FACTS

MACDC, MTA, and MAC adopt the Road Commission's Statement of Facts. Additional factual detail is discussed in context below.

STANDARDS OF REVIEW

MACDC, MTA and MAC adopt the Standards of Review from MACDC's March 23, 2022 *amicus curiae* brief.

ARGUMENT

I. MACDC, MTA and MAC incorporate MACDC's prior discussion.

MACDC's March 23, 2022 *amicus curiae* brief presented an extensive discussion regarding the Court's second issue (indeed, the Court's broad wording of that issue in its May 25, 2022 Order suggests that the Court's inquiry might have been influenced in part by MACDC's prior discussion). Therefore, MACDC, MTA and MAC incorporate that prior discussion, emphasizing that this is simply for the Court's convenience in avoiding duplication, and MACDC, MTA, and MAC remain strongly committed to MACDC's previously-presented arguments.

MACDC, MTA, and MAC also concur in the Road Commission's July 6, 2022 supplemental brief, which builds on the Road Commission's App for Lv, and noted agreement with MACDC (e.g., supplemental brief, p 50, 53).

Perhaps the most notable thing about Plaintiffs' supplemental brief is what it does not say. Plaintiffs do not (and tacitly concede that they cannot) offer any substantive response to various arguments demonstrating why the Court of Appeals was wrong, despite the Court giving them the opportunity to do so. Plaintiffs largely just reprint their initial brief, to the point of (for example)

repeating their counter-statement of the second question presented, despite this Court providing specific direction on the issue to be addressed in the May 25, 2022 Order.

II. Plaintiffs' request for injunctive relief is, in reality, an improper request for a writ of mandamus.

For context, MACDC's *amicus curiae* brief, pp 20–22, explained that the Court of Appeals should have recognized (1) the substance of Plaintiffs' claim, [8] and (2) regardless of Plaintiffs' "injunction" label, they are essentially seeking a writ of mandamus [9] ("requiring Defendant to restore the drainage that existed prior to the changes the Defendant made as part of its bike path

[8] "Courts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 691; 822 NW2d 254 (2012). Instead, it is "well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Buhalis*, 296 Mich App at 691–91, quoting *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710–11; 742 NW2d 399 (2007). See also, *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322; 535 NW2d 187 (1995) (affirming the trial court's rejection of the plaintiff's contention, explaining in part that it is well-established that a court may "look behind the technical label that plaintiff attaches to a cause of action to the substance of the claim asserted"); *Maiden v Rozwood*, 461 Mich 109, 135; 461 NW2d 817 (1999) ("Plaintiff cannot avoid the protection of witness immunity by artful pleading; the gravamen of plaintiff's action is determined by considering the entire claim"); *Aetna Cas & Sur Co v Sprague*, 163 Mich App 650, 654; 415 NW2d 230 (1987) (rejecting complaint's mischaracterizations as a "transparent attempt to trigger insurance coverage").

[9] In *Teasel v Dep't of Mental Health*, 419 Mich 390, 409–10; 355 NW2d 75 (1984), this Court explained:

> ***Mandamus is an extraordinary remedy and will not lie to control the exercise or direction of the discretion to be exercised***. Moreover***, it will not lie for the purpose of*** reviewing, revising, or ***controlling the exercise of discretion reposed in administrative bodies***. However, the writ will lie to require a body or an officer charged with a duty to take action in the matter, notwithstanding the fact that the execution of that duty may involve some measure of discretion. . . . Stated otherwise, mandamus will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner. [Citations and footnotes omitted.]

installation in 2013 and 2015" (App 009A; First Amended Complaint, ¶ 28) that should be dismissed. [10]

Plaintiffs' contrary assertions are inaccurate. See for example, Plaintiffs' supplemental brief, p 19, claiming that "Plaintiffs request injunctive relief to stop and prevent conduct that Defendant has no authority to engage in." To the contrary, Plaintiffs do not seek to "stop and prevent conduct." Instead, Plaintiffs complain about an existing physical structure—drainage system that the Road Commission modified in or before 2015 (as alleged at Plaintiffs' supplemental brief, pp 4–5). Any "conduct" happened years ago, and therefore cannot be stopped or prevented. Plaintiffs instead want to control and compel the exercise of the Road Commission's discretionary authority to do a drainage project at public expense.

Plaintiffs' word play does not alter the nature of Plaintiffs' claim. It simply reflects that any positive thing (do something) can be stated in the negative (stop not doing something). Here, Plaintiffs essentially contend that they are not trying to compel the Road Commission to build a drainage system; instead, they are attempting to compel the Road Commission to stop not building a drainage system (which is the same thing, just stated differently). By analogy, it is like saying "I'm not trying to compel you to build a bridge; instead, I'm trying to stop you from allowing a river to separate two pieces of land." The bottom line remains the same—Plaintiffs are essentially trying to compel the exercise of administrative discretion (a public works project at public expense) for their private benefit, which is fundamentally improper under the law concerning

[10] See, for example, *Minarik v Ziegler*, 336 Mich 209, 213; 57 NW2d 501 (1953) (affirming dismissal of bill seeking a purported injunction ordering the State Highway Commissioner to "restore [a ditch to] its original condition when dug," explaining in part that "[n]o 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 he seeks") and *Burch v Mackie*, 362 Mich 488, 494; 107 NW2d 791 (1961) (following *Minarik* and further noting that the plaintiffs had a remedy by proper proceedings instituted under the Drain Code).

injunctions and mandamus (among other things), as indicated above and further explained in MACDC's March 23, 2022 *amicus curiae* brief.

Moreover, the Road Commission raises a valid conceptial point about the constitutional separation of powers in this context (Road Commission's supplemantal brief, p 54). The Court might not need to reach the issue, because there are numerous other reasons why the Court of Appeals should be reversed. For completeness, however, MACDC, MTA, and MAC agree with the Road Commision that that Courts should not be in a position of usurping administrative authority, and directing the exercise of administrative decisionmaking. In addition to the Road Commision's cited authorities, see generally, *Kyser v Kasson Twp*, 486 Mich 514, 534-39; 786 NW2d 543 (2010) (holding that the "no very serious consequences" rule violated the constitutional seperation of powers by compelling the judiciary to interject itself inappropriately in legislative decisions); *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 140-42; 719 NW2d 553 (2006) (additional historical discussion).

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals' published (and therefore binding) decision that "injunctive relief is an available remedy" to "avoid damages caused by a future sewage disposal event" (App 09A; Slip Op., p 9) is contrary to Act 222, the Drain Code, and other fundamental principles of Michigan jurisprudence as indicated above and further discussed in MACDC's March 23, 2022 *amicus curiae* brief. This radical, binding new decision threatens significant adverse consequences across Michigan because it essentially creates a new exception to governmental immunity and a new cause of action to compel governmental entities to take specific action to address future speculative flooding events that might never occur—and even if they do occur, they might not be caused by the governmental entity.

Therefore, a*mici curiae* MACDC, MTA, and MAC respectfully request that this Court consider this brief in the disposition of this case; and grant the Road Commission's application for leave to appeal, or in the alternative, issue a peremptory order under MCR 7.205(E)(2) vacating the Court of Appeals' opinion.

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for *Amici Curiae* MACDC,
MTA, and MAC

Dated: August 2, 2022

By: _____

Stacy L. Hissong (P55923)
Stephen J. Rhodes (P40112)
4151 Okemos Road
Okemos, Michigan 48864
(517) 381-0100