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STATE OF MICHIGAN
IN THE SUPREME COURT

BRIAN ZEZULA,

Plaintiff / Appellee

v.

INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendant/Appellant,

and

KALTZ EXCAVATING COMPANY, INC.,

Defendant / Appellee,

and

~~NINA BROWN, DTE ENERGY COMPANY,~~

~~Defendants.~~

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

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PLAINTIFF / APPELLEE BRIAN ZEZULA'S BRIEF ON APPEAL

ORAL ARGUMENTS REQUESTED

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STATEMENT OF JURISDICTION

The Honorable Cheryl A. Matthews of the Oakland County Circuit Court reviewed written briefs, heard oral arguments and entered her Order on the material subject matter of this case on October 18, 2023, wherein Judge Matthews denied Defendant Independent Township's Motion for Summary Disposition regarding government immunity. From that Order, Defendant Independence Township appealed Judge Matthew's Order of October 18, 2023, wherein the Michigan Court of Appeals reviewed written briefs, heard oral arguments and opined in its Order of March 11, 2025, our Michigan Court of Appeals upheld the trial court's opinion and ruling by denying Defendant Independent Township's motion for summary disposition and did so with a published opinion. Thereafter, Defendant / Appellant Independence Township of Oakland County relied on MCR 7.305(B) for its application for leave to appeal this this Court wherein this Court granted Defendant / Appellant's application for its appeal to be heard, but in doing so, the Court has restricted the written and oral arguments to two specific points and questions of facts to be heard on the merits. This Court has proper jurisdiction to hear the requested appeal pursuant to MCR 7.202(6)(a)(v), MCR 7.203(A)(1) and MCR 7.305(B).

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Does MCL 691.1407(7) of the Governmental Tort Liability Act (GTLA) create a governmental immunity exception when a governmental agency violates the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 et seq.?

Plaintiff / Appellee says:	**YES**
Trial Court says:	**YES**
MI. Court of Appeals says:	**YES**
Defendant / Appellant Independent Township of Oakland County says:	NO
Defendant / Appellee Kaltz says:	**YES**
This Court should answer:	**YES**

2. Did the Oakland County Circuit Court err in permitting Plaintiff-Appellee Brian Zezula to amend his Complaint to allege a sewage disposal system event claim per MCL 691.1417?

Plaintiff / Appellee says:	**NO**
Trial Court says:	**NO**
MI. Court of Appeals says:	**NO**
Defendant / Appellant Independent Township of Oakland County says:	YES
Defendant / Appellee Kaltz says:	**NO**
This Court should answer:	**NO**

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COUNTER-STATEMENT OF FACTS

I. OPENING STATEMENT

The Township asks this Honorable Court to rewrite two different statutes to create an exclusive remedy our Legislature never enacted. The plain language found in the legislative statutes dispenses with Defendant / Appellant's arguments.

First, MCL 460.728 explicitly preserves civil actions. It states 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 this act." That language is absolute. It contains no carve-out for governmental agencies.

Second, MCL 460.732(2) uses the specific term "may" and does not use the word "shall." It provides that facility owners "may file a complaint with the commission." The Legislature knew the difference when creating the statutes. Further, in the same Act, Section 7 uses "shall" three times to mandate how governmental agencies must mark facilities. Obviously, the term "may" creates a discretionary option and not an exclusive remedy.

Third, nothing in MCL 460.732 says it's exclusive. The Township wants this Court to read an "exclusive remedy" into a statute that never used those words. If the Legislature intended strict and specific exclusivity, it would have expressly stated it as it does throughout our Michigan law. And, truth be told, the fiscal analysis for Senate Bill 539 warned that the bill "will expose municipalities to liability for any damage to underground facilities." It also stated that "potential liabilities of municipalities [will] increase." The Legislature knew it was creating tort liability when it analyzed the fiscal impact on municipalities from civil lawsuits.

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Finally, the Township's reading produces misleading and incorrect results. Under their interpretation, if an unmarked gas line explodes and injures an innocent victim, that victim has no remedy because they're not a facility owner who can file an MPSC complaint. How absurd! Our Michigan Legislature didn't create a remedy within its statutes and Acts that leaves innocent victims without proper civil recourse to remedy their damages suffered. In this case, MCL 691.1407(7) does exactly what it says: governmental immunity "does not apply to liability of a governmental agency under the MISS DIG" Act. Thus, the MISS DIG Act preserves civil actions under MCL 460.728. There is not getting around the plain meaning and understanding of what the Legislature intended as evidenced in their statutes and Acts.

II. LAW AND LEGAL ARGUMENTS

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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A. **The Court of Appeals did not err.**

The Court of Appeals affirmed that, "the GTLA has a broad exception to governmental immunity for alleged violations of the MISS DIG Act. Because Zezula alleges Independence Township violated MISS DIG, Independence Township cannot claim governmental immunity." The statute states, "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." MCL 691.1407(7). The Court of Appeals (COA) interpreted "liability" to mean "all legal responsibility," rejecting Defendant / Appellant Independence Township's argument that the remedy is limited to administrative complaints with the Michigan Public Service Commission (MPSC). From the COA's 2 to 1 majority decision, the dissenting opinion by Judge Boonstra's argued that the majority, "misinterprets the scope of our Legislature's actions" and failed to properly defer to legislative intent. How can this be when the plain and obvious printed words that constitute the statutes found within the four corners of the documents are clear, specific, unambiguous and result in an unequivocal mandate?

B. **Regarding the Sewage Disposal System Event Exception's Amendment.**

The trial court and Court of Appeals held that there was no error in permitting the amendment. The trial court found "the sewage disposal system had a defect pursuant to MCL 691.1417(3)(b)" because the failure to mark facilities is an "operation" of the Township, and therefore constitutes a "defect" under MCL 691.1416(e). The court relied on *State Farm v. Corby Energy*, 271 Mich App 480, 484, which 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." MCL 691.1416(e) defines "defect" as "a construction, design, maintenance, operation, or repair defect," and the court found the failure to mark facilities

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constituted an operational defect. It is noted that Defendant / Appellant argues, "In Pari Materia" Statutory Interpretation wherein allegedly MCL 691.1407(7) and MCL 460.732 must be read together as statutes relating to the same subject matter. The township states to this Court, "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."

MCL 460.728 expressly states MISS DIG "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." Thus, the plain language of MCL 691.1407(7) and MCL 460.728 contains no limiting language or cross-reference to MCL 460.732. Further and again, MCL 460.723(q) and (w) apply to civil actions where the "facility owner" (which includes governmental agencies such as the Defendant / Appellant in this case) is not immune to being named in a civil action regarding tort liability ... and not just MPSC complaints.

C. **Supporting Statutory Language - MCL 460.732(1) - The "Except" Clause**

MCL 460.732(1) has the clause stating, "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." Thus, governmental immunity remains, "except as provided in this section." Section 12 of MCL 460.732 only provides one thing: facility owners/operators may file MPSC complaints. It doesn't say this is an exclusive remedy that shall be followed. Instead, it preserves immunity except for what's in this section which is the MPSC option, not a limitation on MCL 691.1407(7). Further, MCL 460.729(2) that covers Excavators, states, "An excavator or a farmer engaged in farming operations that complies with this act is not responsible for damages that occur to a facility that is improperly marked, not marked, or

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determined to be within the safe zone." Here, it is clearly noted and seen that our Legislature offered some protection to excavators from liability for unmarked facilities. This is exactly what has occurred in this specific Zezula case and it only makes sense that there are prescribed civil remedies beyond MPSC complaints as seen by the protection of excavators above where governmental entities may be held liable in tort.

D. **Senate Bill Analysis**

MCL 460.728 states that, "The 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 Act's requirements, or to enforce the Act's provisions." MCL 691.1407(7) amended the governmental immunity act to express that immunity does not apply to liability of a governmental agency under the "MISS DIG Under Ground Facility Damage Prevention and Safety Act." The Legislature's intent is unambiguous.

It has been long held and understood that there should be no speculation beyond the plain language of the Legislature's intent wherein our Michigan courts may not speculate regarding legislative intent beyond the words expressed in the statute. If we follow the path of the Township, it implies that MCL 460.732(2) would harness, limit, and trap owners and operators in outlandish results such as an innocent victim who could not pursue civil remedies if that victim was injured by a facility's unmarked event resulting in an explosion, or property owners whose buildings burn to the ground, or damages incurred due to fires from utility strikes, etc. Under the Township's argument of 460.732, this leaves no remedy but to file a complaint with the MPSC and we know this is not true.

Per the legislative analysis, two bills amended the GTLA to add MCL 691.1407(7) and to replace the former Protection of Underground Facilities Act, MCL 460.701 et seq with the new

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MISS DIG Underground Facility Damage Prevention Safety Act, MCL 460.721 et seq. The tie-barring of these two major pieces of legislation - one amending the GTLA and one completely replacing the old MISS DIG Act - shows the Legislature intended comprehensive reform, not mere clarification. The legislative analysis stated, "It is not known how many instances of a municipality damaging underground facilities occur during a year, or what the average cost of each instance is." For these reasons, the fiscal impact of the bill on local governments is indeterminate, but will be negative to the extent that the potential liabilities of municipalities increase. The Legislature didn't analyze the fiscal impact of administrative fines - they analyzed the fiscal impact of tort liabilities and damage awards. They knew municipalities would face lawsuits and have to pay damages.

The Legislature exercised its plenary authority over governmental immunity. It enacted clear, unambiguous language removing immunity for MISS DIG violations. It analyzed the fiscal impact. It knew municipalities would face tort liability. And it chose public safety over municipal immunity.

E. **There are not only six exceptions to GTLA.**

Defendant / Appellant Independence Township of Oakland County asserts that there are only six (6) exceptions to the GTLA. Plaintiff / Appellee asserts that the case Defendant / Appellant used in *Odom v. Wayne County,* 482 Mich 459, 478 n 62; 760 NW2d 217 (2008), was decided in 2008, which was six (6) years before the 2014 amendment adding MCL 691.1407(7). This unpublished cases Defendant / Appellant relies on do not analyze MCL 691.1407(7), but instead only rely on the old six (6) exceptions. This is the same position the dissenting opinion in the Court of Appeals with Judge Boonstra's that resulted when he, too, ignored the updated MCL 691.1407(7) and only focused on the older six (6) exceptions. The dissent also ignored

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MCL 460.728 entirely. The dissent misread *State Farm v. Corby* in that the case held that marking facilities IS within the scope of operations. We cannot simply ignore what occurred and took place in 2014 when the new updated statute was passed and made into law. The Legislature explicitly considered all the factors involved and put into print the exact words that guide and mandate the possible liabilities of all municipalities if the law is violated … in that the same municipality does not enjoy immunity. The plain language provides perfect predictability to all municipalities: Don't violate MISS DIG or you lose immunity. The Township's argument would have this Court hold that 'narrow construction' means declaring the Legislature's clear language a nullity. That contradicts basic principles, 'Courts may not speculate regarding legislative intent beyond the words expressed in the statute.' *Omne Financial v. Shacks*, 460 Mich at 311-12.

As this Court has repeatedly held: 'When the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction is neither required nor permitted.' The Court of Appeals correctly enforced the statute as written. This High Court should affirm.

III. THE LOWER COURTS DID NOT ERR IN ALLOWING PLAINTIFF TO AMEND HIS COMPLAINT.

A. Michigan's Liberal Amendment Standard

Michigan courts apply a liberal standard for allowing amendments to pleadings. Granting leave to amend is within the trial court's discretion and should be granted "in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment." Here, Plaintiff demonstrated diligence by promptly amending his Complaint after Defendant Kaltz filed its Notice of Non-Party at Fault identifying the Township. There

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was, and is, no undue delay, bad faith, or repeated failures to cure deficiencies.

B. MISS DIG Exception to Governmental Immunity

The trial court and Court of Appeals correctly found that Plaintiff could amend Plaintiff's complaint to allege liability of the township pursuant to the sewage disposal system event exception MCL 691.1417.

C. Pleading in Avoidance of Governmental Immunity

Plaintiff properly pleaded in avoidance of governmental immunity. "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Mack v. City of Detroit*, 467 Mich 186 (2002). The Court of Appeals affirmed: "Because Zezula alleges Independence Township violated MISS DIG, Independence Township cannot claim governmental immunity." 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.

D. Plaintiff's Lack of Technical Knowledge

Mr. Zezula was a homeowner without technical knowledge about the interplay between the Township, Kaltz, and DTE's respective responsibilities. When Kaltz filed its Motion for Nonparty at Fault identifying the Township, prudence dictated that Plaintiff amend the Complaint under MCR 2.112(K)(4).

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E. Discovery Has Not Yet Occurred

At the time of the Township's motion for summary disposition, and still continued currently, discovery has not been completed. The Township has refused to produce documents regarding its facilities in the area of the MISS DIG request. Questions of fact remain that require discovery, thus making dismissal premature. There is no prejudice by allowing Plaintiff to amend the Complaint when discovery hasn't even begun yet and the two lower Courts have both found that Defendant / Appellant does not enjoy government immunity. Both courts correctly applied Michigan law regarding amendments to pleadings and governmental immunity exceptions. The plaintiff adequately alleged facts that, if proven, would fall within statutory exceptions to immunity. The amendment was not futile, and there were no grounds to deny it. Further, the Township itself contributed to this confusion by advising Plaintiff immediately after the incident that "the Township had no liability or responsibility whatsoever and that the responsible parties were Kaltz and DTE." The Township actively misled Plaintiff, telling him, "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." When Kaltz filed its Notice of Non-Party at Fault on April 28, 2023, identifying the Township's MISS DIG violations, Plaintiff promptly filed a motion to amend on May 23, 2023, which was granted June 7, 2023. This demonstrates diligence, not delay. Prudence dictated that Plaintiff amend under MCR 2.112(K)(4) to add the Township rather than sleep on his rights.

F. Plaintiff Fail did not fail to Provide Pre-Suit Notice Under MCL 691.1419

The Township argues Plaintiff failed to comply with the pre-suit notice requirements of MCL 691.1419, which requires written notice within forty-five (45) days containing specific information. The record decisively refutes this argument. Moreover, the Township is barred from

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raising this defense by its own failure to comply with MCL 691.1419(2). The incident occurred on December 2, 2020. Plaintiff reported it to the Township two days later on December 4, 2020, via an email to David McKee (DPW Director) with photos of the damage. The Township's own December 30, 2020, letters to Kaltz and DTE, well within 45 days, demonstrate the Township had all required information including the address of affected property, date of discovery, brief description of the claim, and claimant's name and address. Instead, the township failed its statutory duty under MCL 691.1419(2) that requires that when a governmental agency receives notification, it "shall" provide written information to the claimant explaining the notice requirements, including where and how to file a claim. The Township never provided this required information. Thus, when a governmental agency fails to comply with MCL 691.1419(2), subsection (3) bars it from raising any notice defense. In *Dybata v. County of Wayne*, 287 Mich. App. 635, 646-47 (2010), the Court of Appeals held that the defendant was barred from raising the notice defense where it received timely notification but "failed to provide plaintiff any information concerning where and how to file a claim as required by § 19(2)." The same analysis applies here. The trial court correctly held this issue in abeyance for supplemental briefing, but the Township appealed before that briefing could occur, staying all proceedings. The Court of Appeals properly declined to address an issue that the trial court had not decided. Independence Township has failed to establish any valid basis for denying Plaintiff's amendment.

Michigan law mandates that motions to amend "are ordinarily to be granted in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of

amendment." Plaintiff demonstrated diligence by promptly amending after Kaltz's filing. The amendment is not futile because two statutory exceptions to immunity apply: MCL 691.1407(7) (MISS DIG exception) and MCL 691.1417 (sewage disposal system event exception). There was no undue delay, bad faith, prejudice, or repeated failures. Both the trial court and Court of Appeals correctly exercised their discretion in allowing the amendment.

RELIEF REQUESTED

WHEREFORE, Plaintiff / Appellee respectfully requests this Honorable High Court uphold and confirm the Trial Court and the Court of Appeals ruling and Orders in favor of Plaintiff.

CERTIFICATE OF COMPLIANCE

I, Daniel A. Groves, hereby certify that Plaintiff / Appellee's Brief on Appeal contains 3,461 words which is within the Michigan Court Rules of Compliance pursuant to MCR 7.212(B).

/s/ Daniel A. Groves

PROOF OF SERVICE

I, Daniel A. Groves, hereby certify that on December 24, 2025, I electronically filed the foregoing paper with the Clerk using the Court's efile system, by selecting and eserve, which will send notification to all attorneys of record.

/s/ Daniel A. Groves

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