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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 REPLY BRIEF

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ARGUMENT

Plaintiffs argue that they are entitled to relief under the sewage disposal system event exception to the Governmental Tort Liability Act ("GTLA") based on language found in the definitional section. This is incorrect because the definitional provisions do not modify the applicable statutory limitations period or accrual statute. The elements a claimant must establish under this exception to *avoid immunity* do not modify the accrual date or limitations period, either. Here the claim accrued in 2015 and the 2020 Complaint was untimely.

Plaintiffs also argue that they are entitled to injunctive relief to prevent some hypothetical future injury or damage—even though they simultaneously claim the backup here was caused by a single "extremely heavy" rain event in 2018. Plaintiffs' Supplement, p 5. Plaintiffs are not entitled to an injunction because they have not pleaded any facts that warrant this sort of extraordinary relief. Further, Plaintiffs' arguments on appeal require that this Court completely ignore their own Complaint. Recall that Plaintiffs are asking for the Road Commission to return the drainage system to its pre-2015 condition. This is a request for specific performance of a discretionary duty vested with the Road Commission (i.e., the Board of County Road Commissioners). It is an improper request for mandamus and should be dismissed.

I. Plaintiffs improperly request that this Court interpret the GTLA according to a public policy preference or "endorse[ment]."

A. The Legislature has set forth limited and narrow exceptions to governmental immunity.

Plaintiffs argue that the Court would be making an unfortunate "policy" choice if it finds that there is no remedy under the GTLA for their alleged tort claims. See Plaintiffs' Supplement, pp 1, 14-15. This argument misunderstands governmental immunity as well as this Court's role in statutory interpretation.

Interpretation and application of the GTLA as considered under the first question granted MOAA does not invoke a question of policy for this

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Court at all. The policy decision rests with the Legislature, which may grant, expand, or abolish any exception to immunity as it sees fit. From statehood forward, Michigan jurisprudence has recognized that the sovereign (now the State) was immune from all suits, including suits for tortious injuries which it had caused. *Ross v Consumers Power Co*, 420 Mich 567, 598; 363 NW2d 641 (1984). Currently, "[u]nder the government tort liability act (GTLA), MCL 691.1401 et seq., governmental agencies are broadly shielded from tort liability." *Fairley v Dep't of Corrections*, 497 Mich 290, 297; 871 NW2d 129 (2015). Indeed, the GTLA was drafted under the "assumption that the state and its agencies enjoyed a total sovereign immunity from tort liability." *Pohutski v City of Allen Park*, 465 Mich 675, 687; 641 NW2d 219 (2002). "The state or its subdivisions cannot be sued without legislative consent, and the Legislature 'may . . . place conditions or limitations on the liability imposed.' " *Elia Companies, LLC v Univ of Michigan Regents*, 335 Mich App 439, 447; 966 NW2d 755 (2021) (quotation marks and citation omitted).

"Accordingly, a governmental agency is immune unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government." *Mack v City of Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002).[1] "WITHOUT EXPRESS legislative authorization, a cause of action cannot be created in contravention of the broad scope of governmental immunity." *Lash v City of Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007) (quotation omitted). In other words, exceptions to governmental immunity exist only where they are set forth by the Legislature. There is no requirement that an exception be available for every tort claim. In fact, the opposite is true: unless the

[1] Governmental agencies are immune even to intentional torts if committed within the scope of a governmental function. *Smith v Dept of Pub Health*, 428 Mich 540, 611; 410 NW2d 749 (1987), affd sub nom. on other grounds, *Will v Michigan Dept of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989); see also *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 328; 869 NW2d 635 (2015) ("if a governmental agency commits an intentional tort during the exercise or discharge of a governmental function, the governmental agency is immune from tort liability").

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Legislature says clearly that immunity is waived, there is no liability in tort.

It does not follow, however, that there is not sound policy behind the Legislature's decision. For example, unlike private actors, the State and its political subdivisions (like the Road Commission) have statutory obligations to provide certain services irrespective of the risk of tort liability. As has been previously noted:

> Government cannot merely be liable as private persons are for public entities are fundamentally different from private persons. Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency. Moreover, in our system of government, decision-making has been allocated among three branches of government—legislative, executive and judicial—and in many cases decisions made by the legislative and executive branches should not be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions. [*Ross*, 420 Mich at 618–619 (citation and quotation omitted)]

When a governmental agency engages in activities that are expressly or impliedly authorized or mandated by statute, it is immune from tort liability unless a specific exception applies. *Id.* It is further a basic principle of our state's jurisprudence that "the immunity conferred upon governmental agencies and subdivisions is to be construed broadly and

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that the statutory exceptions are to be narrowly construed." *Stanton v City of Battle Creek*, 466 Mich 611, 618; 647 NW2d 508 (2002), citing *Nawrocki v Macomb Co Rd Comm,* 463 Mich 143, 158; 615 NW2d 702 (2000).

In sum, there are sound public policy considerations behind governmental immunity (and the exceptions thereto), but the legal questions before this Court are not public policy decisions. The Legislature has set forth the narrow exception at issue and the plain language of that statue must control.[2] The crux of this portion of the appeal, rather, is that Plaintiffs have not pleaded in avoidance of governmental immunity and their claims are statutorily barred.

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

Plaintiffs continue to conflate two separate things: (1) what must occur for a tort claim to "accrue" and (2) what must occur for a claimant to avoid immunity for that same alleged tort. Plaintiffs' Supplement, p 10-14. Only the latter is addressed by sewage disposal system event exception, and it has no impact on the accrual date. Further, "A plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity." *Odom v Wayne Co*, 482 Mich 459, 478-479; 760 NW2d 217 (2008).

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

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[2] The Legislature has also, time and time again, modified, expanded, or otherwise altered the limits to governmental immunity. In fact, the very exception at issue in this case was added in 2002. Thus, there *is* a potential exception for a valid sewage disposal system event claim, but Plaintiffs' suit is not timely.

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With respect to Plaintiffs' argument, MCL 691.1417(3) "imposes several requirements for a claimant to *avoid* governmental immunity for a sewage disposal system event." *Willett v Charter Tp of Waterford*, 271 Mich App 38, 49; 718 NW2d 386 (2006). These additional requirements only prescribe when a claimant can avoid immunity; they do not alter when the underlying claim accrued. The accrual date remains constant regardless of whether the exception applies. And it remains constant regardless of the statutory definitions of "event" or "damages" or any other term. See MCL 691.1411(1); MCL 600.5805(2); MCL 600.5827.

Plaintiffs assert that a change in the design of the drainage system in 2015 increased water flow onto their properties and resulted in at least one flooding event on their collective properties sometime in 2015. Plaintiffs claim the same 2015 modifications caused the 2018 flooding. "[T]he accrual of the claim occurs when both the act and the injury first occur." *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264, 291; 769 NW2d 234 (2009). "Subsequent claims of additional harm *caused by one act* do not restart the claim previously accrued." *Id.* (emphasis added). See also *Garg v Macomb Co Cmty Mental Health Services*, 472 Mich 263, 281-282; 696 NW2d 646 (2005); *Henry v Dow Chem Co*, 501 Mich 965, 965; 905 NW2d 601 (2018). Clearly, the claim accrued in 2015.

On appeal Plaintiffs repeatedly claim that the Road Commission's proposed interpretation would force claimants to "flood" the courthouse and immediately file suit upon a "drop" of errant water or the "most minimal damage." See Plaintiffs' Supplement, pp 2, 15-16. This mischaracterization is unpersuasive for two reasons. First, Plaintiffs themselves did not allege the "most minimal damage." Their Complaint alleges that the Plaintiffs' (collective) properties sustained damages in 2015 due to the purported "defect" and that this damage was significant enough for them to complain to the Road Commission. Moreover, it is exceedingly difficult to see how a "drop" of water would constitute an "overflow" or "backup" of a sewage disposal system in order to give rise to a valid claim under the exception. See MCL 691.1417(3). Therefore, this parade of horribles is neither based on the facts of this case nor at all likely to come to fruition.

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Further, neither the definition nor the use of the term "event" in MCL 691.1416 or MCL 691.1417 makes any difference to this analysis. See Plaintiffs' Supplement, 1, 11-14. The definitions that are glaringly absent from MCL 691.1416 are those for a statute of limitations or accrual. Instead, the GTLA directs that the general law applies. Everything else about the statute pertaining to this exception to governmental immunity describes what must occur for the government to be held liable for this tort – the statute does not redefine when a claim accrues.

Again, the Road Commission is not claiming that separate wrongful *acts* (plural) would not be compensable. Plaintiffs' Supplement, p 1, 10-14. But there are no separate wrongful "acts" alleged in this case. The only act (singular) alleged was implementation of a purportedly defective design in 2015. The claim accrued in 2015 and Plaintiffs' arguments do not change this conclusion.

C. *Haney* was based on a zoning violation and does not support Plaintiffs' position in this case.

The difference between *Haney* and this case was already set forth in the Road Commission's supplemental brief. Compare Plaintiffs' Supplement, pp 2, 16-17 with Defendant's Supplement pp 40-41. To avoid duplication, those arguments are not repeated here. Further, Plaintiffs completely ignore the fact that *Haney* involved a zoning violation, which is inherently different from the alleged "defect" at issue here. As this Court noted, "the nature of zoning violations typically makes a limitations period of little relevance to nuisance-abatement actions concerning present or ongoing nonconforming uses." *Haney*, slip op at 4. Because each day that the defendants in *Haney* kept a pig on their property was a separate underlying "wrongful act" or nonconforming use in violation of the ordinance, each day of violation had its own accrual date. *Id*. at 5.

This case is clearly different. There is no zoning violation. And there is only *one* underlying alleged act: a modification implemented in 2015. Additional flooding – i.e., additional injuries 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. Plaintiffs are not entitled to restoration of the prior drainage system (mandamus) or any other type of injunction under the facts pleaded here.

Plaintiffs are not entitled to restoration of the prior drainage system nor any other type of injunction under the facts pleaded here.

First, the sewage disposal system event exception does not provide for any injunctive relief anywhere in its text. See Plaintiffs' Supplement, 1. And it certainly does not provide or permit relief for alleged future harms. See MACDC Amicus Brief, Section I.B & C.[3] It is again important to recall that Plaintiffs are asking for the Road Commission to return the drainage system to its pre-2015 status.[4] Plaintiffs are also asking for monetary relief and an injunction based on the exact same alleged underlying tort. Therefore, to the extent *any* recovery is available at all, it is governed by the GTLA. And the GTLA does not provide for injunctive relief. See Defendant's Supplement, Section II.B.

Moreover, Plaintiffs have not pleaded *any* imminent future harm that would warrant an injunction. See MCR 3.310. To the contrary, Plaintiffs claim one "extremely heavy" rain event in 2018. Plaintiffs' Supplement, 5. That's it. Even under circumstances where a hypothetical injunction might be available (and the Road Commission does not agree that it would here at any rate for each of the reasons raised in its Supplemental Brief), this is not a case where such a claim would make it past the pleading stage. For this same reason, Plaintiffs' bare allegation that this Court's failure to permit an injunction would

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[3] The MTA and MAC adopted the prior filed amicus brief in full in the amicus filing dated August 2, 2022.

[4] Plaintiffs should not be permitted to deny the contents of their own Complaint on appeal. Further, this Court is not being asked to decide an issue of discovery (or lack thereof). Plaintiffs have simply not pleaded any fact that, even if true, would warrant an injunction or provide a legal basis for that remedy.

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somehow subject them to "continual" flooding is without merit or foundation. Plaintiffs' Supplement, p 20.

The Road Commission is not alleged to have violated any statute. It is not alleged to have violated the constitution. It is not alleged to be refusing to exercise its discretion. Instead, it is claimed that it is not exercising its discretion in a manner that is to the liking of these Plaintiffs. Plaintiffs instead want a court to order the Board of County Road Commissioners to construct the drain system of Plaintiffs' own choosing. This is not a cognizable claim.

For this same reason, Plaintiffs' continued reliance on *Lash* and *Michigan Assn of Home Builders* is unpersuasive. Plaintiffs' Supplement, p 17-20. In *Lash v City of Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007), this Court explained that the claimant could possibly seek injunctive relieve to enforce *a specific statutory right*, i.e., lawful application of the residency requirements under MCL 15.602. Likewise, in *Michigan Assn of Home Builders v City of Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019), this Court found injunctive relief *might* be available to *enforce the requirements in a separate specific statute* regarding limitations on fees associated with building permits. MCL 125.1522(1). Plaintiffs have not cited or claimed any such statutory "right" in this case. None exists. And unpublished cases from the Court of Appeals or federal district courts which claim to rely on *Lash* and *Michigan Assn of Home Builders* do not give any further insight—other than to highlight the need for this Court's clarification. See Plaintiffs' Supplement, 17-19. This Court's discretionary review is warranted to settle this area of law.

The fact of the matter here is that Plaintiffs did not request an order to enforce a statutory provision, nor did they request a declaratory order seeking to determine the rights of the parties. See *Lash* and *Michigan Assn of Home Builders*. They asked the trial court to order that the drain system be restored to its condition prior to the bike path. This is mandamus. In fact, this Court has already rejected a nearly identical request for injunctive relief in *Burch v Mackie*, 362 Mich 488, 489-490; 107 NW2d 791 (1961). The *Burch* Court also addressed *Sweeney v Hillsdale Co Bd of Rd Comm*, 293 Mich 624; 292 NW 506 (1940) and *Bennett v County of Eaton*, 340 Mich 330; 65 NW2d 794 (1954), both of

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which Plaintiffs have relied on here. The *Burch* Court ultimately noted that:

> In neither of these cases was the question of jurisdiction of the circuit court involved. The granting of the injunctive relief sought was not precluded by the statutory inhibition invoked in *Minarik v State Highway Commissioner, supra*, and likewise in the present suit, affecting the jurisdiction of circuit courts to issue writs of mandamus to State officers. [*Burch*, 362 Mich at 494].

Plaintiffs' supplemental briefing regarding mandamus asks this Court to ignore the pleadings in full. Plaintiffs were, in fact, requesting exactly what they now deny on appeal: asking the Road Commission to choose one permissible discretionary option over a second option. Plaintiffs' Supplement, p 19. And to be clear, *it is not illegal or unlawful for a culvert to backup or overflow* or even to have a defect.[5] Plaintiffs have never pointed to any law to the contrary. As was noted in the Amicus Brief of the MACDC, MTA, and MAC, attempting to argue that they are entitled to an injunction that compels the Road Commission to stop not doing what Plaintiffs want them to do is mere word play. It does not provide any basis for relief. The Court of Appeals' opinion to the contrary represents a dramatic and alarming expansion of the law contrary to precedent as outlined in the Road Commission's Supplemental Brief. This Court's discretionary review is warranted.

[5] In fact, unless every single element of the statutory exception is satisfied, it is not even compensable in tort. Plaintiffs have made no claim for a constitutional taking.

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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,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 3,143 countable words as calculated by the word processing document used in its preparation. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

Respectfully submitted,

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