

STATE OF MICHIGAN
COURT OF APPEALS

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

Plaintiffs-Appellants,

v

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendant-Appellee.

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

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

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

PER CURIAM.

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

I. BACKGROUND

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

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

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

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

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

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

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

This appeal followed.

II. STANDARDS OF REVIEW

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

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

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

III. STATUTE OF LIMITATIONS

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

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

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

A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental

agency. [MCL 691.1416] to [MCL 691.1419] abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory.

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

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

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

(1) that the claimant suffered property damage or physical injuries caused by a sewage disposal system event;

(2) that the governmental agency against which the claim is made is “an appropriate governmental agency,” which is defined as “a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury”;

(3) that the sewage disposal system had a defect;

(4) that the governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect;

(5) that the governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect;

(6) that the defect was a substantial proximate cause of the event and the property damage or physical injury;

(7) reasonable proof of ownership and the value of [any] damaged personal property; and

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

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

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

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

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

MCL 600.5827 defines accrual and provides:

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

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

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

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

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

The trial court concluded that plaintiffs’ claim accrued in 2015 because plaintiffs alleged that they were first harmed in 2015.³ Although plaintiffs are now precluded from bringing any claim based on the 2015 incident because they did not bring an action within three years of that incident, nothing in the statute precludes them from maintaining a separate claim for the event that occurred in 2018.

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

Subsequent claims of additional harm caused by one act do not restart the claim previously accrued. For the purposes of accrual, there need only be one wrong and one injury to begin the running of the period of limitations. In sum, the accrual of the claim occurs when both the act and the injury first occur, that is when the “wrong is done.” [*Id.* at 291.]

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

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

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

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

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

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

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

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

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

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

IV. INJUNCTIVE RELIEF

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

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

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

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

A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency. [MCL 691.1416] to [MCL 691.1419] abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory. [Emphasis added.]

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

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

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

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

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

Plaintiffs argue that injunctive relief is permitted on the basis of MCL 691.1418(4) and MCR 3.310. MCL 691.1418(4) provides: “*Unless this act provides otherwise*, a party to a civil action brought under [MCL 691.1417] has all applicable common law and statutory defenses ordinarily available in civil actions, and is entitled to all rights and procedures available under the Michigan court rules.” (Emphasis added.) The Michigan court rules permit injunctive relief under MCR 3.310.

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

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

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

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

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

/s/ Amy Ronayne Krause

/s/ Thomas C. Cameron

/s/ Michelle M. Rick