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STATE OF MICHIGAN
IN THE SUPREME COURT

BRIAN ZEZULA,
Plaintiff/Appellee,

vs.

INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,
Defendant/Appellant,

and

KALTZ EXCAVATING COMPANY, INC.,
Defendant/Appellee,

and

NINA BROWN, DTE ENERGY COMPANY,
Defendants.

Supreme Court No. 168483
COA Docket No. 368261
Circuit Court No. 22-197937-NZ
Hon. Cheryl A. Matthews

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DEFENDANT/APPELLEE KALTZ EXCAVATING COMPANY, INC.'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The defendant/appellee Kaltz Excavating Company, Inc. does not object to defendant/appellant Independence Township's Statement of Jurisdiction other than it neglects to state that the Court of Appeals Opinion also denied Independence Township's motion for summary disposition pursuant to MCR 2.116(C)(10) on the basis that the issue was "abandoned" as insufficiently briefed. (Township Appx 1, p 2, footnote 1).

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

The defendant/appellee Kaltz Excavating Company, Inc. objects to the defendant/appellant Independence Township's QUESTIONS PRESENTED as they are not in conformity with MCR 7.212(C)(5) as they ignore the position of defendant/appellee Kaltz. Without waiving this objection, following are the counter-statement of questions involved by defendant/appellee Kaltz:

1. Does MCL 691.1407(7) provide an exception to governmental immunity for the liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act?

   The trial court's answer is "yes."

   Plaintiff/appellant Independence Township's answer is "no."

   Defendant/appellee Kaltz Excavating Company, Inc.'s answer is "yes."

   Plaintiff/appellee Zezula's answer is "yes."

   The Court of Appeals' answer is "yes."

2. Does MCL 460.732 provide an exclusive remedy for the MCL 691.1407(7) immunity exception for the liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act?

   The trial court's answer is "no."

   Defendant/appellant Independence Township's answer is "yes."

   Defendant/appellee Kaltz Excavating Company, Inc.'s answer is "no."

   Plaintiff/appellee Zezula's answer is "no."

   The Court of Appeals' answer is "no."

3. Did Public Act 2013 Nos. 173 & 174, effective April 1, 2014 amend the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*. and repeal the former Protection of

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Underground Facilities Act, MCL 460.701 *et seq.* and replace it with the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq*. to provide a governmental immunity exception for the liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act per MCL 691.1407(7) and define "person" under the Miss Dig Act to include a "governmental agency" so that all of the requirements of the Miss Dig Act apply to every governmental agency in the State of Michigan per MCL 460.723(w), and define "facility owner" as "a person that owns a facility" per MCL 460.723(q), so that a "governmental agency" such as Independence Township, which is a "facility owner" has the duties of a "facility owner" pursuant to the Miss Dig Act, MCL 460.727, to respond to a Miss Dig ticket by the start date and time for the proposed excavation by marking its facilities in the area of the proposed excavation and to mark the location of each facility with paint, sticks, flags or other customary methods and provide notification to the Miss Dig notification system by using positive response per MCL 460.727?

The trial court's answer is "yes."

Defendant/appellant Independence Township's answer is "no."

Defendant/appellee Kaltz Excavating Company, Inc.'s answer is "yes."

Plaintiff/appellee Zezula's answer is "yes."

The Court of Appeals' answer is "yes."

4. Does the Miss Dig Act section 12, MCL 460.732(2) limit the governmental immunity exception of MCL 691.1407(7) to a facility owner or facility operator filing a complaint with the Public Service Commission as the "singular" and "exclusive" remedy for a governmental agency's violation of the Miss Dig Act as argued by Independence Township and the amicus briefs, when the language of MCL 460.732(2) is written as

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only a "permissive" and "discretionary" remedy by the use of the word "may", limited solely to a "facility owner" or "facility operator" and not applying to an "excavator" or any other "person" under the Miss Dig Act and the Township's and Amici's arguments require the Court to interpret the word "may" as the mandatory word "shall" directly contrary to statutory language to make it the "singular" and "exclusive" remedy for a governmental agency's violation of the Miss Dig Act, which is also directly contrary to the Miss Dig Act section 8, MCL 460.728, which specifically states that the Miss Dig Act "does not limit the right of an excavator, facility owner, or facility operator to seek legal relief and recover actual damages incurred and equitable relief in a civil action arising out of the violation of the requirements of this Act"?

The trial court's answer is "no."

Defendant/appellant Independence Township's answer is "yes."

Defendant/appellee Kaltz Excavating Company, Inc.'s answer is "no."

Plaintiff/appellee Zezula's answer is "no."

The Court of Appeals' answer is "no."

5. Does the so-called sewage disposal system event exception to governmental immunity per MCL 691.1417 apply where a governmental entity fails to respond to a Miss Dig ticket to mark its facilities in the area of a proposed excavation and indicates "NO CONFLICT" thereby creating a "defect" in its "operation"?

The trial court's answer is "yes."

Defendant/appellant Independence Township's answer is "no."

Defendant/appellee Kaltz Excavating Company, Inc.'s answer is "yes."

Plaintiff/appellee Zezula's answer is "yes."

The Court of Appeals' answer is "yes."

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COUNTER-STATEMENT OF FACTS

I. PLAINTIFF'S COMPLAINT.

Plaintiff Brian Zezula ("Zezula") initially filed suit against his neighbor, Nina Brown, DTE Energy Company ("DTE") and Kaltz Excavating Company, Inc. ("Kaltz") by complaint filed on 12/23/2022 alleging that a water lead from a water main leading to Zezula's home was damaged by mechanical boring and the water lead was punctured and drilled through causing long-term flooding into Zezula's basement drainage pipes and into his home causing property damage on 12/02/2020 and 12/29/2020. (Appx 1, ¶¶ 20-21; 31-32).

Plaintiff Zezula then filed a first amended complaint on 12/30/2022 against the same three defendants but changed the allegations from a water line from a water main being punctured and drilled through causing water to flood into plaintiff's basement, to allege that a sewer lead had been punctured and drilled through causing sewage to flood into plaintiff's basement drainage pipes and into his home causing property damage. (Appx 2, ¶¶ 19-20; 31-32).

Plaintiff's allegations against Kaltz in the first amended complaint were that Kaltz had been hired by DTE to perform electrical line work for the defendant Nina Brown and that Kaltz caused damage to plaintiff's sewer lead due to mechanical boring. (Appx 2, ¶¶ 31-32).

Plaintiff reported the incident to Independence Township (the "Township") on 12/03/2020 and was advised by the Township that the Township had no liability or responsibility whatsoever and that the responsible parties were Kaltz and DTE. (Appx 6, pp 43, 52-57, 64-65).

II. PROJECT INFORMATION.

Investigation established that the plaintiff's neighbor, Nina Brown, made a complaint to DTE of sparking at the electrical service to her home. DTE determined that there was a fault in the electrical service to Nina Brown's residence under the street in front of her home and DTE

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hired Kaltz on an emergency basis to bore a new underground electrical service to Nina Brown's residence.

In accord with the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq.*, before beginning the underground work, per MCL 460.725, Kaltz submitted a request to Miss Dig to have all facilities marked in the area of the bore job. (Copy of request attached as Appx 3). Per the MISS DIG Act, MCL 460.726, the Miss Dig system provided notice to multiple companies and governmental entities who potentially had underground facilities in the area including four different entities of Independence Township including Sanitary Sewers and Water. (Appx 3).

Pursuant to the Miss Dig Act, MCL 460.726, Miss Dig then issued to Kaltz the responses by the various responding entities and the response by Independence Township Sanitary Sewers and Independence Township Water was "NO CONFLICT." (Copy of Miss Dig Response, Appx 4).

Kaltz employees then went to the scene to perform the work on 12/02/2020 and did not note any marks showing any conflict for the bore job for any underground sewer facilities which would require green paint, stakes or flags per MCL 460.727(2)(h). The lack of any green paint, stakes or flags was in accord with the response by Independence Township Sanitary Sewers and Water of "NO CONFLICT." (Appx 4).

Kaltz then completed the work as directed by DTE with no problems, running the bore job from the DTE pedestal on the north side of Forrest View Drive across Forrest View Drive to the Brown residence on the south side of Forrest View Drive, following the existing underground service which was being replaced.

The next day, 12/03/2020, Kaltz was contacted by the plaintiff Zezula, apparently on direction from the Township, and was advised that Zezula had a sewage backup into his

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basement. In accordance with Kaltz' policy, Kaltz immediately responded sending a crew to the site, who discovered that the bore job had struck Zezula's sanitary sewer lead under Forrest View Drive in front of the Zezula residence, along the path of the bore job from the DTE pedestal to the Brown residence. The Kaltz crew repaired the damaged sewer lead that day.

Contrary to the Township's brief on appeal (pp 2-3), the repair job where the bore job struck Zezula's sanitary sewer lead was not "past the public-right-of-way" or on a "private road" or "on private land," but rather was right in the middle of the street, the public-right-of-way of Forrest View Drive, directly in front of Zezula's house at 5116 Forrest View Drive on the north side and Brown's house at 5122 Forrest View Drive on the south side of Forrest View Drive, as marked below with an "X".



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Repair job in the middle of Forrest View Drive in front of Zezula's residence to the north.



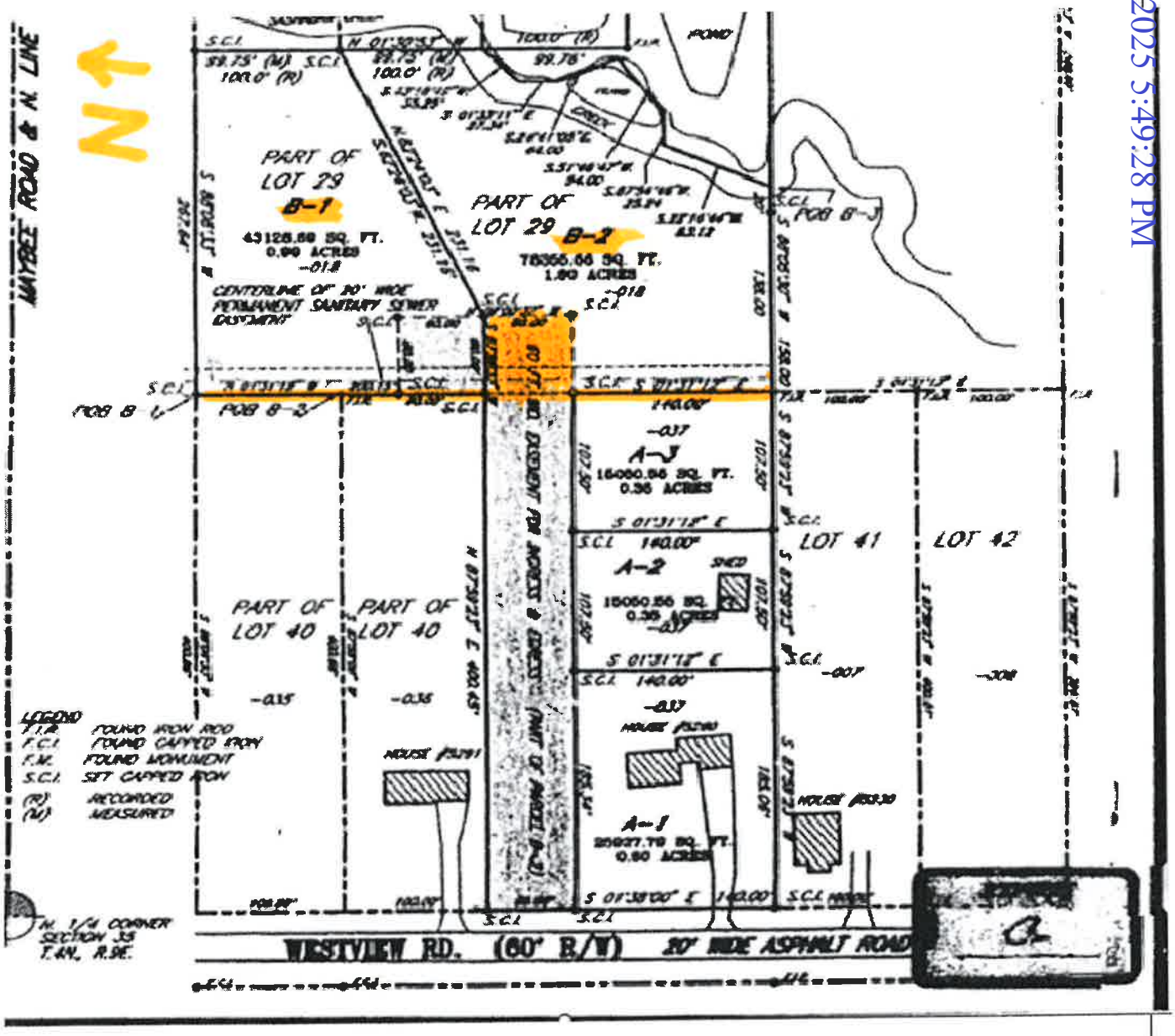
Repair job in the middle of Forrest View Drive in front of the Brown's residence to the south.



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Below is the recorded page from the Oakland County Register of Deeds which shows that the public-right-of-way of Forrest View Road continues east past the west lot lines of Zezula's residence (B-1) and the Brown residence (B-2) directly contrary to the "demonstrative map" in Independence Township's brief on appeal (p 2), which misrepresents that the public-right-of-way of Forrest View Drive did not extend in front of the Zezula and Brown lots.



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III. DISCOVERY REQUESTS TO INDEPENDENCE TOWNSHIP REGARDING INDEPENDENCE TOWNSHIP FACILITIES IN THE AREA OF THE BORE JOB

After the suit was filed against Kaltz and Kaltz answered the complaint, Kaltz served a subpoena and notice of records deposition on the Township, because the Township was not a party to the case. (Appx 5). The purpose was to determine if the Township had sewer or water facilities in the area which should have been marked by the Township per the Miss Dig request (Appx 3) and whether the Township response of "NO CONFLICT" was accurate. (Appx 4).

There were only five requests (Appx 5) but the first request was required to have 20 subparts to include the Township's description of any and all types of underground services it may have had in the area pursuant to its own definitions in its ordinances. (Township Brief, pp 3-4). The subpoena stated:

The deponent is required to produce the following documents:

1. Any and all records pertaining to the area of Forrest View Road from West View Road to the end point of Forrest View Road, including for any and all lots on the north or south side of Forrest View Road from West View Road to the end point of Forrest View Road including but not limited to 5260, 5134, 5128, 5122, 5312, 5290, 5166 Forrest View Road for the following items:
   a. Any and all easements whatsoever.
   b. Any and all utility rights of way.
   c. Any and road rights of way, dedications, or easements.
   d. Any and all surveys.
   e. Any and all water mains.
   f. Any and all sewer mains.
   g. Any and all lateral sewers.
   h. Any and all intercepting sewers or interceptor sewers.
   i. Any and all building sewers.
   j. Any and all combined sewers.
   k. Any and all common sewers.
   l. Any and all county sewers.

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m. Any and all municipal sewers.

n. Any and all public sewers.

o. Any and all sanitary sewers.

p. Any and all trunk sewers or trunk lines.

q. Any and all facilities, including underground facilities.

r. Any and all appurtenances to any facilities, including stubs, taps, sewer taps, and/or sewer stubs.

s. Any and all connections between the sewer main and sewer leads or sewer laterals.

t. Any and all building sewers, sewer laterals, and/or sewer connection.

2. Any and all records of any and all water service or sanitary sewer leads or connection points to or from any water mains or sewer mains for 5260, 5134, 5128, 5122, 5312, 5290, 5166 Forrest View Road.

3. Any and all records, including drawings, sketches, photos, plans, permits, and/or inspection reports for construction or installation of any sewer laterals, building sewers, stubs, or connections for the properties on Forrest View Road from West View Road to the end point of Forrest View Road, including for any and all lots on the north or south side of Forrest View Road from West View Road to the end point of Forrest View Road including but not limited to 5260, 5134, 5128, 5122, 5312, 5290, 5166 Forrest View Road.

4. Any and all records, including photos, regarding the response by or on behalf of Independence Township and/or its agents to the Miss Dig request by Kaltz Excavating of 12/01/2020.

5. Any and all records, including reports, correspondence, demand letters, emails, videos, and photos, regarding any damage claims, sewer backup claims, or injury claims regarding Brian Zezula and/or 5116 Forrest View Road. (Appx 5, pp 31-32)

The Township responded with non-responsive documents (per copy attached as Appx 6) and a letter from the Township's attorney, Morgan A. McAtamney, stating:

> "Enclosed, please find Independence Township's response to your recent subpoena and Notice of Records Deposition." (Appx 6, p 37, Independence Township response to subpoena).

The response was in violation of MCR 2.305 by failing to produce ***any*** of the requested documents. The only documents produced were: (1) a list of objections by its attorney, (2) the

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request to Miss Dig to mark the facilities, (3) a permit for a water/sewer connection for one of the six addresses on Forrest View Drive, (4) a copy of a residential builders license for Jidas Custom Homes with an expiration date of 05/31/2001, (5) an email from plaintiff Zezula to David McKee, DPW Director of the Township, dated 12/04/2020 attaching several photographs apparently of the damages to the Zezula basement, the repairs being done by Kaltz, and thanking the Township "for fighting Kaltz for me," (6) several additional emails between the Township employees dated 12/28/2020 discussing following up with the Township attorney regarding the complaints by the plaintiff Zezula regarding Kaltz and the sewer line, (7) letters of 12/30/2020 from the Township's attorney to Kaltz and DTE denying that the Township has any liability and that the damage is the responsibility of Kaltz and DTE, (8) several emails from Amerisure, the insurer of Kaltz, advising that the Township had failed to mark its facilities, and (9) multiple emails between the plaintiff Zezula and the Township employees stating that the Township had no liability, that Kaltz was the at-fault party, that the Township regrets that Kaltz has failed to admit its liability, that Zezula may want to seek an attorney's advice, and if Zezula retains an attorney, the Township will be happy to provide information to assist with any action they feel is necessary. (Copy of the Township's response to subpoena attached as Appx 6). ***As stated, the documents produced did not contain a single document requested to be produced to identify whether the Township had any facilities in the area of the Miss Dig request, or any documents regarding the Township's response to the Miss Dig request, or any documents that could be used to locate any of the Township's facilities that were in the area of the Miss Dig request.***

Since plaintiff Zezula had been convinced by the Township that the Township had no liability and that only DTE and Kaltz were at fault, and thus had not sued the Township, Kaltz filed a notice of non-party fault on 04/28/2023 naming the Township for negligence and violation of statutes and ordinances including, but not limited to: the MISS DIG Underground

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Facility Damage Prevention and Safety Act, MCL 460.721 *et seq.* and the Township Ordinances including 48-53, 48-82 and 48-84, including failing to respond to the Miss Dig request to mark its facilities, but rather indicating "NO CONFLICT." (Notice of non-party fault attached as Appx 7).

Plaintiff then filed a motion on 05/23/2023 to add the Township as a defendant which was granted by the court by order of 06/07/2023.

Plaintiff then filed plaintiff's second amended complaint on 06/15/2023. (Appx 8). It added Count IV for Negligence as to the Township for violation of the MISS DIG Underground Facility Damage and Safety Act, MCL 460.721 *et seq.*, and the Township's ordinances.

After being served with the complaint, the Township then engaged in delay tactics to avoid participating in any discovery and avoid producing any documents or information regarding any facilities it had in the area of the bore job until it could file a motion for summary disposition based on governmental immunity.

First, the Township requested a stipulation and order to extend the time to file its answer from the due date of 07/10/2023 to 07/31/2023, to delay the time that the defendants could file discovery requests to the Township. (Copy of stipulation and order attached as Appx 9).

The Township then filed its responsive pleadings on 07/31/2023.

Kaltz then filed a request to produce to the Township on 08/01/2023, the first day it could do so after the Township filed its first responsive pleadings. (Copy of Kaltz 08/01/2023 requests to produce attached as Appx 10, pp 89-92) The requests to produce were ***identical*** to the requests previously made by Kaltz to the Township by subpoena and notice of records deposition (Appx 5, pp 31-32) in response to which the Township had failed to produce ***any*** of the requested documents (Appx 6).

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Before the 28 days expired for the Township to answer the requests to produce which were due on 08/29/2023, the Township filed its motion for summary disposition on 08/14/2023 arguing that it was entitled to the defense of governmental immunity.

In addition to filing a motion for summary disposition, the Township also filed a motion for protective order on 09/01/2023 arguing that all discovery involving the Township should be terminated pending argument of the Township's motion for summary disposition. Kaltz filed a response objecting to the motion as another delaying tactic to avoid producing anything in discovery before arguing its motion for summary disposition. (Copy attached as Appx 13).

The Township waited two weeks after filing its motion for summary disposition to 08/29/2023 to respond to Kaltz' request to produce and served what it called "Objections And Response To Defendant Kaltz Excavating Company's Requests To Produce." (Copy attached as Appx 11, pp 94-99). ***Not a single document was produced. Every request was answered with the same objection that Independence Township had governmental immunity, had no liability and did not have to produce anything***.

These responses were in direct violation of MCR 2.313(A)(4) which provides:

> (4) *Evasive or Incomplete Disclosure, Answer or Response.* For purposes of this subrule an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

As a result, Independence Township produced nothing regarding any facilities it had in the area of the Miss Dig request before arguing its motion for summary disposition.

IV. ARGUMENT OF INDEPENDENCE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION AND TRIAL COURT OPINION.

Independence Township's motion for summary disposition argued first that there are only six exceptions to governmental immunity citing pre-2014 case law (Appx 12, p 108) and ***ignored*** the April 1, 2014 amendment to MCL 691.1407 (the so-called Government Tort Liability Act

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(GTLA)) adding paragraph (7) to the Act, MCL 691.1407(7), which stated that governmental immunity no longer applied to liability of any government agency under the MISS DIG Underground Facility Damage Prevention And Safety Act:

> (7) The immunity provided by this Act does not apply to liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act.

The motion argued next that the existing MCL 691.1417 immunity exception for a "sewage disposal system event" also did not apply because the sewer lead that was struck was a private sanitary sewer lead on private property (Appx 12, pp 109-10) ignoring that the claim was not regarding a "defect" in a private sanitary sewer lead, but rather a "defect" in the Township's "operation" of its sewage disposal system by violating the Miss Dig Act by not responding to the request to mark its facilities.

The Court held oral argument on the motions for summary disposition by the Township and defendant Nina Brown on 10/11/2023. (Transcript of hearing attached to the Township's Application for Leave to Appeal as Appx 12). The Court granted summary disposition to defendant Nina Brown as to any and all claims made by the plaintiff which is irrelevant to this appeal. After hearing oral argument on the Township's motion for summary disposition, the court advised that she would take the matter under advisement and issue an opinion. Regarding the discovery issue, the court advised that ". . . If I determine that, that they don't have immunity, then they're going to have to provide discovery." (Township Appx 12, p 291).

At oral argument, the Township argued again that there were only six exceptions to governmental immunity and no seventh exception for violation of the Miss Dig Act. (Township Appx 12, pp 251-52; Township Appx 7, p 64) and that the "exclusive remedy" for a Miss Dig violation is to file a complaint with the Public Service Commission. (Township Appx 12, pp 252-53, 254-55).

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Plaintiff argued that plaintiff should be allowed to amend plaintiff's complaint to answer the objections of the Township. (Township Appx 12, p 258).

The Township's Statement of Facts in its brief on appeal criticizes the plaintiff Zezula's briefing in response to the Township's motion for summary disposition. Zezula's lack of information was due to the Township's refusal to participate in discovery. Zezula had also been the subject of considerable misinformation provided by the Township in response to Zezula's notification to the Township of his sewage backup. The Township's response to Zezula regarding the backup was that the Township had fully complied with the Miss Dig Act but that DTE and Kaltz had not and were responsible for the damage and the Township would help Zezula in his claim against DTE and Kaltz. (See Appx 6, pp 43, 52-57, 64-65).

Kaltz argued that there was a specific governmental immunity exception for liability under the Miss Dig Act per the April 1, 2014 amendment to the GTLA along with replacement of the Protection of Underground Facilities Act, MCL 460.701 *et seq.* with the new MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq.* which added specific provisions to include governmental agencies as a "person" defined by the Act to impose liabilities on governmental agencies to comply with the Miss Dig Act. (Township Appx 12, pp 259-61) Kaltz also argued that there was no so-called "exclusive remedy" for a violation of the Miss Dig Act to file a complaint to the Public Service Commission, and that this argument by the Township regarding the Miss Dig Act, Section 12, MCL 460.732(2), ignored that MCL 460.732(2) ***only*** provided a permissive, non-mandatory remedy for a "facility owner" or "facility operator" to file a complaint with the Public Service Commission. (Township Appx 12, pp 263-65). Kaltz argued that there was also another applicable immunity exception, the so-called "sewage disposal system event exception," MCL 691.1417, in regard to the Township's failure to mark any of its facilities, per the Court of Appeals decision in *State Farm v Corby Energy,*

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271 Mich App 480, 484 n2; 722 NW2d 906 (2006), that failing to mark is considered an "operation" and thus would be a "defect" in a sewage disposal system per MCL 691.1416 and 1417. (Township Appx 12, pp 264-67).

The trial court issued its Opinion and Order on the Township's Motion For Summary Disposition on October 23, 2023 (Appx 14) holding that the Township was not entitled to governmental immunity pursuant to the MCL 691.1407(7) exception for liability under the Miss Dig Act, that the plaintiff may also amend his complaint to state a claim pursuant to MCL 691.1417(3), and that per *State Farm Fire v Corby Energy Servs,* 271 Mich App 480, 484, n2, the failure to mark is an "operation" of the Township and the failure to mark is a "defect" per MCL 691.1417(3)(b). The Court further held that it had addressed the statutory immunity issue but questioned whether Zezula gave notice as required by MCL 691.1419 and held that issue was insufficiently discussed and thus the Township's request for summary disposition premised on lack of notice was held in abeyance pending supplemental briefing to be filed by the parties and set forth a briefing schedule. (Appx 14). This briefing did not occur, because the Township filed the current appeal and proceedings in the trial court were stayed.

V. KALTZ MISS DIG REQUEST FOR MARKINGS.

The Township further states in its Statement of Facts that "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." (Township Statement of Facts, p 6).

The Kaltz Miss Dig request (Appx 3) requested locating the entire front of the property and both sides of the road at 5112, 5116 and 5128, which was Zezula's property, Brown's property and Brown's neighbor's property to the west.

Per MCL 460.727(1)(2):

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> "(1) A facility owner or facility operator ***shall*** respond to a ticket by the start date and time for the excavation or blasting under section 5(1) ***by marking its facilities*** in the area of the proposed excavation or blasting in a manner that permits the excavator to employ soft excavation to establish the precise location of facilities.
>
> (2) A facility owner of facility operator ***shall mark the location of each facility*** with paint, stakes, flags, or other customary methods using the uniform color code of the American national standards institute . . ." (emphasis added)

MCL 460.723(o) defines "facility" as:

> "(o) 'Facility' or 'underground facility' means an underground or submerged conductor, pipe, or structure, including, but not limited to, a conduit, duct, line, pipe, wire, or other device ***and its appurtenances*** used to produce, store, transmit or distribute a utility service, including communications, data, cable television, electricity, heat, natural or manufactured gas, oil, petroleum products, steam, sewage, video, water, and other similar substances, including environmental contaminants or hazardous waste." (emphasis added)

Contrary to its argument, the Township was ***required*** by state law, the Miss Dig Act, to mark all of its "facilities" in the requested area with "facilities" defined as including "appurtenances." Kaltz has never made the argument the Township continually makes that Kaltz requested the Township to mark Zezula's private lead. This is false. Kaltz asked, as required by the Miss Dig Act, that the Township mark all of its facilities in the requested area which would include their appurtenances. This would not include Zezula's private lead but would include the connection or stub where that lead connects with the Township's main. All governmentally owned sewer mains contain stubs for each property owner to connect their private sanitary sewer leads to the main. These stubs are part of the governmental agencies' main and are owned by the governmental agency and exist regardless of whether a homeowner has built a home on the property or connected to the stub. As a "facility" and as an "appurtenance," these stubs are connecting parts owned by the governmental agency which must be marked per MCL 460.727(1)

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and (2). If the stub or connecting point at Zezula's lead had been marked, Kaltz would have had notice of Zezula's lead and would have avoided it.

Despite not responding to the Kaltz subpoena or discovery requests, the Township has included in its Statement of Facts what it describes as a "demonstrative map that depicts Zezula's property, Brown's property and the private road, Forrest View Drive." (Township Brief, pp 1-2). This "demonstrative map" was not produced in discovery by the Township including in response to Kaltz' subpoena and discovery requests. The Township's Statement of Facts describes the "demonstrative map" as including "orange lines indicate property lines . . . 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 location of the connection stubs." (Township Statement of Facts, p 2). The Township's Statement of Facts goes on to state that:

> "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." (Township Statement of Facts, p 3).

This statement is not correct per the Township's own "demonstrative map." As noted on page 5 of this Brief, this "demonstrative map" is inaccurate as it does not show that the paved surface and public-right-of-way of Forrest View Drive extends past the west property lines of the Zezula and Brown properties and extends directly to in front of the Zezula and Brown properties as noted on page 5 of this Brief. The Kaltz Miss Dig request requested the Township "LOCATE ENTIRE FRT OF PROP AND BTH SDS OF RD AT ADDRS 5112, 5116, & 5128." (Appx 3, p 22). This includes the entire front of the properties of Zezula, Brown and Brown's neighbor to the west and ***both*** sides of Forrest View Drive. Per the "demonstrative map", this would ***include*** all of the facilities within the orange line which would ***include*** the "green lines *with* arrows"

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which "represent the Township's sewer system" and the "white dots that connect the private leads to the sewer main depict the approximate location of the connection stubs" which would include the connection stub to Zezula's private lead (marked with a red circle), and the "yellow daisy-like circles" which represent manhole access to the Township's sewer main. Contrary to the Township's statement, the "demonstrative map" shows multiple Township facilities in this area that were required to be marked, including the connection to Zezula's private lead.



As demonstrated by its "demonstrative map" and description of its facilities, the Township violated the Miss Dig Act by failing to mark ***any*** of its facilities within the area of the Kaltz Miss Dig request, including the connection of Zezula's private sanitary sewer lead to the Township's main, which would have alerted Kaltz to the presence of the Zezula private sanitary

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sewer lead. Rather than mark its facilities, the Township responded that there was "NO CONFLICT." (Appx 4).

The path of the bore job was from an electrical box on the north side of Forrest View Drive, west of Zezula's property, moving to the southeast toward the Brown property on the south side of Forrest View Drive and crossing the Zezula sanitary sewer lead in the public-right-of-way of Forrest View Drive in front of Zezula's house.

VI. COURT OF APPEALS OPINION.

The Court of Appeals affirmed the trial court by a 2-1 published decision on March 11, 2025. (Township Appx 1, pp 1-14). Contrary to the Township's Statement of Facts, the Court of Appeals did not err in rendering its conclusions and did not "effectively" legislate from the bench or create a new, "broad" exception to governmental immunity. (Township Statement of Facts, pp 6-7).

First, the Court of Appeals held, contrary to the Township's first argument on appeal, that there are seven, not six, exceptions to governmental immunity, which include the so-called Miss Dig exception, MCL 691.1407(7), effective April 1, 2014, which unambiguously states in clear and simple language: "(7) The immunity provided by this act does not apply to liability of a governmental agency under the MISS DIG underground facility damage prevention and safety act."

Second, the Court of Appeals held, contrary to the Township's second argument on appeal, that Section 12 of the Miss Dig Act, MCL 460.732, by its terms "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" but only provides an alternative remedy limited to a "facility owner" or a "facility operator" who "***may*** file a complaint with the commission seeking a civil fine . . ." (emphasis added).

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Third, the Court of Appeals held, contrary to the Township's third argument, that the sewage disposal event exception to governmental immunity, MCL 691.1417, does not require that there must be a backup in a public owned sewer but that it also can apply to a "defect" in the "operation" of the Township's sewer system by failing to mark its facilities.

The Township then sought reconsideration of the Court of Appeals Opinion and that motion was denied. (Township Appx 4).

The Township then filed an application for leave to appeal which this Court granted by Order of 09/24/2025. (Township Appx 20).

ARGUMENT

I. STANDARD OF REVIEW.

The standard of review of a trial court's decision on a motion for summary disposition based on governmental immunity per MCR 2.116(C)(7) is de novo. *Odom v Wayne County,* 482 Mich 459, 466; 760 NW2d 217 (2008).

The standard of review of a trial court's statutory interpretation is also de novo with the goal of statutory interpretation to effectuate the intent of the Legislature. *Sunrise Resort Association v Cheboygan County Road Commission,* 511 Mich 325, 333-34; 999 NW2d 423 (2023) ("We also review de novo questions of statutory interpretation. *Madugula v Taub*, 496 Mich. 685, 695, 853 N.W.2d 75 (2014). The goal of statutory interpretation is to effectuate the intent of the Legislature. *Id.* at 696, 853 N.W.2d 75").

The standard of review of a trial court's decision on summary disposition pursuant to MCR 2.116(C)(8) is also de novo. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

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II. CONTRARY TO THE TOWNSHIP'S ARGUMENT, TWO DISTINCT EXCEPTIONS TO GOVERNMENTAL IMMUNITY APPLY IN THIS CASE.

There are two separate and distinct exceptions to governmental immunity at issue on this appeal.

Independence Township has argued in the trial court in its motion for summary disposition (Appx 12, p 108), at oral argument of its motion for summary disposition in the trial court (Township Appx 12, pp 251-252), in its brief on appeal to the Court of Appeals (p 9, n2) and in its current brief to the Supreme Court (pp 5, 10 and 15) that there are only six exceptions to governmental immunity: the highway exception, the motor-vehicle exception, the public building exception, the proprietary-function exception, the governmental-hospital exception and the sewage-disposal-system-event exception, citing pre-2014 cases issued before the GTLA was amended in 2014 such as *Wesche v Mecosta County Road Commission,* 480 Mich 75, 84; 746 NW2d 847 (2008); and *Odom v Wayne County,* 482 Mich 459, 478, n 62; 760 NW2d 217 (2008). Judge Boonstra's dissent in the Court of Appeals Opinion in the current case similarly cites six "established 'statutory exceptions . . .'" (Township Appx 2, p 9).

This argument ignores Public Act 2013 Nos. 173 & 174 effective April 1, 2014, comprised of Senate Bills 539 and 540 which amended the GTLA to add in its operative provision, section 7, MCL 691.1407, a new subsection (7) which states:

> "(7) The immunity provided by this Act does not apply to liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act."

The second immunity exception at issue is the immunity exception provided by MCL 691.1417 for liability for a "sewage-disposal-system-event." The Township's argument on this issue argues that the exception cannot apply here because there was only a sewage backup caused by the Kaltz bore job striking Zezula's ***private*** sanitary sewer lead. This ignores the

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statute's definition of what is a "defect" which is defined as ". . . a construction design, maintenance, operation, or repair defect." MCL 691.1416(e). In this case the claim is that the sewage backup was caused by a "defect" in the "operation" by the Township of its sewer system by refusing and failing to mark its facilities in violation of the Miss Dig Act and to compound the error by reporting in its response to the Miss Dig request that there was "NO CONFLICT." (Appx 4).

III. CONTRARY TO THE TOWNSHIP'S ARGUMENT, MCL 691.1407(7) PROVIDES A GOVERNMENTAL IMMUNITY EXCEPTION FOR LIABILITY OF A GOVERNMENTAL AGENCY UNDER THE MISS DIG UNDERGROUND FACILITY DAMAGE PREVENTION AND SAFETY ACT.

As stated, the Legislature by Public Act 2013 Nos. 173 & 174 effective April 1, 2014, comprised of Senate Bills 539 and 540 amended the GTLA to add the following immunity exception to MCL 691.1407:

> "(7) The immunity provided by this Act does not apply to liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act."

It is well-settled Michigan law that statutory language must be enforced as written to give effect to the Legislature's intent. The Court begins the process by reviewing the language of the statute and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute and judicial construction is neither required nor permitted. All non-technical words and phrases must be construed and understood according to their common and approved usage, and, if a term is not defined in the statute, a court may consult a dictionary to aid in the goal of determining the Legislature's intent.

In *McCormick v Carrier,* 487 Mich 180, 191-92; 795 NW2d 517 (2010), the Supreme Court held:

> The primary goal of statutory construction is to give effect to the Legislature's intent. *Briggs Tax Serv, LLC v Detroit Pub Sch,* 485 Mich

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> 69, 76; 780 NW2d 753 (2010). This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. *Id.* Judicial construction of an unambiguous statute is neither required nor permitted. *In re MCI Telecom Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999). When reviewing a statute, all non-technical "words and phrases shall be construed and understood according to the common and approved usage of the language," MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid in its goal. *Oakland Co Bd of Co Rd Com'rs v Mich Prop & Cas Guaranty Ass'n,* 456 Mich 590, 604; 575 NW2d 751 (1988). A court should consider the plain meaning of a statute's words and their 'placement and purpose in the statutory scheme.'"

These rules have been emphatically repeated by multiple Michigan Supreme Court cases for years. *Rowland v Washtenaw County Road Commission,* 477 Mich 197, 202; 731 NW2d 41 (2007) ("We begin by construing the language of the statute itself. When the language is unambiguous, we give the words their plain meaning and apply the statute as written."); *Odom v Wayne County, supra* at 467 ("When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted.") *Wesche v Mecosta County Road Commission,* 480 Mich 75, 83; 746 NW2d 847 (2008) ("When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted.").

As applied to the quoted language of MCL 691.1407(7), the language is simple, plain, clear, unambiguous and emphatic that governmental immunity does not apply to liability of a governmental agency under the MISS DIG Act. The language provides no limitation.

As the Court of Appeals noted in its Opinion (Township Appx, pp 4-5), the term "liability" is not defined in the statute and therefore the Court must apply its commonly understood plain and ordinary meaning, as stated in *McCormick, supra,* and in *Haynes v Beulah,* 308 Mich App 465, 468; 865 NW2d 923 (2014), where the court held: "If a word is not defined

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in the statute, that word should be interpreted according to its plain and ordinary meaning, and in 'those situations, [this Court] may consult dictionary definitions.'"

The Court of Appeals in this case referred to *In re Bradley Estate,* 494 Mich 367; 835 NW2d 545 (2013), which addressed the meaning of the words "tort liability" in MCL 691.1407, the statute at issue here, holding: "As commonly understood, the word 'liability,' refers to liableness, i.e., 'the state or quality of being liable.' To be 'liable' means to be 'legally responsible[.]'." 494 Mich at 385.

The word "under" is also not defined in the statute but its commonly understood meaning per the American Heritage Dictionary is "subject to the authority, rule or control of".

Therefore the clear language of MCL 691.1407(7) as held by the Court of Appeals Opinion (Township Appx 1, p 4) is that the provision "precludes any governmental immunity for 'all legal responsibility under MISS DIG.'"

IV. CONTRARY TO THE TOWNSHIP'S ARGUMENT, THERE IS NO LIMITATION PROVIDED ON THE LANGUAGE OF MCL 691.1407(7) BY THE MISS DIG ACT.

The Township argues next that a section of the Miss Dig Act, MCL 460.732(2), limits the immunity exception of MCL 691.1407(7) to provide that a facility owner or a facility operator may only file a complaint with the Public Service Commission.

This argument is not supported by any statutory language and is directly contrary to the express statutory language, and all rules of statutory construction under Michigan law.

The MCL 691.1407(7) immunity exception was added to the GTLA at the same time the Legislature replaced the former Protection of Underground Facilities Act, MCL 460.701 *et seq.* with the new MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq.*

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The new Miss Dig Act in conjunction with the immunity exception added to the GTLA confirms that the overall legislative intent was to create the immunity exception for the liability of a governmental agency for a violation of the Miss Dig Act.

Specifically, the Miss Dig Act included new definitions to confirm that the Act applies to governmental agencies:

1. "Facility operator" is defined in MCL 460.723(p) as: "'Facility operator' means a person that controls the operation of its facility."

2. "Facility owner" is defined in MCL 460.723(q) as: "'Facility owner' means a person that owns a facility."

3. "Excavator" is defined in MCL 460.723(n) as: "any person performing excavation or blasting."

4. "Person" is defined in MCL 460.723(w) to include as a "person" a "governmental agency, department or agency."

5. "Governmental Agency" is defined at MCL 460.723(t) as "the state and its political subdivisions, including counties, townships, cities, villages or any other governmental entity."

These definitions confirm the legislative intent that every governmental agency is required to comply with all of the duties of a "person" under the Miss Dig Act, including as a "facility operator," "facility owner," and as an "excavator" .

MCL 460.727 provides the duties of a "facility owner" or "facility operator" which is what the Township is in this case:

> (1) A facility owner or facility operator ***shall*** respond to a ticket by the start date and time for the excavation or blasting under Section 5(1) by marking its facilities in the area of the proposed excavation or blasting in a manner that permits the excavator to employ soft excavation to establish the precise location of the facilities.
>
> (2) A facility owner or facility operator ***shall*** mark the location of each facility with paint, sticks, flags, or other customary methods using the uniform color code of the American National Standard Institute as follows:
>
> * * * *

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(h) Green – sewers and drain lines.

(3) A facility owner or facility operator ***shall*** provide notification to the notification system using positive response. (emphasis added).

* * * *

The legislative intent as to these duties of Independence Township is further confirmed by the use of the word "shall" which the Michigan Supreme Court has held indicates a mandatory and imperative directive. *Burton v Reed City Hospital,* 471 Mich 745, 752; 691 NW2d 424 (2005) (". . . The Legislature's use of the word 'shall' indicates a mandatory and imperative directive . . ."); *Costa v Community Emergency Medical Service,* 475 Mich 403, 409; 716 NW2d 236 (2006) ("The Legislature's use of the word 'shall' in a statute generally indicates a mandatory and imperative directive."); *Oakland County v State of Michigan,* 456 Mich 144, 154; 566 NW2d 616 (1997) ("The phrase 'shall administer a public welfare program' is mandatory, not permissive." n 10 "There is a presumption that 'shall' is mandatory.").

As discussed in the Court of Appeals opinion (Township Appx 1, pp 4-5), it is the governmental entity's "liability" for not complying with these and other mandatory directives of the Miss Dig Act, which are excepted from governmental immunity by MCL 691.1407(7).

The Miss Dig Act defines "facility" at MCL 460.723(o):

(o) "Facility" or "underground facility" means an underground or submerged conductor, pipe, or structure including, but not limited to, a conduit, duct, line, pipe, wire or other device ***and its appurtenances*** used to produce, store, transmit or distribute a utility service including . . . sewage . . . water . . ." (emphasis added)

This definition, as discussed in the Counter-Statement of Facts of this Brief, was intended to provide a very broad definition of "facility" to avoid arguments raised by governmental

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agencies, such as by the Township in this case, who attempt to strictly limit the definition of a "facility" to avoid having to mark all of their facilities.

The definition adds and includes not just the underground conductor, pipe or structure, but also includes "a conduit, duct, line, pipe, wire or other device ***and its appurtenances*** . . ." (emphasis added)

The exact issue on appeal in this case has been the subject of dispute for years. Governmental agencies often refuse to respond to Miss Dig marking requests and/or incorrectly claim "NO CONFLICT," as the Township did in this case, when they have facilities in the area of the request. In this case, this has been established by the Township's own "demonstrative map," which clearly shows multiple Township owned facilities in the area requested to be marked, yet the Township states in its brief to this Court that "no sanitary or water facilities owned, operated or maintained by the Township were near the job site . . ." (Township Brief, p 3) which is directly contrary to the Township's own "demonstrative map" in its brief. (Township Brief, p 2). As previously stated, Kaltz is not arguing that the Township or any governmental agency has to mark private sanitary sewer leads. This is not required by MCL 460.727 because the governmental agency is not the owner of a private sanitary sewer lead. However, as discussed in the Counter-Statement of Facts of this Brief, where the private sanitary sewer leads connect with the government-owned sewer main, the connecting stub is part of the main and is owned by the governmental agency. The stub is a government owned "facility" as defined by MCL 460.723(o) as an "appurtenance" to the sewer main and must be marked by the governmental agency. A marking of the stub alerts the excavator to the presence of the private sanitary sewer lead. In this case, as pointed out in the Counter-Statement of Facts, the Township did not mark any of its facilities including its mains, manholes, and connecting stubs in the requested area, and further stated that there was "NO CONFLICT."

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This exact issue of marking the stub to alert the excavator of the presence of a private sanitary sewer lead is the subject of the Michigan Damage Prevention Board Best Practice 2015-03 which provides:

> **MDPB BEST PRACTICE**
>
> Facility owners/operators are subject to the requirements of PA 174, specifically sections 460.724 and 460.727. An appurtenance to a facility is subject to the same requirements of that facility. For example, most municipal sewer systems consist of a main in public right of way and sewer leads on private property. The main and the leads are separate facilities as defined in 460.723(o). ***The connection between the main and leads, the stub, would be considered an appurtenance to the sewer main and would fall under the responsibilities of the owner/operator of the main***. Further, any leads up to the edge of the public right of way are considered owned or operated by the municipality and are subject to the requirements of PA 174. (Appx 15, p 133, emphasis added)

The Best Practice defines "appurtenances" as:

> Appurtenances - as defined by Webster's New College Dictionary
>
> 1: an incidental right (as a right-of-way) attached to a principal property right and passing in possession with it
> 2: a subordinate part or adjunct
> 3: plural: accessory objects: apparatus (Appx 15, p 133)

The Best Practice further discusses the danger caused by governmental agencies, such as the Township, not marking appurtenances to their facilities:

> ***Unmarked appurtenances are a threat to safety because the excavator is not aware of the presence of the facility or does not have enough information to define a caution zone for safe excavation.*** Excavation activity can lead to damage to the unmarked appurtenance. In the case of sewer leads, the excavator might be unaware of the damage, resulting in a cross bore through the sewer lead. Efforts to remove the subsequent blockage from the sewer can result in serious safety incidents when gas, electric or other utility lines are damaged during the clean out process. (Appx 15, p 133, emphasis added)

The Township's own ordinance, Sec. 48-84 ***admits*** that it ***owns*** such connections:

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> ***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 centers and mobile home parks. (Township Appx 7, p 102, emphasis added.)

A. CONTRARY TO THE TOWNSHIP'S ARGUMENT, THE ENACTMENT OF MCL 691.1407(7) AND THE REPEAL AND REPLACEMENT OF THE PROTECTION OF UNDERGROUND FACILITIES ACT WITH THE MISS DIG UNDERGROUND FACILITY DAMAGE PREVENTION AND SAFETY ACT REQUIRE GOVERNMENTAL AGENCIES TO COMPLY WITH THE MISS DIG ACT OR LOSE GOVERNMENTAL IMMUNITY FOR FAILING TO COMPLY.

The problem of governmental agencies throughout the state refusing and/or failing to comply with the Protection of Underground Facilities Act, MCL 460.701 *et seq.* resulted in the Legislature adding MCL 691.1407(7) to the GTLA and replacing the Protection of Underground Facilities Act, MCL 460.701 *et seq.* with the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq.* to specifically apply all of its provisions to governmental agencies.

Contrary to the Township's objections to this immunity exception and attempt to limit its remedy to a complaint to the Public Service Commission, accompanied by obtaining support for its arguments by Amici Curiae: Michigan Townships Association, Michigan Municipal League, Michigan County Road Commission Self-Insurance Pool and Government Law Section of the State Bar of Michigan, are continued attempts to ***exempt and excuse*** governmental agencies from complying with the Miss Dig Act.

Contrary to the Township's Amici arguments of massive exposure to governmental agencies in Michigan to liability, the immunity exception does not create ***any*** liability for any governmental agency which complies with state law, the Miss Dig Act. The Miss Dig Act specifically provides that it applies to every "person" which is specifically defined by MCL

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460.723(w) to include not only individuals, firms, joint ventures, partnerships, corporations, associations, community cooperatives or joint stock associations, including any trustee, receiver, assignee, or personal representative, but also including every "governmental agency, department or agency." What the Township and Amici are arguing for is that they be excepted from complying with the Miss Dig Act, which is basically how they operate. The duties and responsibilities of every person including governmental agencies include not only duties per MCL 460.727 as a "facility owner" or a "facility operator" but also per MCL 460.725 as an "excavator."

MCL 460.725 provides:

> (1) An excavator ***shall*** provide a dig notice to the notification system at least 72 hours, but not more than 14 calendar days, before the start of any blasting or excavation . . .
>
> (4) An excavator ***shall*** comply with the notification system procedures and all requirements of this Act.
>
> (5) Except as otherwise provided in this subsection, before blasting or excavating in a caution zone, an excavator ***shall*** expose all marked facilities in the caution zone by soft excavation . . . .
>
> (6) An excavator ***shall*** provide supports or bracing of facilities or excavation walls . . .
>
> (7) An excavator ***shall*** provide notification to the notification system if facility markings are destroyed or covered by excavation or blasting activities . . .
>
> (8) An excavator ***shall*** provide notification to the notification system requesting additional assistance if the location of a marked facility was in the proximate location cannot be determined.
>
> (9) An excavator ***shall*** provide immediate notice to the notification system of soft excavation in the immediate vicinity if the excavator has reason to suspect the presence of an unmarked facility . . .
>
> (12) An excavator ***shall*** provide prompt emergency notice to the notification system for any proposed excavation or blasting in an emergency . . . (emphasis added).

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Governmental agencies are engaged daily in excavating projects.

There is no basis to exempt governmental agencies from complying with the Miss Dig Act pursuant to any language in the Miss Dig Act or the GLTA. Governmental agencies, such as the Township, owe their citizens a duty to comply with state law, including the Miss Dig Act, and it is certainly of no benefit to the Township's citizens for the Township to avoid complying with the Miss Dig Act which creates avoidable dangers to people and property throughout the Township, and in regard to the Amici arguments to people and property throughout the state.

The Township's response to the Zezula claim in this case is typical, by advising Zezula that the Township had no responsibility to mark, and only Kaltz and DTE were responsible, and then in defense of this case by refusing to produce any information regarding what facilities it owned in the area requested to be marked, and in support of its motion for summary disposition and on this appeal to argue that the damage to Zezula's private sanitary sewer lead did not occur in the public right-of-way of Forrest View Drive, when per the photos on page 4 of this Brief, was right in the middle of Forrest View Drive right in front of Zezula's house, and then denying that it owned any facilities in the area requested to be marked, directly contrary to its own "demonstrative map", which destroys the Township's credibility and shows the extent a governmental agency will go to avoid complying with the Miss Dig Act.

B. CONTRARY TO THE TOWNSHIP'S AND AMICUS CURIAE'S ARGUMENTS, THERE IS NO LIMITATION ON MCL 691.1407(7) PROVIDED BY ANY PART OF THE MISS DIG ACT INCLUDING MCL 460.732(2).

Section 12 of the Miss Dig Act, MCL 460.732(1) and MCL 460.732(2), provide:

> (1) Except 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.
>
> (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

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> governmental agency under this section for any violation of this act. . . . . (emphasis added)

The Township and Amici Curiae argue that this provision provides the only remedy for violation of the Miss Dig Act by any governmental agency. The Township's brief states that MCL 460.732(2) creates a "singular, exclusive" remedy for any liability of any governmental agency under the Miss Dig Act and the Miss Dig Act exception to the GLTA, MCL 691.1407(7):

> "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***." (Township Brief, p 11, emphasis in original)

The Township's brief quotes from the amicis brief of the Michigan County Road Commission Self-Insurance Pool:

> "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")." (Township Brief, p 12, emphasis in original)

The amicus brief by the Michigan Township Association and Michigan Municipal League, makes the same argument:

> "MCL 460.732(2) goes on to describe the ***sole*** exception to governmental immunity contemplated by MISS DIG Act: '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.'" (Michigan Township's Brief, p 14, emphasis added)

Similarly, the amicus brief by the Government Law Section of the State Bar of Michigan states:

> "Per Section 12 of the MISS DIG Act, the remedy against a governmental agency ***is limited*** to an administrative remedy for a civil fine and possibly damages . . ." (Government Law Section Brief, p 16, emphasis added).

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Similarly, the amicus brief by the Michigan County Road Commission Self-Insurance Pool states:

> "In turn, the MISS DIG Act ***limits*** liability of government agencies to Commissioned-based remedies." (Michigan County Road Commission Brief, p 25, emphasis added)

Pursuant to these arguments, the ***only*** remedy for any liability within the immunity exception for liability of any governmental agency under the MISS DIG Act would be for an owner or operator of an underground facility, who "may" file a complaint with the Public Service Commission. The Miss Dig Act defines "facility" as:

> (o) "Facility" or "underground facility" means an underground or submerged conductor, pipe, or structure, including, but not limited to, a conduit, duct, line, pipe, wire, or other device and its appurtenances used to produce, store, transmit, or distribute a utility service, including communications, data, cable television, electricity, heat, natural or manufactured gas, oil, petroleum products, steam, sewage, video, water, and other similar substances, including environmental contaminates or hazardous waste.

This would exclude any claim by any person or entity other than the owner or operator of an underground facility for any bodily injury or property damage or loss of business resulting from any failure of any governmental agency to comply with the Miss Dig Act in regard to marking its facilities, or excavating or blasting or any other activity regulated by the Miss Dig Act.

There is no support for these arguments in the language of the GLTA, the Miss Dig Act, or any other statute. Rather, this argument is directly contrary to the statutory language, all rules of statutory construction and the interests of the citizens of the Township and the State of Michigan.

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This Brief previously cited the Michigan Supreme Court case law that courts cannot engage in judicial construction of unambiguous statutory language. Supra at pp 20-21. Yet this is exactly what the Township is arguing for.

In *In re Certified Question From the United States Court of Appeals for the Sixth Circuit,* 468 Mich 109, 113, 116-17; 659 NW2d 597 (2003), the Michigan Supreme Court held:

> A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich 59, 65, 503 NW2d 435 (1993). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co v Ward*, 460 Mich 230, 596 NW2d 119 (1999). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27, 528 NW2d 681 (1995).

The Michigan Supreme Court has repeatedly held that the corollary to enforcing a statute as written, is that a court cannot read anything into an unambiguous statute that is not within the intent of the Legislature as derived from the words of the statute, and may not speculate regarding legislative intent beyond the words expressed in the statute and cannot impute intent or speculate as to possible intent of the Legislature.

In *Roberts v Mecosta County*, 466 Mich 57, 63; 642 NW2d 663 (2002), the Michigan Supreme Court held:

> "If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562, 621 NW2d 702 (2001). A necessary corollary of these principles is that 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."

Similarly, in *Omne Financial, Inc. v Shacks, Inc.,* 460 Mich 305, 311-12; 596 NW2d 591 (1999), the Michigan Supreme Court held:

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> "Statutory interpretation is a question of law, subject to de novo review. . . . Courts may not speculate regarding legislative intent beyond the words expressed in a statute. . . . nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself. . . . we need not, and consequently will not, speculate regarding legislative intent beyond the plain words expressed in the statute."

Similarly, in *City of Lansing v Lansing Township,* 356 Mich 641, 649-50; 97 NW2d 804 (1999), the Michigan Supreme Court held:

> "The express wording of the statute in this case does not fall within the above provisions so as to justify judicial interpretation. Certainly it is plain, unambiguous and not subject to different interpretations by two reasonable minds. It is clear, definite, and would be easily understood by even those not trained in the law. The language of the statute, therefore, leaves no room for judicial construction. . . . No intent may be imputed to the Legislature in the enactment of a law other than such is supported by the face of the law itself. The courts may not speculate as to the probable intent of the legislature beyond the words employed in the act."

Nowhere does MCL 460.732(2) contain any language that it provides a "singular" or "exclusive" or mandatory remedy, limited to a facility owner or facility operator and excluding any remedy for any other person or entity.

First, Section 1 of MCL 460.732 makes clear that except 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 MCL 691.149.

Second, MCL 460.732(2) provides a very limited remedy that a facility owner or a facility operator ***"may"*** file a complaint with the Public Service Commission seeking a civil fine, and, if applicable, damages from a governmental agency for any violation of this act, for damage to its underground facilities. Thus, by its language, this is a limited non-mandatory remedy which is limited to "facility owners" and "facility operators" for damage to their underground facilities There is no language stating that it excludes any person or entity from having any remedy for any governmental agency's liability under the Miss Dig Act.

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Third, in MCL 460.732(2), the Legislature chose to use the word "may" as opposed to a mandatory word such as "shall" previously discussed in this Brief. *Burton v Reed City Hospital,* 471 Mich 745, 752; 691 NW2d 424 (2005) (". . . The Legislature's use of the word 'shall' indicates a mandatory and imperative directive . . ."); *Costa v Community Emergency Medical Service,* 475 Mich 403, 409; 716 NW2d 236 (2006) ("The Legislature's use of the word 'shall' in a statute generally indicates a mandatory and imperative directive."); *Oakland County v State of Michigan,* 456 Mich 144, 154; 566 NW2d 616 (1997) ("The phrase 'shall administer a public welfare program' is mandatory, not permissive." n 10 "There is a presumption that 'shall' is mandatory.").

As applied to this case, the Legislature was aware of the use of mandatory words, such as "shall," in its enactment of the Miss Dig Act including in MCL 460.727 as to duties of a facility owner or operator where it states: "(1) A facility owner or operator ***shall*** respond to a ticket . . . (2) A facility owner or facility operator ***shall*** mark the location of each facility . . . (3) A facility owner or facility operator ***shall*** provide notification to the notification system. . ."; in MCL 460.726 as to the duties of the notification system where it states: "(1) The notification system ***shall*** receive dig notification of proposed excavation and blasting activities and promptly transmit a ticket to facility owners or facility operators of facilities in the area . . . (2) The notification system ***shall*** publicize the availability and use of the notification system . . . (3) The notification system ***shall*** administer a positive response system . . . (4) The notification system ***shall*** maintain adequate records of its notification activity . . . (5) The notification system ***shall*** expedite the process of any emergency notice . . . (6) The notification system ***shall*** receive design tickets under the procedures in section 6a. and transmit them to facility owners or facility operators;" and in MCL 460.725 as to the duties of an excavator where it states: "(1) an excavator ***shall*** provide a dig notice to the notification system at least 72 hours, but not more

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than 14 calendar days, before the start of any blasting or excavation . . . (2) A dig notice ***shall*** contain at least the following . . . (4) The excavator ***shall*** comply with notification system procedures and all requirements of this Act . . . (5) . . . before blasting or excavating in a caution zone, excavator ***shall*** expose all marked facilities in the caution zone by soft excavation . . . (6) An excavator ***shall*** provide support or bracing of facilities or excavation walls . . . (7) An excavator ***shall*** provide notification to the notification system if facility markings are destroyed or covered by excavation or blasting activities . . . (8) An excavator ***shall*** provide notification to the notification system requesting additional assistance if the location of a marked facility within the approximate location cannot be determined. (9) An excavator ***shall*** provide immediate additional notice to the notification system and stop excavation in the immediate vicinity if the excavator has reason to suspect the presence of an unmarked facility . . . (10) If an excavator contacts or damages a facility, the excavator ***shall*** provide immediate notice to the facility owner or facility operator . . . (12) An excavator ***shall*** provide prompt emergency notice to the notification system for any proposed excavation or blasting in an emergency . . .” (emphasis added)

These provisions confirm that the Legislature knew of the choice of the word “shall” to connote a mandatory requirement, but determined not to use the mandatory term “shall” in MCL 460.732(2), but rather used the word “may” because the remedy in MCL 460.732(2) was ***not*** intended by the Legislature to be an exclusive or mandatory requirement, but only an alternative remedy limited to facility owners or facility operators.

Fourth, use of the word “may” in MCL 460.732(2) cannot be interpreted to mean “shall.” To do so would be in violation of the well-settled rule of construction, that the first and primary rule is to apply unambiguous language in a statute as written: *Rowland v Washtenaw County Road Commission,* 477 Mich 197, 202; 731 NW2d 41 (2007) (“We begin by construing

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the language of the statute itself. When the language is unambiguous, we give the words their plain meaning and apply the statute as written."); *Wesche v McCosta County Road Commission,* 480 Mich 75, 83; 746 NW2d 847 (2008) ("When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted."). (See, also, cases cited, *supra,* pp 20-21; 32-33).

This issue that the word "may" should not be interpreted as "shall" has been recently discussed in *True Care Physical Therapy v Auto Club Group,* 347 Mich App 168; 14 NW3d 456 (2023), lv den, 513 Mich 1073; 4 NW3d 745 (2024). This is an opinion written by Justice N.P. Hood while sitting as a judge on the Michigan Court of Appeals. The issue was whether a no-fault provider was required to appeal a utilization review to the Department of Insurance before suing in state court. It was noted that both the Legislature under MCL 500.3157a(5) and the DIFS under the Mich Admin Code, RR500.64(3) and 500.65(1) used the discretionary term "may" regarding an appeal, and not "must" or "shall." 347 Mich App at 174.

The Court held in affirming the trial court's denial of the Auto Club's motion for summary disposition, that the Court was not persuaded by Auto Club's argument that the word "may" means "shall" or "must":

> Nor are we persuaded by Auto Club's argument that "may," as used here, means "shall" or "must." Courts must give the ordinary and accepted meaning to the permissive word "may" and the mandatory words "shall" or "must" unless doing so "would frustrate the legislative intent as evidenced by other statutory language or by reading the statute as a whole."
>
> * * * *
>
> Second, we are not persuaded that "may" means "must." That interpretation shortens the limitations period for actions under § 3112 and carries the additional danger of allowing a regulation to overwrite a statute.
>
> * * * *

> Here, the Legislature did not use language expressing an intent to grant the DIFS exclusive jurisdiction. Indeed, the language it chose expresses an intent to give the circuit court jurisdiction. See MCL 500.3112. MCL 500.3112 explicitly affords providers with an unqualified cause of action that is not preconditioned on an administrative appeal. 347 Mich App at 182, 183-4, 188.

This is the exact issue on this appeal. There is no basis in the statutory language of any legislative intent that the use of the word "may" in MCL 460.732(2) was intended to mean "shall" or "must." As discussed above, the Legislature knew when and how to use "shall" in the Miss Dig Act in MCL 460.725, 726 and 727 when setting forth the duties of excavators, the notification system, and facility owners and facility operators, and clearly chose not to use "shall" or any other mandatory language when discussing the permissive alternative in MCL 460.732(2) limited to a facility owner or a facility operator who "may" file a complaint with the Public Service Commission rather than file a complaint in circuit court.

In *K2 Retail Construction v West Lansing Retail,* 2025 WL 540378 (Michigan Court of Appeals Docket No. 367762) (2025) (Appx 19), the Court of Appeals per the opinion of Judge N.P. Hood again held:

> The Legislature's choice to use the word "may" ordinarily indicates a permissive provision and the word "shall" indicates a mandatory provision.

Similarly here the Legislature's choice of the word "may" indicates only a permissive provision and not a "mandatory" provision as argued by the Township.

Fifth, use of the word "may" shows the legislative intent that the remedy in MCL 460.732(2) is meant to be "permissive" and not "mandatory." In *Township v Rice,* 509 Mich 363, 372; 984 NW2d 71 (2022), the Supreme Court stated:

> "We acknowledge that the term 'may' is ordinarily considered to be permissive. The use of that term in MCL 286.473b therefore gives discretion, rather than imposing a mandatory condition."

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See also, *In re Bail Bond Forfeiture,* 496 Mich 320, 328; 852 NW2d 747 (2014) ("While the term 'may' is permissive, not mandatory, the term 'shall' as discussed is a 'mandatory term, not a permissive one[.]'"); *Manuel v Gill,* 481 Mich 637, 647; 753 NW2d 48 (2008) ("In general, our courts have said that the term 'may' is 'permissive' as opposed to the term 'shall' which is considered 'mandatory[.]'").

Sixth, use of the word "may" also indicates legislative intent that the remedy at MCL 460.732(2) is intended to provide a facility owner or facility operator an alternative and a discretionary choice whether to use the remedy of a complaint to Public Service Commission or a civil suit against a governmental agency for liability under the Miss Dig Act. *Kingdomware Technologies, Inc. v United States,* 579 U.S. 162, 163; 136 S.Ct. 1969; 195 L.Ed.2d 334 (2016) ("The word 'shall' usually connotes a requirement, unlike the word 'may,' which implies discretion.").

Seventh, arguing that MCL 460.732(2) provides a mandatory remedy limited to a facility owner or a facility operator limited to filing a complaint to the Public Service Commission is also ***directly contrary*** to Section 8 of the Miss Dig Act, MCL 460.728, which provides that the Miss Dig Act ***does not limit the right of an excavator, facility owner, or facility operator to seek legal relief and recovery of actual damages incurred and equitable relief in a civil action*** arising out of a violation of the requirements of the Act:

> ***This act does not limit the right of an excavator, facility owner, or facility operator to seek legal relief and recovery of actual damages incurred and equitable relief in a civil action arising out of a violation of the requirements of this act***, or to enforce the provisions of this act, nor shall this act determine the level of damages or injunctive relief in any such civil action. ***This section does not affect or limit the availability of any contractual or legal remedy that may be available to an excavator, facility owner, or facility operator arising under any contract to which they may be a party***. (emphasis added)

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The plain and simple language of MCL 460.728 that "this Act does not limit the right of an excavator, facility owner, or facility operator to seek legal relief . . ." is completely inconsistent with any argument of any legislative intent that MCL 460.732(2) ***limits*** any remedy for any liability of any governmental agency under the Miss Dig Act to a facility owner or facility operator to file a complaint with the Public Service Commission for any governmental agency's violation of the Miss Dig Act. The Township's and Amici's argument on this point is directly contrary to the ***mandate*** of MCL 460.728 that the Miss Dig Act "does not limit the right of an excavator, facility owner, or facility operator to seek legal relief and recovery of actual damages incurred and equitable relief in a civil action arising out of the violation of the requirements of this Act . . ." This language could not be any more contrary to the Township's and Amici's argument. This is not just legislative intent, it is the language of the statute itself which per all of the Supreme Court case law cited above must be enforced as written. (Supra, pp 20-21; 28-29).

Eighth, in addition, MCL 460.732(2), per well-settled rules of statutory construction, must be read in the context of the entire Miss Dig Act and the governmental immunity exception at MCL 691.1407(7), which provides that there is no governmental immunity for the liability of a governmental agency under the Miss Dig Act. This is especially so, because the enactment of MCL 691.1407(7) was combined with the Legislature's replacement of the Protection of Underground Facility Act with the Miss Dig Act, with all of the specific sections imposing duties under the Miss Dig Act on all governmental agencies as discussed above. As stated by the Supreme Court in *Potter v McLeary,* 484 Mich 397, 14-11; 774 NW2d 1 (2009), a statute must be read as a whole, individual words, while important, should be read in the context of the entire legislative scheme which requires consideration of both the plain meaning of a critical word or phrase as well as its placement and purpose in the statutory scheme and the statute must also be

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read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained and that the language at issue is interpreted in a manner that ensures that it works in harmony with the entire statutory scheme:

> In determining the intent of the Legislature, this Court must first look to the language of the statute. The Court must, first and foremost, interpret the language of a statute in a manner that is consistent with the intent of the Legislature. "'As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.'" Moreover, when considering the correct interpretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. In defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. Finally, the statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme.

Similarly, in *Herman v Berrien County,* 481 Mich 352, 366; 750 NW2d 570 (2008):

> "Finally, in defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'"

Thus, in the context of the statutory scheme of adding the new immunity exception at MCL 691.1407(7) excepting from immunity the liability of a governmental agency under the Miss Dig Act combined with the replacement of the Protection of Underground Facilities Act with the Miss Dig Act, which includes multiple specific provisions imposing duties on governmental agencies, show a clear intent that the word "may" in MCL 460.732(2) must be interpreted and applied per its definition as a "permissive", "discretionary" term, as opposed to interpreting it as a "mandatory" and "exclusive" remedy available only to facility owners and operators and limited to filing a complaint to the Public Service Commission with limited sanctions. Moreover, as stated above, the Township's argument is directly contrary to and not in

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harmony with the Miss Dig Act itself. which, per MCL 460.728 specifically states that "This Act does not limit the right of an excavator, facility owner, or facility operator to seek legal relief and recovery of actual damages incurred and equitable relief in a civil action arising out of a violation of the requirements of this Act . . ." This language cannot be any more on point to show that the Township's argument is directly contrary to the legislative intent.

Ninth, the Township's argument regarding MCL 460.732(2) that the only remedy available against a governmental agency for violation of the Miss Dig Act is a complaint by a facility owner or operator to the Public Service Commission ignores that there are multiple individuals and entities other than a facility owner or operator who may have claims against a governmental agency arising out of the liability of the governmental agency under the Miss Dig Act:

(1) A governmental agency may fail to comply with its duties under the Miss Dig Act to respond to a Miss Dig request and mark its facilities which could result in an explosion, or fire or release of hazardous materials resulting in injuries, deaths and property damage other than property damage to a facility owner or operator's underground facilities;

(2) A governmental agency's failure to comply with the Miss Dig requirements regarding acting as an excavator per MCL 460.725 by failing to provide notice to Miss Dig of a proposed excavation, proceeding with excavation without having facilities marked, ignoring marked facilities when excavating any of which could result in an explosion or fire or release of hazardous materials resulting in injuries, deaths and property damage other than property damage to a facility owner or operator's underground facilities.

There is absolutely no language in MCL 460.732(2) regarding any such possibilities or claims, which were certainly not intended by the Legislature to be replaced by a complaint to the Public Service Commission limited to a facility owner or operator.

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V. CONTRARY TO THE TOWNSHIP'S ARGUMENT, THE PLAINTIFF HAS ALLEGED A CLAIM WITHIN THE SEWAGE-DISPOSAL-SYSTEM-EVENT EXCEPTION, MCL 691.1417.

The Township argues that the Court of Appeals committed "grave legal error" by agreeing with the trial court to allow amendment of the complaint to allege a sewage disposal system event within that exception. (Township Brief, pp 14-20). The Township argues that the exception cannot apply because the damage occurred to a private sewer lead. (Brief, pp 15-19).

There is nothing in MCL 691.1417 or any case law that the exception is limited to public property.

The requirements are set forth at MCL 691.1417(3) which provide:

> (3) If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:
>
> (a) The governmental agency was an appropriate governmental agency.
>
> (b) The sewage disposal system had a defect.
>
> (c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.
>
> (d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
>
> (e) The defect was a substantial proximate cause of the event and the property damage or physical injury.

All of these apply here:

(a) The Township is an appropriate governmental agency which was required to mark its facilities.

(b) The Township sewage disposal system had a "defect" as defined by the statute in the Township's "operation" of its

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system by refusing and failing to mark its facilities causing the sewage backup.

(c) The Township knew its duties under the Miss Dig Act and failed to comply with them by refusing to mark its facilities and stating that there was "NO CONFLICT."

(d) The Township failed to take the steps required by the Miss Dig Act to mark its facilities, resulting in Kaltz striking the unmarked facility, which would have been disclosed by marking the location of where the Zezula lead connected with the Township's main, and by not stating "NO CONFLICT".

(e) The Township's failure to mark its facilities and to claim that there was "NO CONFLICT" was the cause of the event of Kaltz striking the sanitary sewer lead, to cause a sewage backup on Zezula's property.

MCL 691.1416(e) defines "defect" as: "A construction, design, maintenance, ***operation***, or repair defect." (emphasis added).

It is well settled that where a statute defines a term, that definition is binding on the courts. *Welch Foods v Attorney General,* 213 Mich App 459, 462; 540 NW2d 693 (1995) held:

> Where a statute defines a term, that definition supersedes a commonly accepted or dictionary definition, and it is binding on the courts.

In the trial court's Opinion and Order denying the Township's motion for summary disposition (Appx 14) and in the Court of Appeals Opinion affirming the trial court (Township Appx 1, p 7, n3), the Courts relied on *State Farm v Corby Energy,* 271 Mich App 480, 484, n2; 722 NW2d 906 (2006), where the Court of Appeals held that a "defect" would include the governmental agencies' "operation" of its system including properly marking its water system pursuant to the then in effect Protection of Underground Facilities Act:

> We reject State Farm's contention that the marking of the water main, as required by MCL 460.708, did not constitute operation or maintenance of the water line. Construing the term "governmental function" broadly as we must, see *Maskery v Univ of Michigan Bd of Regents,,* 468 Mich 609,614; 664 NW2d 165 (2003), we conclude that the prevention of

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> accidental damage to the City's water system through notification is within the scope of the water department's operations.

Throughout its brief on appeal, the Township argues repeatedly that "the immunity conferred upon governmental agencies is broad . . ." (Township Brief, p 8). However, the Township ignores the corollary to that argument, that the term "governmental function" must also be broadly construed. In *Maskery v Board of Regents,* 468 Mich 609, 613-14; 664 NW2d 165 (2003), the Supreme Court held:

> A governmental function is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). The term "governmental function" is to be broadly construed, and the statutory exceptions are to be narrowly construed.

See, also: *Horice v City of Pontiac,* 456 Mich 744, 749-50; 575 NW2d 762 (1998) ("The term 'governmental function' is to be broadly construed . . ."); *Ross v Consumers Power,* 420 Mich 567, 618; 363 NW2d 641 (1984) (". . . The Legislature intended that the term 'governmental function' be interpreted in a broad manner.").

This is why the Court of Appeals in *State Farm v Corby, supra,* held that "The prevention of accidental damage to the City's water system through notification [to Miss Dig] is within the scope of a water department's operations."

Since the decision in *State Farm v Corby, supra,* in 2006, we have now had the Legislature repeal and replace the Protection of Underground Facilities Act with the MISS DIG Underground Facility Damage Prevention and Safety Act and enact the governmental immunity exception for liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act per MCL 691.1407(7) both effective April 1, 2014. Thus, now, even more so, complying with the Miss Dig Act is a governmental function as compliance

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is required by the Miss Dig Act itself which defines "governmental agency" as a "person" ***required*** to comply with the requirements of the Miss Dig Act. MCL 460.723(p)(q)(t) and (w).

Both the trial court and the Court of Appeals correctly ruled that the plaintiff should be allowed to amend plaintiff's complaint to allege a claim under MCL 691.1417 based upon the Township's violation of the Miss Dig Act by refusing to mark its facilities in the area requested, knowing that it had facilities in that exact area and then stating in response to Kaltz' Miss Dig request that there was "NO CONFLICT."

In *Fane v Detroit Library Commission,* 465 Mich 68, 74; 631 NW2d 678 (2001), the Supreme Court stated the standard to survive a motion for summary disposition based on governmental immunity:

> To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity. *Wade v Dep't of Corrections,* 439 Mich 158, 164, 483 NW2d 26 (1992). We consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them.

As applied here, the admissions in the Township's Brief on Appeal that it had facilities in the area requested to be marked as designated by its own "demonstrative map" (Township Brief, p 2), and that it marked nothing because "there was no conflict" (Township Brief, p 3), when the "demonstrative map" clearly shows multiple Township facilities in the area requested to be marked, establishes that the Township was in violation of the Miss Dig Act resulting in the property damage to the plaintiff Zezula.

Similarly, in *Willett v Waterford Charter Township,* 271 Mich App 38, 51-52; 718 NW2d 386 (2006), the Court of Appeals held that a "defect" could include "maintenance":

> The statute defines "defect" as "a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). The statute does not further define the terms used to define "defect." Given that the definition of "defect" itself uses the term "defect," and the second use of the term is

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> undefined in the statute, we reference dictionary definitions. *Laurence G. Wolf, supra,* at 271; *Pierce, supra,* 265 Mich App 178. A "defect" is defined as "a fault or shortcoming; imperfection." *Random House Webster's College Dictionary* (1997). "Maintenance" is defined as "the act of maintaining," and "maintain" is defined as: "1. To keep in existence or continuance; preserve. 2. To keep in due condition, operation or force. 3. To keep in a specified state, position, etc." *Id.* . . . Defendant's response to the obstruction indicates that it viewed the obstruction as a fault or a defect requiring immediate maintenance. After being notified of the sewer backup, defendant deployed a "jet truck" to attempt to dislodge the obstruction and restore proper operation of its sewer lines. Thus, under the plain language of the statute, there was evidence to support plaintiff's allegation that the "sewage disposal system had a defect."

As applied here, there was certainly a "fault or shortcoming" in the Township's response to the Miss Dig request, and thus a "defect" in the Township's "operation" of its sewage disposal system.

Similarly in *Cannon Township v Rockford Public Schools,* 311 Mich App 403, 418; 875 NW2d 242 (2015), the Court of Appeals held that a "defect could be in 'operation' of the sewage disposal system:

> "The trial court correctly held that plaintiff had presented sufficient evidence of a 'defect' of some kind, whether in design, construction, or mere operation, in the sewage disposal system, sufficient to avoid governmental immunity."

As applied here, sufficient evidence of a "defect" in the "operation" of the Township's sewage disposal system has been established.

Similarly in *Kuhn v City of Gibraltar,* 2024 WL 62688 (Mich App, 2024)[1] (Appx 17), the Court of Appeals held there could be a "maintenance" defect:

> Viewing the evidence in a light most favorable to Kuhn, we conclude that she established a genuine issue of material fact regarding the existence of a maintenance defect in the SDS. Gibraltar failed to take any corrective steps for the two years of intermittent flooding that occurred before

[1] Pursuant to MCR 7.215(C)(1), unpublished decisions have been cited in this Brief as they provide guidance on application of public authority to facts similar to this matter.

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> Kuhn's injury could be viewed by a reasonable fact-finder as evidence of a maintenance defect.

As applied here, the evidence has established a genuine issue of material fact regarding an "operation" defect in the Township's sewage disposal system. The Township failed to comply with the Miss Dig Act to mark its facilities in the area requested to be marked and reported that there was "NO CONFLICT."

Similarly in *Nakfoor v Our Savior Lutheran Church,* 2018 WL 626037 (Mich App, 2018)[1] (Appx 18), the Court of Appeals held there could be an "operation" defect:

> And the question that lies at the heart of this case is whether the storm water draining system had a defect with respect to its operation or maintenance, taking into consideration rainfalls and the change in the physical environment – the increase in the elevation of OSLC's property. On this question there exists a genuine issue of fact.

As applied here, there is certainly an issue of fact as to "fault or shortcomings" in the Township's responses to the Miss Dig request.

In the current case, there is not only evidence but now admissions in the Township's brief on appeal of a "defect" in the "operation" of the Township's sewage disposal system by failing to mark the location of its facilities as required by the Miss Dig Act, MCL 460.727, and to state that there was "NO CONFLICT," when the record (the Township's own "demonstrative map") establishes that there were "conflicts" known by the Township but undisclosed which resulted in the property damage.

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RELIEF REQUESTED

It is respectfully requested that this Honorable Court affirm the decisions of the Trial Court and Court of Appeals.

Respectfully submitted,
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DATED: December 22, 2025

CERTIFICATE OF CONFORMITY

Pursuant to MCR 7.205(B)(1) and MCR 7.212(B), the undersigned certifies that this Brief contains 14,569 words, as determined by the word-counting function in Microsoft Word.

/s/ Michael F. Schmidt
Attorney for Defendant/Appellee
Kaltz Excavating Company, Inc.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing pleading(s) has been electronically filed with the Clerk of the Court via the Electronic Case Filing system on the date shown below, which will send notice of filing to all attorneys of record.

/s/Cheryl A. Pinter
Dated: December 22, 2025 Legal Assistant, Harvey Kruse, PC

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