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STATE OF MICHIGAN

IN THE SUPREME COURT

BRIAN ZEZULA,

Plaintiff/Appellee,

-vs-

INDEPENDENCE TOWNSHIP,

Defendant/Appellant.

and

NINA BROWN, DET ENERGY COMPANY, and KALTZ EXCAVATING COMPANY INC,

Defendants.

Supreme Court No. 168483

COA Docket No. 368261

Circuit Court No. 22-197937-NZ
Hon. Cheryl A. Matthews

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DEFENDANT/APPELLANT INDEPENDENCE TOWNSHIP'S BRIEF ON APPEAL

**** ORAL ARGUMENT REQUESTED ****

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STATEMENT OF JURISDICTION

On September 24, 2025, this Court granted Defendant/Appellant Independence Township's Application for Leave to Appeal. See **APPX_488-489**; 9/24/25 Order. Defendant/Appellant appeals the Court of Appeals' March 11, 2025, published opinion affirming the trial court's denial of its Motion for Summary Disposition under MCR 2.116(C)(7) (governmental immunity) and MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted. See *Zezula v Brown*, ___ Mich App ___; ___ NW3d ___ (2025). **APPX_1-7.** See also **APPX_294-295**; 10/18/23 Opinion and Order Denying Summary Disposition. Thus, this Court has chosen to affirmatively exercise is discretionary jurisdiction to consider the issues raised herein pursuant to MCR 7.303(B)(1).

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QUESTIONS PRESENTED

As articulated by this Court in its September 24, 2025, Order granting Defendant/Appellant's Application for Leave to Appeal, the Questions Presented are as follows:

I. **Whether MCL 691.1407(7) of the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., creates a broad exception to governmental immunity when a governmental agency allegedly violates the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq*.**

Plaintiff/Appellee would answer, "Yes."

Defendant/Appellant answers, "No."

The Oakland County Circuit Court answered, "Yes."

The Court of Appeals answered, "Yes."

This Court should answer, "No."

II. **Whether the Oakland County Circuit Court erred in permitting Plaintiff/Appellee Brian Zezula to amend his Complaint on the basis that Defendant/Appellant Independence Township's alleged failure to mark facilities constitutes a "defect" as that term is defined in MCL 691.1416(e) and a compensable "sewer disposal system event" under MCL 691.1417 for purposes of the sewage disposal system event exception to governmental immunity under the GTLA.**

Plaintiff/Appellee would answer, "No."

Defendant/Appellant answers, "Yes."

The Oakland County Circuit Court answered, "No."

The Court of Appeals answered, "No."

This Court should answer, "Yes."

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STATEMENT OF FACTS

I. Factual Background

Plaintiff/Appellee Brian Zezula ("Zezula") previously owned the property located at 5116 Forrest View Drive in Independence Township, Michigan.[1] In December 2020, Zezula's neighbor, Nina Brown ("Brown"), hired DTE Energy Company to complete electrical work on her property located at 5122 Forrest View Drive, across the private road from Zezula's property. **APPX_42-52**; Second Amended Complaint. The electrical work required digging and excavating onto private property, and under the private road that runs on top of the "private sewer lead[s.]" **APPX_42-52**.

To best understand the properties and systems at issue, below is a demonstrative map that depicts Zezula's property, Brown's property, and the private road, Forrest View Drive.

[1] Zezula sold the subject property on September 15, 2025.

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The greyed-out portion of Forrest View Drive represents the public right-of-way. The road that continues past the public-right-of-way is a private road. Zezula's property is the parcel labeled 08-35-226-049 (upper right corner). Brown's property is the parcel labeled 08-35-226-050 (lower right corner). The orange lines indicate property lines. The yellow line with arrows represents the Oakland County interceptor system. The yellow daisy-like circles represent manhole access to the Township's sewer main. The green lines *with* arrows represent the Township's sewer system. The green lines *without* any arrows are the approximate locations of private sewer leads. The white dots that connect the private leads to the sewer main depict the approximate the location of the connection stubs.

To complete the work, DTE Energy Company hired Defendant Kaltz Excavating Company ("Kaltz") to bore underground to bury the electrical lines. To its credit, Kaltz submitted a request to MISS DIG to have all underground facilities in the area of the bore job marked. **APPX_126-**

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129; MISS Dig Request, attached as Exhibit A to Kaltz's Response to the Township's Motion for Summary Disposition. As is clear from the demonstrative exhibit above, no sanitary or water facilities owned, operated or maintained by the Township were near the job site, thus, the Township responded "NO CONFLICT," because there was no conflict. **APPX_130-133**; MISS DIG Response, attached as Exhibit B to Kaltz's Response to the Township's Motion for Summary Disposition.

On or about December 2, 2020, and/or December 29, 2020, Kaltz engaged in digging, excavating and drilling on private land, and in doing so, drilled through Zezula's private sewer lead, causing effluent from the private lead to enter into, and damage Zezula's basement. **APPX_42-52**.

II. Procedural History

After co-Defendant Kaltz filed a notice of non-party fault, **APPX_53-56**, Zezula filed a Second Amended Complaint, adding Independence Township ("the Township") as a Defendant on June 8, 2023. **APPX_42-52** Against the Township, Zezula pleaded one count of negligence, premised on an alleged violation of MCL 460.721. Zezula further alleged that the Township was in violation of Independence Township Ordinance 48-84, which provides, in full:

> All new sanitary sewer systems, *except individual building sewers*, connected directly or indirectly into the intercepting sewer or sewers of the county shall be owned, operated and maintained by the governing community. This includes, but is not necessarily limited to, on-site sewer systems serving condominiums, apartment projects, shopping center and mobile home parks. [See **APPX_89-102**; Ordinance Provisions, attached as Exhibit 3 to the Township's Motion for Summary Disposition (emphasis added).]

Chapter 48 of the Township's Ordinances provides a definitions section. Specifically, Ordinance 48-53 is titled, "Definitions," and provides:

> Sewer means a pipe or conduit that carries wastewater or drainage water. See the following definitions modifying sewer:

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(1) *Building sewer means, in plumbing, the extension from the building drain to the public sewer or other place of disposal. Also called house connection*.

(2) Combined sewer means a sewer intending to receive both wastewater and stormwater, surface or drainage water.

(3) Common sewer means a sewer in which all owners of abutting properties have equal rights.

(4) County sewer means a public sewer controlled by the county agency.

(5) Intercepting sewer means a sewer that received dry-weather flow from a number of transverse sewers of outlets in frequently additional predetermined quantities of stormwater (if from a combined system) and conducts such waters to a point for treatment of disposal).

(6) Lateral sewer means that portion of the sewer system located under the street, within the street right-of-way, or easement and which collects sewage from a particular property for transfer to the trunk line or interceptor. A sewer that is designed to receive a building sewer.

(7) Municipal sewer means a public sewer exclusive of a county sewer or City of Detroit sewer.

(8) *Public sewer means a common sewer controlled by a governmental agency or public utility*.

(9) Sanitary sewer means a sewer that carries liquid and water-carried waste from residences, commercial buildings, industrial plants, and institutions, together with minor quantities of groundwater, stormwater, surface water and drainage water and are not admitted intentionally.

(10) Storm sewer means a sewer that carries stormwater and surface water, street wash and other wash waters, or drainage, but excludes domestic wastewater and industrial wastewater. Also called a storm drain.

(11) Trunk sewer or trunk line means a sewer that connects the lateral sewer to the intercepting sewer and to which building sewers may be connected. [**APPX_89-102**; Ordinance Provisions (emphasis added).]

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On August 16, 2023, the Township moved for summary disposition under MCR 2.116(C)(7) and (C)(8). The Township argued that Zezula had not plead facts to support a claim for damages under the GTLA, as none of the six exceptions to governmental immunity apply or were plead. **APPX_57-108**; Motion for Summary Disposition. Further, the Township argued that Zezula had failed to comply with the pre-suit notice requirements of MCL 691.1419, and therefore any cognizable claim under MCL 691.1417 is barred. **APPX_57-108**.

In an odd procedural twist, Zezula's response to the Township's motion does not defend his Complaint, or make any legal arguments in support of his negligence claim. **APPX_109-112**; Plaintiff's Response to the Township's Motion for Summary Disposition. Rather, Zezula states that because the Township and co-Defendant Kaltz disagree on whether the sewer lead breached by Kaltz was private, "[i]t won't be until oral arguments that these arguments can be better argued by Plaintiff." **APPX_109-112**. In essence, Zezula offered no legal support for why summary disposition of *his claim against Independence Township* is not barred by the GTLA. For reasons that are unclear, Zezula has relied on co-Defendant Kaltz to defend his claim against the Township throughout this litigation.

In Kaltz's response to the Township's Motion, it argued that the 2014 amendments to the GTLA created a seventh exception to governmental immunity for violations of the MISS DIG Act, and specifically cited to MCL 691.1407(7). **APPX_113-187**; Kaltz's Response to the Township's Motion for Summary Disposition. Kaltz further argued that the Township had violated the MISS DIG Act by failing to mark its facilities and any appurtenances in the area, instead responding that there was no conflict. Pursuant to MCL 460.729, Kaltz argued that it was not responsible for any damages that occurred to any facility because it complied with the requirements under the MISS DIG Act and requested that any facilities and appurtenances in the area be marked. **APPX_113-**

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187. Kaltz requested that the trial court deny the Township's motion, and impose sanctions and attorney's fees under MCR 1.109(E)(5)(6)(7) and MCR 2.313 for refusing to engage in discovery. **APPX_113-187**. Notably, Kaltz neither asked to have "appurtenances" marked, nor did it establish as a matter of law that the Township had any obligation to mark private lead connections.

The Township filed Replies to both Zezula's and Kaltz's Responses, attempting to refocus the issues, and noting that Zezula did not even attempt to advance any legal argument in support of its claim against the Township. **APPX_188-243**; Replies in Support of Motion for Summary Disposition. On October 11, 2023, the trial court held a hearing on the Township's Motion where the parties argued consistently with their briefs. **APPX_244-293**; Transcript. In a subsequent Opinion and Order, the trial court denied summary disposition by misconstruing the MISS DIG Act and the sewer exception to governmental immunity. **APPX_294-295**; Opinion and Order. The trial court erroneously determined that Plaintiff's negligence claim, predicated on an alleged violation of the MISS DIG Act, was not barred by the GTLA. Although Zezula did not allege a claim under the sewer exception, the trial court allowed him to file a Third Amended Complaint. For the reasons set forth *infra*, such an amendment is futile. Further, despite acknowledging that Zezula did not respond to the Township's MCL 691.1419 pre-suit notice argument, the trial court did not deem the lack of response to be a waiver or abandonment. Rather, it authorized supplemental briefing to allow Zezula an additional opportunity to respond. **APPX_294-295**.

The Township filed a Claim of Appeal in the Court of Appeals. On March 11, 2025, the Court of Appeals issued a 2-1 published decision affirming the trial court's denial of the Township's motion for summary disposition. *Zezula v Independence Twp*, ___ Mich App ___; ___ NW3d ___ (2025) (Docket No. 368261). **APPX_1-7**. As discussed herein, the Township maintains on appeal that the Court of Appeals clearly erred in rendering its conclusions. In short, the Court

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effectively legislated from the bench, ignoring decades of Michigan jurisprudence regarding the broad application of governmental immunity. Instead of deferring to the Michigan Legislature, the majority created a new, "broad" exception governmental immunity. Additionally, the majority further erred by finding Zezula's proffered claim under the sewage-disposal-system-event exception to governmental immunity is potentially viable. The Township sought reconsideration of the Court's opinion, and that motion was denied. **APPX_8-14**; *Zezula v Independence Twp of Oakland County*, unpublished order of the Court of Appeals, entered April 16, 2025 (Docket No. 368261).

On May 7, 2025, the Township filed a timely Application for Leave to Appeal to this Court. **APPX_296-324**; Application for Leave to Appeal. Both Plaintiff/Appellee Brian Zezula (Zezula) and Defendant Kaltz Excavating Company, Inc., (Kaltz), responded, and opposed the Township's Application. See **APPX_325-401**; Responses to Applications for Leave to Appeal. However, the Township's Application received amicus support from the Government Law Section of the State Bar of Michigan, the Michigan County Road Commission Self-Insurance Pool, the Michigan Townships Association, and the Michigan Municipal League. See **APPX_402-487**; MSC Register of Actions.

On September 24, 2025, this Court granted the Township's Application, and limited the questions before this Court to those enumerated *supra*. See **APPX_488-489**; 9/24/2025 Order. This timely Brief on Appeal now follows.

LEGAL ARGUMENTS

I. Preservation and Standard of Review

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The issues raised in the instant Application for Leave to Appeal were raised in the trial court, and thus, are preserved for appellate review. *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, 347 Mich App 280, 289; ___ NW3d ___ (2023).

A trial court's decision on summary disposition de novo. *Wilmore-Moody v Zakir*, 511 Mich 76, 82; 999 NW2d 1 (2023). The Township's Motion sought summary disposition under MCR 2.116(C)(7) and (C)(8). MCR 2.116(C)(7) states that "[e]ntry of judgment [or] dismissal of the action… is appropriate because of… immunity granted by law." A governmental agency is presumed immune from suit unless a plaintiff establishes that his case falls within one of the recognized exceptions to governmental immunity. MCL 691.1407; *Mack*, 467 Mich at 201. While there are statutorily-created exceptions to governmental immunity, "there is one basic principle" that guides our courts in their decisions involving governmental immunity: "the immunity conferred upon governmental agencies is *broad,* and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb County Road Comm'n*, 463 Mich 143, 158; 615 NW2d 702 (2000) (internal citations omitted) (emphasis in original). "To survive [a (C)(7)] motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Com'n*, 465 Mich 68, 74; 631 NW2d 678 (2001). If immunity is granted by law, summary disposition is proper. *Fane*, 465 Mich at 74.

Under MCR 2.116(C)(8), the Court may grant summary disposition if "[t]he opposing party has failed to state a claim on which relief can be granted." That type of motion tests the legal sufficiency of a claim based on the complaint alone. *Mack v City of Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). To bring a tort claim against a municipality, a plaintiff must plead in avoidance of governmental immunity. *Id*. Summary disposition is appropriate when, taking all the plaintiff's well-pleaded facts as true, his or her claims are clearly unenforceable as a matter of law.

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Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817(1999).

II. MCL 691.1407(7) does not create a broad exception to governmental immunity for violations of the MISS DIG Act.

The Court of Appeals' majority opinion contains palpable legal errors regarding the construction and application of governmental immunity that cannot be allowed to stand. As explained herein, the majority opinion has effectively legislated from the bench, ignored clear and unambiguous interplay between two statutory schemes, and disregarded longstanding Michigan jurisprudence regarding the breadth of governmental immunity and the restricted nature of the few recognized, and enumeration exceptions. Most egregious is the Court of Appeals' conclusion that the GTLA contains a "broad" exception to the GTLA for violations of the MISS DIG Act. This palpable legal error regarding governmental immunity construction cannot be allowed to stand.

A. Courts must give deference to longstanding jurisprudence regarding governmental immunity.

In the GTLA, the Michigan Legislature "established a general rule that a 'governmental agency is immune from tort liability of the governmental agency is engaged in the exercise or discharge of a governmental function.'" MCL 691.1407(1). The Township hereby relies upon and incorporates herein the legislative history of the GTLA as set forth by the *Amici's* Briefs in support of the Township's Application for Leave to Appeal.

Further, this Court has consistently made clear that, "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Sunrise Resort Ass'n, Inc v Cheboygan Co Rd Comm*, 511 Mich 325, 334; 999 NW2d 423 (2023), quoting *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). See also *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 203; 731 NW2d 41 (2007) ("…governmental agencies, *with few exceptions*, are generally statutorily immune from tort

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liability.") (emphasis added); *Madbak v City of Farmington Hills*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 364734), quoting *Thurman v Pontiac*, 295 Mich App 381, 384; 819 NW2d 90 (2012) ("The immunity conferred upon governmental agencies is broad, and the statutory exceptions thereto are to be narrowly construed."); *Norman v Department of Transportation*, 338 Mich App 141, 162; 979 NW2d 390 (2021) ("In Michigan, unless a specified exception exists, governmental agencies have broad immunity from tort liability.").

There are some very *limited* statutory exceptions to governmental immunity; exceptions that our *Legislature* has intentionally carved out. Specifically, they include the highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2), (3). See also *Odom v Wayne Co*, 482 Mich 459, 478 n 62; 760 NW2d 217 (2008). As discussed herein, compliance with the MISS DIG underground facility damage prevention and safety act, ("MISS DIG"), MCL 460.721 *et seq*., is not an exception to governmental immunity that creates a cause of action in our circuit courts.

B. The GTLA and MISS DIG are in pari material and must be read together.

This case requires interpretation of both the GTLA and the MISS DIG Act. The purpose of statutory interpretation is to give effect to the Legislature's intent. *Sunrise Resort Ass'n, Inc*, 511 Mich at 334. This starts with examining the words of the statute itself, as they are "the most reliable evidence of" the Legislature's true intent. *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011) (quotation marks and citation omitted). A statute that is unambiguous "must be enforced as written," and "[n]o further judicial construction is required or permitted."

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Madugula v Taub, 496 Mich 685, 696; 853 NW2d 75 (2014) (quotation marks and citation omitted).

The Court of Appeals' majority opinion erroneously goes beyond a plain reading of unambiguous statutes to reach its conclusions. Here, the relevant provisions of the GTLA and the MISS DIG Act are *in pari materia*. See *K2 Retail Construction Serv, Inc v West Lansing Retail Development,* LLC, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 367762); slip op at 9, quoting *O'Connell v Dir of Elections*, 316 Mich App 91, 99; 891 NW2d 240 (2016) ("Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates."). In his dissenting opinion, Judge Boonstra accurately and completely sets forth the 2014 Legislative history that details the interplay between the GTLA and the MISS DIG Act. *Zezula*, dissenting op at 2-3. To summarize, in 2014, the Michigan Legislature amended the GTLA to clarify that "[t]he immunity provided by [the GTLA] does not apply to liability of a governmental agency under the [MISS DIG act]." MCL 691.1407(7). The MISS DIG Act has a reciprocal provision, which states, "[e]xcept as provided in this section, this act does not affect the liability of a governmental agency for damages for tort or the application of 1964 PA 170, MCL 691.1401 to 691.1419," i.e., the GTLA. The next provision of the MISS DIG Act provides the designated remedy, an administrative remedy, for liability claims against a governmental agency:

> (2) A facility owner or a facility operator may file a complaint with the commission seeking a civil fine and, if applicable, damages from a governmental agency under this section for any violation of this act. [MCL 460.732(2).]

When read together, these provisions make clear that the MISS DIG Act creates liability for governmental agencies who violate the Act and a singular, exclusive ***administrative*** remedy, whereby aggrieved facility owners can be awarded costs, fees, ***and damages***. As expressly stated,

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the GTLA does not operate to preclude a facility owner or operator from pursuing such an administrative remedy in MPSC, and a governmental agency cannot use the shield of the GTLA to avoid liability when faced with a complaint brought before the MPSC, which has exclusive jurisdiction. What the MISS DIG Act does not do, however, is provide a facility owner or operator with an avenue for a civil lawsuit, i.e., a tort claim, for an alleged violation of MISS DIG. The GTLA continues to provide broad immunity from claims of tort liability, including alleged violations of the MISS DIG Act filed in Michigan courts, characterized as negligence claims. The way the majority opinion has construed these statutes is not in keeping with the proposition that governmental immunity is broad, and its statutorily enumerated exceptions are subject to narrow construction.

In sum, and to be abundantly clear, the Court of Appeals' opinion is wrong. MCL 691.1407(7) provides:

> The immunity provided by [the GTLA] ***does not*** apply to liability of a governmental agency under the MISS DIG underground facility damage prevention and safety act.

As explained by the Michigan County Road Commission Self-Insurance Pool in its *Amicus Curiae Brief* filed in support of the Township's Application for Leave to Appeal to this Court, the issue is not whether the GTLA creates a new, broad exception to governmental immunity predicated on a violation of the MISS DIG Act. Rather, the relevant inquiry is what is the "liability of a governmental agency *under* the MISS DIG" Act. MCL 691.1407(7). The Michigan County Road Commission Self-Insurance Pool has aptly set forth that,

> [t]o determine what liability a governmental agency has "under" MISS DIG, it is necessary to look at that Act. And, under MISS DIG, governmental agencies can be held liable through an exclusive set of remedies carried out by ***filing a complaint with the Michigan Public Service Commission*** **(MPSC)**. MCL 460.732. MISS DIG also expressly states that, apart from the MPSC-based remedies provided in

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> MCL 460.732, the Act does not disturb immunity for governmental entities as established under the GTLA.
>
> The Court of Appeals conclusion that the commission-based remedies are not exclusive is wrong. To start, MCL 460.732 states that, apart from the commission-based remedies provided in that section, immunity is undisturbed. Moreover, the very section the Court of Appeals relied upon to find otherwise plainly provides that it is inapplicable to governmental entities. See MCL 460.731(2), (3). In other words, even though MCL 460.731(3) provides that "[a] complaint filed under subsection (2) does not limit a person's right to bring a civil action to recover damages that person incurred arising out of a violation of the requirements of this act," subsection (2) is not applicable to governmental entities at all. Thus, while a complaint filed in the MPSC does not limit a person's right to bring a civil action against a nongovernmental entity, MISS DIG does not reserve (or create) this right for any claims against a governmental actor. See MCL 460.732. [**APPX_430-463**; MCRCSIP Amicus Brief, pp 11-12 (emphasis added).]

In addition to misinterpreting the interplay between the two statutes, and the misconstruing the MISS DIG Act itself, the Court of Appeal's majority opinion ignores the longstanding principle of statutory construction that "where a statute contains a general provision and a specific provision, the specific provision controls." *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 350; 952 NW2d 384 (2020) (quotation marks and citation omitted). As noted in Judge Boonstra's dissent in support of the proposition that MCL 460.732(2) is not an exclusive remedy, the majority opinion cites to MCL 460.731(3), which provides that "[a] complaint filed under [MCL 460.731(2)] does not limit a person's right to bring a civil action to recover damages that person incurred arising out of a violation of the requirements of this act." The majority's analysis ends there, thereby ignoring the specificity of MCL 460.732(2) and MCL 691.1407(7).

Moreover, not only did the Court of Appeals majority misconstrue MISS DIG, it profoundly erred in its statutory construction by declaring that MCL 691.1407(7) created a "broad exception to governmental immunity for alleged violations of the MISS DIG Act," *Zezula*, slip op at 5, and that the administrative remedy provided for in MCL 460.732(2) is not exclusive. The majority's conclusions ignore years of well-established case law requiring the immunity provided

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by the GTLA be interpreted broadly, and any exceptions construed narrowly. Indeed, when MCL 691.1407(7) and MCL 460.732(2) are considered *in pari materia,* it is clear that the Legislature's intent was to provide clarification, and to acknowledge the existence of the MISS DIG Act and the separate remedies that exist within that Act. This includes an acknowledgement of the exclusive, administrative remedy as the vehicle for addressing wrongs committed by governmental agencies in violation of the Act. The Legislature did not, by referencing the MISS DIG Act in the GTLA, create a another mechanism for asserting tort claims, or allow claims against municipalities for MISS DIG violations to proceed in Michigan courts . Thus, the Township respectfully requests this Court reverse the Court of Appeals, and vacate its March 11, 2026 Opinion in order to correct the Court of Appeals' grave errors of law.

III. An amendment of the Complaint to add a sewage disposal system event exception claim under the GTLA is futile, and the Court of Appeals has erred in concluding otherwise.

The Court of Appeals has committed a second, grave legal error related to governmental immunity by agreeing "with the trial court's decision to allow an amendment of the complaint" to add a sewage disposal system event exception claim. *Zezula*, slip op at 5. Again, when the plain language of the sewage exception found in the GTLA is considered, it is clear that the trial court abused its discretion in allowing Zezula to further amend the Complaint, where such an amendment is futile.

Independence Township, as a governmental agency, is presumed to be immune from suit unless a plaintiff establishes that his case falls within one of the recognized exceptions to governmental immunity. MCL 691.1407; *Mack v City of Detroit*, 467 Mich 186, 201; 649 NW2d 47 (2002); see also *Lash v Traverse City*, 479 Mich 180, 199; 735 NW2d 628 (2007). "Governmental immunity is the public policy, derived from the traditional doctrine of sovereign

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immunity that limits imposition of tort liability on a governmental agency." *Nawrocki v Macomb County Road Comm'n*, 463 Mich 143, 155-156; 615 NW2d 702 (2000) (citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 621; 363 NW2d 641 (1984)).

There are limited statutorily-created exceptions to governmental immunity, but "there is one basic principle" that guides courts in their decisions involving governmental immunity: "the immunity conferred upon governmental agencies is broad, and the statutory exceptions thereto are to be narrowly construed." *Nawrocki*, 463 Mich at 158 (internal citations omitted) (emphasis in original). Thus, for a plaintiff to maintain a lawsuit based on an exception to governmental immunity, that action must be clearly within the scope and ***meaning*** of that exception. *Scheurman v Dep't of Trans*, 434 Mich 619, 630; 456 NW2d 66 (1990).

There are only six exceptions to governmental immunity, none of which apply to the facts of this case. Thus, any attempt at amendment would be futile. *Wesche v Mecosta Cty Rd Comm'n*, 480 Mich 75, 84; 746 NW2d 847 (2008). *Wesche* listed the statutory exceptions: the highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3). *Id.* n.10. Plaintiff pleaded no exception to immunity and Courts have expressly indicated that in accordance with MCL 691.1407, no variety of "negligence" claim avoids governmental immunity. *Walby v City of Caro*, unpublished opinion per curium of the Court of Appeals, issued May 13, 2021 (Docket No 354155) (**APPX_104-108**).[2]

MCL 691.1417 provides the only avenue for relief for compensation of property damages,

[2] While the Township acknowledges that *Walby* is unpublished, and thus not binding on this Court under MCR 7.215(C), it is cited herein as persuasive authority.

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sustained in connection with a sewer back up. The statute goes on to state, unambiguously, that the property damages *must* have been sustained because of problem with the *municipally operated* system. MCL 691.1417(2) provides, in relevant part:

> 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. [Emphasis added.]

MCL 691.1416(k) goes on to define a sewage disposal system event:

> "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 [Emphasis added.]:
>
> (*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.]

As noted by Judge Boonstra in his dissent, only if a claimant clears the hurdle of demonstrating the backup was not caused by something connected to the system, like a building drain, can he sustain a claim under the sewer exception. Here, it is beyond cavil that the problem that caused the backup onto his private property was a defect in Zezula's building drain connected to the sewage disposal system. It is undisputed that sewage backed up into his basement because Kaltz severed his private lead to the system. There is no contention made that the *Township's* system overflowed or backup into Plaintiff's basement. This was, quite simply, not a compensable "event". Only where there is a defect in the governmental sewage disposal system can there be an "event" for which the sewer exception provides relief. MCL 691.1416(j) and (k). The GTLA requires a

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claimant show that the "sewage disposal system", that which is under the jurisdiction and control of a governmental agency (MCL 691.1416(j)), had a defect. A defect is statutorily-defined as "a construction, design, maintenance, operation, or repair defect" that caused the backup. MCL 691.1416(e).

The Township's Ordinances, cited by Zezula in his Second Amended Complaint, mirror MCL 691.1416(k), and clearly state that individual building sewers, i.e., private leads are not owned by the Township. See Ordinance 48-84, which provides that "all new sanitary sewer systems, **except individual building sewers** . . . shall be owned, operated and maintained by the governing community. Moreover, a building sewer is defined by Township Ordinance as the extension from a building drain to the public sewer or other place of disposal, i.e., a house connection. See Ordinance 48-53, cited in full *supra*. Because no sewage disposal system under the jurisdiction and control of Independence Township caused an "event," Zezula could never successfully plead a sewage-disposal-system-event claim, and thus, amendment of the Complaint for a third time is futile. Yet the Court of Appeals' majority opinion simply ignores MCL 691.1416(j) and (k) in reaching its erroneous conclusions.

In the trial court, and again in the Court of Appeals, Kaltz has argued, oddly enough for Zezula's benefit, that the Township's decision to not mark the main (because it was not within the identified work zone) and also not mark appurtenances to the main, somehow constitutes a violation of the MISS DIG Act. Kaltz further argued that this alleged MISS DIG violation can form the basis of a sewage-disposal-system-event claim. Not so. Under the MISS DIG Act, the Township had a responsibility to mark its facilities only, i.e., those that it owns and/or operates, in the proposed work zone. The Miss Dig Act defines "facility" as "an underground or submerged conductor, *pipe*, or structure, including, but not limited to, a conduit, duct, line, pipe, wire, or other

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device *and its appurtenances used to* produce, store, *transmit*, or distribute a utility service, *including … sewage*….” MCL 460.723(o). Presumably understanding that the Township did not have a pipe (main) in the work zone that required marking, Kaltz focuses on the word “appurtenance” and tries to argue the Township had to mark more than just its main. However, Kaltz both misunderstands the Township’s obligation under MISS DIG’s statutory language, and gravely misconstrues MCL 691.1417.

Zezula’s private lead/drain was neither a Township pipe, nor was it used by the Township to transmit sewage; it was a private drain used by only Zezula to transmit or convey sewage out of his home. This severed “facility”, the building drain, cannot be considered an “appurtenance” used by the Township to transmit a utility service; instead it was used by Zezula for his benefit, as a lead to get his sewage to the City main. As admitted by Zezula, the Township did not own the affected drain. Since the MISS DIG Act does not define “appurtenance,” Kaltz relies on the Best Practices of the Michigan Damage Prevent Board, which references the Webster’s New College Dictionary definition of “appurtenance.” **APPX_187**; Best Practices, attached to Kaltz’s Response to the Township’s Motion as Exhibit G. In Kaltz’s view, the Best Practices necessitated that the Township to mark not only the sewer main, but also the connector stub between the sewer main the Zezula’s private lead. Kaltz seems to think that if those two items had been marked with green paint or green flags, it would have prevented it from hitting Zezula’s private lead. But this argument is a red herring. Best Practices are not a law of rule, or even a regulation, they are but mere suggestions or practices. Indeed, the Best Practices, which are drafted by the Michigan Damage Prevention Board, not by MISS DIG, state:

> MDPB Best Practices are presented as a general guide. The MDPB encourages all users to consult and consider not only the MDPB Best Practices, but also (i) employer practices, (ii) industry practices, (iii) federal and state statutes and regulations, (iv) building and fire codes, and (v) local laws, regulations, and

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ordinances. [**APPX_187**.]

However, even assuming that the Township had a duty to mark not only the sewer main, but also the connector between the sewer main and Zezula's private lead, it is clear from the map provided *supra* that the sewer main *and the connector* were not even close to where Kaltz hit the private lead. Not only did the Township have no obligation to mark the private lead but significantly, the location at which the private line was breached is not in the public right-of-way, making even the Best Practices inapplicable. Kaltz says the Best Practices requires marking a main that is in a *public right-of-way*, yet it is undisputed that Plaintiff's damaged lead was "a private sewer lead beneath a private road," not in a "public" right-of-way. See Second Amended Complaint; **APPX_42-52**.

Finally, the Township agrees, as should this Court, that Judge Boonstra's dissent correctly concludes that Plaintiff/Appellant's proffered claim is not viable under the MCL 691.1417(3)(b) because an alleged failure to properly mark facilities under the MISS DIG Act does not constitute a "defect" as contemplated by the GTLA. According to MCL 691.1416(e), defect "means a construction, design, maintenance, operation, or repair defect". Kaltz tries to pound a square peg into a round hole by arguing that alleged failing to MISS DIG mark, constitutes a defect in operating the sanitary sewer system. But this construction is an illogical stretch, when the statute is view in congruity with its other provisions. That language makes clear a defect must be both within the municipal system and must have caused the alleged overflow of municipal sewage, onto private land. The alleged failure to mark here, did not cause effluent from the municipal system to overflow or backup into Zezula's property. For that reason, the majority opinion has palpably erred in reaching the opposite conclusion. There cannot be any dispute that a substantial proximate cause (a MCL 691.1416(*l*) 50% or more cause), if not the sole proximate cause, of the overflow or backup was Kaltz's boring into Zezula's service lead. This created an obstruction to the drainage of flow

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from Zezula's home *to* the sewage disposal system under the Township's jurisdiction and control (not vice versa). MCL 691.1417(3)(e). Thus, Zezula's home sewage flow back into his basement. Consequently, the majority erred in finding Zezula could bring a sustainable cause of action under MCL 691.1417(2) when the obstruction to drainage of Zezula's service lead into the municipal main, the "defect", was indisputably caused by Kaltz drilling through the private lead such that it was no longer an effective conduct or connection to the sewage disposal system. Such "connections" can never form the basis for a claim as by definition this was not a "sewage disposal system event" or "event" compensable under this immunity exception. MCL 691.1416(k)(*i*) and (*ii*).

CONCLUSIONS AND RELIEF REQUESTED

For the reasons discussed herein, Defendant/Appellant Independence Township respectfully requests this Court vacate the Court of Appeals' March 11, 2025, majority Opinion and reaffirm the longstanding principle that governmental immunity is to be broadly enforced, and any statutorily enumerated exceptions are to be narrowly construed. Defendant/Appellant further asks this Court to accept the legal analysis contained in the dissenting opinion, this Brief on Appeal, and the multiple *amicus curiae* briefs, and to hold that alleged violations of the MISS DIG Act do not constitute exceptions to governmental immunity such that an aggrieved property owner can bring a tort action seeking to recover damages in Michigan circuit courts, but rather, the MISS DIG Act provides an adequate exclusive, administrative remedy. Finally, Defendant/Appellant requests this Court hold that any amendment to Plaintiff/Appellee's Complaint to include allegations under MCL 691.1417 is futile, and for any other relief this Court deems equitable and just.

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Respectfully submitted,

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Dated: November 19, 2025

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief on Appeal contains 6,283 words, and otherwise complies with the requirements of MCR 7.212(B).

/s/ Amanda P. Waske
AMANDA P. WASKE (P81128)

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2025, I electronically filed the foregoing paper with the Clerk of the Court using the Court's efile system, by selecting efile and eserve, which will send notification all attorneys of record.

/s/ Amanda P. Waske