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

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APPENDIX 1

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This case has been designated as an eFiling case, for more information please visit www.oakgov.com/efiling.

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STATE OF MICHIGAN
6TH CIRCUIT COURT FOR THE COUNTY OF OAKLAND

2022-197937-NZ
JUDGE CHERYL A. MATTHEWS

BRIAN ZEZULA

Plaintiff,

Case No. 22- -NZ
Hon.

v

NINA BROWN, DTE ENERGY COMPANY, and KALTZ EXCAVATING COMPANY INC.

Defendants.
/

LIONEL E. BASHORE (P-58599)
DANIEL A. GROVES (P-74026)
Bashore Green Law Group
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/

THERE IS NO OTHER PENDING OR RESOLVED CIVIL ACTION ARISING OUT OF THE TRANSACTIONS OR OCCURRENCES ALLEGED IN THIS COMPLAINT

/s/ Daniel A. Groves
DANIEL A. GROVES (P-74026)

COMPLAINT

NOW COMES Plaintiff, BRIAN ZEZULA, by and through his attorneys, Bashore Green Law Group, and for her COMPLAINT, hereby alleges as follows:

COMMON ALLEGATIONS, JUSIDICTION AND VENUE

1. Plaintiff, BRIAN ZEZULA, is a resident in the City of Clarkston, County of Oakland and State of Michigan.

2. Defendant NINA BROWN is a resident in the City of Clarkston, County of Oakland and State of Michigan.

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3. Defendant DTE ENERGY COMPANY is a private domestic corporation with its primary place of business in the City of Detroit, County of Wayne and State of Michigan; DTE conducts business with separate offices throughout the State of Michigan to include Oakland County, Michigan and Defendant DTE ENERGY COMPANY has a registered agent located at 2900 West Road, Suite 500, East Lansing, Michigan, 48223.

4. Defendant KALTZ EXCAVATING COMPANY, INC. is a private domestic corporation with its primary place of business in the City of Pontiac, County of Oakland and State of Michigan and has a registered agent located at 6140 Green Drive, Harsens Island, Michigan, 48028.

5. This Court has proper jurisdiction over all parties and the amount in controversy exceeds $25,000.

COUNT I

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO NINA BROWN

6. Plaintiff incorporates by reference paragraphs 1 through 5.

7. In the early month of December and in the year of 2020, Defendant Nina Brown requested and hired Defendant DTE ENERGY COMPANY and subsequently subcontractor KALTZ EXCAVATING COMPANY, INC. to complete electrical line work on her property address located at 5122 Forrest View Dr., Clarkston, Michigan, 48346. Defendant Brown ordered the outside work, to include digging and excavating into private property land that also had a private roadway on the same property with a water main beneath the ground and water pipe leads from the water main.

8. That due to the request, order, supervision and knowledge of Defendant Brown having the underground digging work done by Defendant DTE ENERGY COMPANY and DEFENDANT KALTZ EXCAVATING COMPANY, INC., Defendant Brown knew or should have known that the same work could lead to and be liable for damages done to any of the underground water leads that connected neighboring houses on immediately located private properties.

9. That on December 2, 2020, and again on December 29, 2020, Defendant Brown's outside groundwork as requested, ordered, supervised and with knowledge by Defendant Brown caused damage to Plaintiff's underground pipe lead from the private property's main water line

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due to mechanical boring. Plaintiff's water lead was severely punctured and drilled through, thus causing leakage and flooding into Plaintiff's basement drainage pipes into his home, as well as also causing other harm.

10. That Defendant Brown breached her duties in the following manners including, but not limited to, her disregard, her knowing or should have known of the inherent risk of having work done that included boring beneath the ground and hazardously jeopardizing and compromising the existing water leads into other residents' private homes, to include Plaintiff, wherein such hazardous damage consisting of piercing a water lead was the proximate cause for flooding and destruction of Plaintiff's property and personal possessions within Plaintiff's home.

11. That Defendant Brown breached her duties as a direct and proximate result of her negligence for any and all other acts of negligence that may be learned or discovered through the litigative discovery process.

12. That Defendant Brown's negligence was foreseeable and avoidable.

13. That at all times herein, Defendant Brown owed Plaintiff BRIAN ZEZULA a duty to reasonably assure no harm or damage due to any outside work done by Defendant Brown on her private property would wrongfully damage and adversely affect Plaintiff BRIAN ZEZULA'S physical (structural) and personal property.

14. That Defendant Brown failed to take adequate and reasonable measures to warn and assure Plaintiff ZEZULA of the inherent risk and damage to Plaintiff's land and personal property due to the actions of Defendant Brown; while similarly and concurrently failing to provide Plaintiff with any protection and instruction so Plaintiff could mitigate Defendant Brown's wrongful damages to Plaintiff's land and personal property on December 2, 2020, and again on December 29, 2020.

15. That Defendant Brown put Plaintiff and Plaintiff's family at great harm and risk due to the environmental mycobacteria and other hazardous harm caused by raw sewage wrongfully entering Plaintiff's home.

16. As a direct and proximate result of Defendant Brown's negligence, Plaintiff has suffered harm to his property and person, including but not limited to:

a) Interior Home water damage to wall, support beams, flooring, carpeting, etc.

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b) Significant water damage in the basement of Plaintiff's properties on Forrest View Drive in Clarkston, MI. in the County of Oakland, State of Michigan.

c) Loss of personal possessions including, but not limited to furniture, clothing, personal items, cabinets, home supplies, sporting gear, bedroom accessories to include bed, mattresses, sheets, etc., electronic equipment, books, hunting gear, etc.

d) Loss of use and enjoyment of Plaintiff's basement and other parts of his home.

e) Possible medical internal disease, sickness, and specifically right-hand injury suffered during the emergency water flooding and clean-up process;

f) Emotional distress; past, present, and future;

g) Mental anguish; past, present, and future.

WHEREFORE, Plaintiff respectfully request that this Honorable Court enter a Judgment in their favor and against Defendant NINA BROWN in an amount in excess of $25,000, together with costs, interest and attorney fees so wrongfully incurred.

COUNT II

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO TO DTE ENERGY COMPANY

17. Plaintiff incorporates by reference paragraphs 1 through 16.

18. At all material times, Defendant DTE ENERGY COMPANY (DTE) was in the business of providing, generating, processing, transmitting, distributing, maintaining, modifying, repairing, installing and working with all aspects of electrical output to over two million (2,000,000) Michigan residents in the southeastern portion of the State of Michigan.

19. That in the early month of December and in the year of 2020, Defendant DTE (and subcontractor KALTZ EXCAVATING COMPANY, INC.) was hired by Defendant Brown to complete electrical line work on Defendant Brown's property address located at 5122 Forrest View Dr., Clarkston, Michigan, 48346. As such, Defendant DTE engaged in work, to include digging and excavating into private property land that also had a private roadway on the same property that had a water main beneath the ground and water pipe leads from the water main underground.

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20. That on December 2, 2020, and again on December 29, 2020, Defendant DTE's outside groundwork as conducted by, supervised and with knowledge by Defendant DTE caused damage to Plaintiff's underground pipe lead from the private property's main water line due to mechanical boring. Plaintiff's water lead was severely punctured and drilled through, thus causing long-term flooding into Plaintiff's basement drainage pipes and up into his home, as well as other harm.

21. That Defendant DTE breached its duties in the following manners including, but not limited to its disregard, DTE's knowing or should have known of the inherent risk of having this work done (that included boring beneath the ground and hazardously jeopardizing and compromising the existing water leads into other residents' private homes) to include Plaintiff, wherein such hazardous damage consisting of piercing a water lead was the proximate cause for flooding and destruction of Plaintiff's property and personal possessions within Plaintiff's home.

22. That Defendant DTE breached its duties and as a direct and proximate result of DTE's negligence, DTE is liable for any and all other acts of negligence that may be learned or discovered through the litigative discovery process.

23. That Defendant DTE's negligence was foreseeable and avoidable.

24. That at all times herein, Defendant DTE owed Plaintiff BRIAN ZEZULA a duty to reasonably assure no harm or damage due to any outside work done by Defendant DTE on private property would wrongfully damage and adversely affect Plaintiff BRIAN ZEZULA'S physical (structural) property and Plaintiff's personal possessions.

25. That Defendant DTE failed to take adequate and reasonable measures to warn and assure Plaintiff ZEZULA of the inherent risk and damage to Plaintiff's land and property due to the actions of Defendant DTE; while similarly and concurrently failing to provide Plaintiff with any protection and instruction so Plaintiff could mitigate Defendant DTE's wrongful damages to Plaintiff's property and personal possessions on December 2, 2020 and again on December 20, 2020.

26. Thank Defendant DTE failed to conduct basic, routine, commonly exercised practices of measurement to assure that no leads from the underground water main would be directly (or indirectly), negatively, adversely and destructively damaged, harmed or destroyed during Defendant's work-related conduct in boring underneath the ground where water leads were

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known to be connected to all surrounding residential homes in the immediate area of said excavation by Defendants.

27. That Defendant DTE put Plaintiff and Plaintiff's family at great harm and risk due to the environmental mycobacteria and other harm caused by raw sewage wrongfully entering Plaintiff's home.

28. As a direct and proximate result of Defendant DTE's negligence, Plaintiff has suffered harm to his property, possessions, and person, including but not limited to:

a. Interior Home water damage to wall, support beams, flooring, carpeting, etc.
b. Significant water damage in the basement of Plaintiff's properties on Forrest View Drive in Clarkston, MI. in the County of Oakland, State of Michigan.
c. Loss of personal possessions including, but not limited to furniture, clothing, personal items, cabinets, home supplies, sporting gear, bedroom accessories to include bed, mattresses, sheets, etc., electronic equipment, books, hunting gear, etc.
d. Loss of use and enjoyment of Plaintiff's basement and other parts of his home.
e. Possible medical internal disease, sickness, and specifically right hand injury suffered during the emergency water flooding and clean-up process;
f. Emotional distress; past, present, and future;
g. Mental anguish; past, present, and future;

WHEREFORE, Plaintiff respectfully request that this Honorable Court enter a Judgment in their favor and against Defendant DTE ENERGY COMPANY in an amount in excess of $25,000, together with costs, interest and attorney fees so wrongfully incurred.

COUNT III

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO TO KALTZ EXCAVATING COMPANY, INC.

29. Plaintiff incorporates by reference paragraphs 1 through 28.

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30. At all material times, Defendant KALTZ EXCAVATING COMPANY, INC. (KALTZ) was in the business of providing all aspects of outdoor land and ground digging and excavating work as directly related to the work Defendant Brown and DTE requested for electrical work to be done on Defendant Brown's private property as previously described.

31. That in the early month of December and in the year of 2020, Defendant KALTZ was hired by Defendant Brown and DTE to complete electrical line work on Defendant Brown's property address located at 5122 Forrest View Dr., Clarkston, Michigan, 48346. As such, Defendant KALTZ engaged in work, to include digging and excavating into private property land that also had a private roadway on the same property that had a water main beneath the ground and water pipe leads from the water main underground.

32. That on December 2, 2020, and again on December 29, 2020, Defendant KALTZ'S outside groundwork as conducted by, supervised and with knowledge by Defendant KALTZ caused damage to Plaintiff's underground pipe lead from the private property's main water line due to mechanical boring. Plaintiff's water lead was severely punctured and drilled through, thus causing severe and long-term flooding into Plaintiff's basement drainage pipes and up into his home, as well as other harm.

33. That Defendant KALTZ breached its duties in the following manners including, but not limited to its disregard, KALTZ'S knowing or should have known of the inherent risk of having this work done (that included boring beneath the ground and hazardously jeopardizing and compromising the existing water leads into other residents' private homes) to include Plaintiff, wherein such hazardous damage consisting of piercing a water lead was the proximate cause for flooding and destruction of Plaintiff's property (structural) and personal possessions within Plaintiff's home.

34. That Defendant KALTZ breached its duties and as a direct and proximate result of KALTZ'S negligence, KALTZ is liable for any and all other acts of negligence that may be learned or discovered through the litigative discovery process.

35. That Defendant KALTZ'S negligence was foreseeable and avoidable.

36. That at all times herein, Defendant KALTZ owed Plaintiff BRIAN ZEZULA a duty to reasonably assure no harm or damage due to any outside work done by Defendant KALTZ on private property would wrongfully damage and adversely affect Plaintiff BRIAN ZEZULA'S physical and personal possessions / property.

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37. That Defendant KALTZ failed to take adequate and reasonable measures to warn and assure Plaintiff ZEZULA of the inherent risk and damage to Plaintiff's land and property due to the actions of Defendant KALTZ; while similarly and concurrently failing to provide Plaintiff with any protection and instruction so Plaintiff could mitigate Defendant KALT'S wrongful damages to Plaintiff's land, property and personal possessions on December 2, 2020 and again on December 20, 2020.

38. Thank Defendant KALTZ failed to conduct basic, routine, commonly exercised practices of measurement to assure that no leads from the underground water main would be directly (or indirectly), negatively, adversely and destructively damaged, harmed or destroyed during Defendant's work-related conduct in boring underneath the ground where water leads were known to be connected to all surrounding residential homes in the immediate area of said excavation by Defendants.

39. That Defendant KALTZ put Plaintiff and Plaintiff's family at great harm and risk due to the environmental mycobacteria and other harm caused by raw sewage wrongfully entering Plaintiff's home.

40. As a direct and proximate result of Defendant KALTZ'S negligence, Plaintiff has suffered harm to his property and person, including but not limited to:

h. Interior Home water damage to wall, support beams, flooring, carpeting, etc.

i. Significant water damage in the basement of Plaintiff's properties on Forrest View Drive in Clarkston, MI. in the County of Oakland, State of Michigan.

j. Loss of personal possessions including, but not limited to furniture, clothing, personal items, cabinets, home supplies, sporting gear, bedroom accessories to include bed, mattresses, sheets, etc., electronic equipment, books, hunting gear, etc.

k. Loss of use and enjoyment of Plaintiff's basement and other parts of his home.

l. Possible medical internal disease, sickness, and specifically right hand injury suffered during the emergency water flooding and clean-up process;

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m. Emotional distress; past, present, and future;

n. Mental anguish; past, present, and future;

WHEREFORE, Plaintiff respectfully request that this Honorable Court enter a Judgment in their favor and against Defendant KALTZ EXCAVATING COMPANY, INC. in an amount in excess of $25,000, together with costs, interest and attorney fees so wrongfully incurred.

Respectfully submitted,
BASHORE GREEN LAW GROUP,
a Professional Corporation,

/s/ Daniel A. Groves
DANIEL A. GROVES (P-74026)
Attorneys for Plaintiff
17 South Saginaw Street, 2nd Floor
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Dated: December 23, 2020

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APPENDIX 2

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STATE OF MICHIGAN
6TH CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA

Plaintiff,

Case No. 22-197937-NZ

NZ
v

Hon. Cheryl A. Matthews

NINA BROWN, DTE ENERGY COMPANY,
and KALTZ EXCAVATING COMPANY INC.

Defendants.
/

LIONEL E. BASHORE (P-58599)
DANIEL A. GROVES (P-74026)
Bashore Green Law Group
Attorneys for Plaintiffs
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Pontiac, Michigan 48342
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e-Mail: lionel@bglawpc.com
daniel@bglawpc.com
/

THERE IS NO OTHER PENDING OR RESOLVED CIVIL ACTION ARISING OUT OF THE TRANSACTIONS OR OCCURRENCES ALLEGED IN THIS COMPLAINT

/s/ Daniel A. Groves
DANIEL A. GROVES (P-74026)

FIRST AMENDED COMPLAINT BY RIGHT

NOW COMES Plaintiff, BRIAN ZEZULA, by and through his attorneys, Bashore Green Law Group, and for her COMPLAINT, hereby alleges as follows:

COMMON ALLEGATIONS, JUSIDICTION AND VENUE

1. Plaintiff, BRIAN ZEZULA, is a resident in the City of Clarkston, County of Oakland and State of Michigan.

2. Defendant NINA BROWN is a resident in the City of Clarkston, County of Oakland and State of Michigan.

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3. Defendant DTE ENERGY COMPANY is a private domestic corporation with its primary place of business in the City of Detroit, County of Wayne and State of Michigan; DTE conducts business with separate offices throughout the State of Michigan to include Oakland County, Michigan and Defendant DTE ENERGY COMPANY has a registered agent located at 2900 West Road, Suite 500, East Lansing, Michigan, 48223.

4. Defendant KALTZ EXCAVATING COMPANY, INC. is a private domestic corporation with its primary place of business in the City of Pontiac, County of Oakland and State of Michigan and has a registered agent located at 6140 Green Drive, Harsens Island, Michigan, 48028.

5. This Court has proper jurisdiction over all parties and the amount in controversy exceeds $25,000.

COUNT I

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO NINA BROWN

6. Plaintiff incorporates by reference paragraphs 1 through 5.

7. In the early month of December and in the year of 2020, Defendant Nina Brown requested and hired Defendant DTE ENERGY COMPANY and subsequently subcontractor KALTZ EXCAVATING COMPANY, INC. to complete electrical line work on her property address located at 5122 Forrest View Dr., Clarkston, Michigan, 48346. Defendant Brown ordered the outside work, to include digging and excavating into private property land that also had a private roadway with a private sewer lead beneath the private road in an easement to goes across the same road.

8. That due to the request, order, supervision and knowledge of Defendant Nina Brown having the underground digging work done by Defendant DTE ENERGY COMPANY and DEFENDANT KALTZ EXCAVATING COMPANY, INC., Defendant Brown knew or should have known that the same work could lead to and be liable for damages done to any of the underground private sewer leads that connected to Plaintiff's home also located on private property.

9. That on December 2, 2020, and again on December 29, 2020, Defendant Nina Brown's outside groundwork as requested, ordered, supervised and with knowledge by Defendant Brown caused damage to Plaintiff's underground private sewer lead due to mechanical boring.

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Plaintiff's sewer lead was severely punctured and drilled through, thus causing raw sewage and Category III waste to flood into Plaintiff's basement drainage pipes into his home, as well as also causing other harm.

10. That Defendant Brown breached her duties in the following manners including, but not limited to, her disregard, her knowing or should have known of the inherent risk of having work done that included boring beneath the ground and hazardously jeopardizing and compromising the existing private sewer lead into other residents' private homes, to include Plaintiff, wherein such hazardous damage consisting of piercing a private sewer lead was the proximate cause for raw sewage flooding and destruction of Plaintiff's property and personal possessions within Plaintiff's home.

11. That Defendant Nina Brown breached her duties as a direct and proximate result of her negligence for any and all other acts of negligence that may be learned or discovered through the litigative discovery process.

12. That Defendant Nina Brown's negligence was foreseeable and avoidable.

13. That at all times herein, Defendant Nina Brown owed Plaintiff BRIAN ZEZULA a duty to reasonably assure no harm or damage due to any outside work done by Defendant Brown on her private property would wrongfully damage and adversely affect Plaintiff BRIAN ZEZULA'S physical (structural) and personal property.

14. That Defendant Nina Brown failed to take adequate and reasonable measures to warn and assure Plaintiff BRIAN ZEZULA of the inherent risk and damage to Plaintiff's land and personal property due to the actions of Defendant Nina Brown; while similarly and concurrently failing to provide Plaintiff with any protection and instruction so Plaintiff could mitigate Defendant Nina Brown's wrongful damages to Plaintiff's land and personal property on December 2, 2020, and again on December 29, 2020.

15. That Defendant Brown put Plaintiff and Plaintiff's family at great harm and risk due to the environmental mycobacteria and other hazardous harm caused by raw sewage wrongfully entering Plaintiff's home.

16. As a direct and proximate result of Defendant Brown's negligence, Plaintiff has suffered harm to his property and person, including but not limited to:

a) Interior Home water & raw sewage damage to wall, support beams, flooring, carpeting, etc.

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b) Significant water & raw sewage damage in the basement of Plaintiff's properties on Forrest View Drive in Clarkston, MI. in the County of Oakland, State of Michigan.

c) Loss of personal possessions including, but not limited to furniture, clothing, personal items, cabinets, home supplies, sporting gear, bedroom accessories to include bed, mattresses, sheets, etc., electronic equipment, books, hunting gear, etc.

d) Loss of use and enjoyment of Plaintiff's basement and other parts of his home.

e) Possible medical internal disease, sickness, and specifically right-hand injury suffered during the emergency water & raw sewage flooding and clean-up process;

f) Emotional distress; past, present, and future;

g) Mental anguish; past, present, and future.

WHEREFORE, Plaintiff respectfully request that this Honorable Court enter a Judgment in their favor and against Defendant NINA BROWN in an amount in excess of $25,000, together with costs, interest and attorney fees so wrongfully incurred.

COUNT II

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO DTE ENERGY COMPANY

17. Plaintiff incorporates by reference paragraphs 1 through 16.

18. At all material times, Defendant DTE ENERGY COMPANY (DTE) was in the business of providing, generating, processing, transmitting, distributing, maintaining, modifying, repairing, installing and working with all aspects of electrical output to over two million (2,000,000) Michigan residents in the southeastern portion of the State of Michigan.

19. That in the early month of December and in the year of 2020, Defendant DTE (and subcontractor KALTZ EXCAVATING COMPANY, INC.) was hired by Defendant Nina Brown to complete electrical line work on Defendant Brown's property address located at 5122 Forrest View Dr., Clarkston, Michigan, 48346. As such, Defendant DTE engaged in work, to include

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digging and excavating into private property land that also had Plaintiff's private sewer lead beneath the private road in an easement to goes across the same road.

20. That on December 2, 2020, and again on December 29, 2020, Defendant DTE's outside groundwork as conducted by, supervised and with knowledge of/by Defendant DTE caused damage to Plaintiff's underground private sewer lead due to mechanical boring. Plaintiff's sewer lead was severely punctured and drilled through, thus causing raw sewage and Category III waste to flood into Plaintiff's basement drainage pipes into his home, as well as also causing other harm.

21. That Defendant DTE breached its duties in the following manners including, but not limited to its disregard, DTE's knowing or should have known of the inherent risk of having this work done (that included boring beneath the ground and hazardously jeopardizing and compromising the Plaintiff's existing private sewer leads) wherein such hazardous damage consisting of piercing a private sewer lead was the proximate cause for raw sewage flooding and destruction of Plaintiff's property and personal possessions within Plaintiff's home.

22. That Defendant DTE breached its duties and as a direct and proximate result of DTE's negligence, DTE is liable for any and all other acts of negligence that may be learned or discovered through the litigative discovery process.

23. That Defendant DTE's negligence was foreseeable and avoidable.

24. That at all times herein, Defendant DTE owed Plaintiff BRIAN ZEZULA a duty to reasonably assure no harm or damage due to any outside work done by Defendant DTE on private property would wrongfully damage and adversely affect Plaintiff BRIAN ZEZULA'S physical (structural) property and Plaintiff's personal possessions.

25. That Defendant DTE failed to take adequate and reasonable measures to warn and assure Plaintiff ZEZULA of the inherent risk and damage to Plaintiff's land and property due to the actions of Defendant DTE; while similarly and concurrently failing to provide Plaintiff with any protection and instruction so Plaintiff could mitigate Defendant DTE's wrongful damages to Plaintiff's property and personal possessions on December 2, 2020 and again on December 20, 2020.

26. That Defendant DTE failed to conduct basic, routine, commonly exercised practices of measurement to assure that no sewer leads from the underground private sewer line would be directly (or indirectly), negatively, adversely and destructively damaged, harmed or

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destroyed during Defendant's work-related conduct in boring underneath the ground where sewer leads were known to be connected to Plaintiff's home in the same area of said excavation by Defendants.

27. That Defendant DTE put Plaintiff and Plaintiff's family at great harm and risk due to the environmental mycobacteria and other harm caused by raw sewage wrongfully entering Plaintiff's home.

28. As a direct and proximate result of Defendant DTE's negligence, Plaintiff has suffered harm to his property, possessions, and person, including but not limited to:

a. Interior Home water & raw sewage damage to wall, support beams, flooring, carpeting, etc.
b. Significant water & raw sewage damage in the basement of Plaintiff's properties on Forrest View Drive in Clarkston, MI. in the County of Oakland, State of Michigan.
c. Loss of personal possessions including, but not limited to furniture, clothing, personal items, cabinets, home supplies, sporting gear, bedroom accessories to include bed, mattresses, sheets, etc., electronic equipment, books, hunting gear, etc.
d. Loss of use and enjoyment of Plaintiff's basement and other parts of his home.
e. Possible medical internal disease, sickness, and specifically right-hand injury suffered during the emergency water & raw sewage flooding and clean-up process;
f. Emotional distress; past, present, and future;
g. Mental anguish; past, present, and future;

WHEREFORE, Plaintiff respectfully request that this Honorable Court enter a Judgment in their favor and against Defendant DTE ENERGY COMPANY in an amount in excess of $25,000, together with costs, interest and attorney fees so wrongfully incurred.

COUNT III

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO KALTZ EXCAVATING COMPANY, INC.

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29. Plaintiff incorporates by reference paragraphs 1 through 28.

30. At all material times, Defendant KALTZ EXCAVATING COMPANY, INC. (KALTZ) was in the business of providing all aspects of outdoor land and ground digging and excavating work as directly related to the work Defendant Nina Brown and DTE requested for electrical work to be done on Defendant Brown's private property as previously described.

31. That in the early month of December and in the year of 2020, Defendant KALTZ was hired by Defendant Nina Brown and DTE to complete electrical line work on Defendant Nina Brown's property address located at 5122 Forrest View Dr., Clarkston, Michigan, 48346. As such, Defendant KALTZ engaged in work, to include digging and excavating into private land that also had a private roadway and Plaintiff's private sewer lead beneath the private road in an easement to goes across the same road.

32. That on December 2, 2020, and again on December 29, 2020, Defendant KALTZ'S outside groundwork as conducted by, supervised and with knowledge of/by Defendant KALTZ caused damage to Plaintiff's underground private sewer lead due to mechanical boring. Plaintiff's sewer lead was severely punctured and drilled through, thus causing raw sewage and Category III waste to flood into Plaintiff's basement drainage pipes into his home, as well as also causing other harm.

33. That Defendant KALTZ breached its duties in the following manners including, but not limited to its disregard, KALTZ'S knowing or should have known of the inherent risk of having this work done (that included boring beneath the ground and hazardously jeopardizing and compromising the existing sewer leads into Plaintiff's private home) wherein such hazardous damage consisting of piercing a sewer lead was the proximate cause for raw sewage flooding and destruction of Plaintiff's property (structural) and personal possessions within Plaintiff's home.

34. That Defendant KALTZ breached its duties and as a direct and proximate result of KALTZ'S negligence, KALTZ is liable for any and all other acts of negligence that may be learned or discovered through the litigative discovery process.

35. That Defendant KALTZ'S negligence was foreseeable and avoidable.

36. That at all times herein, Defendant KALTZ owed Plaintiff BRIAN ZEZULA a duty to reasonably assure no harm or damage due to any outside work done by Defendant KALTZ on private property would wrongfully damage and adversely affect Plaintiff BRIAN ZEZULA'S physical and personal possessions / property.

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37. That Defendant KALTZ failed to take adequate and reasonable measures to warn and assure Plaintiff ZEZULA of the inherent risk and damage to Plaintiff's land and property due to the actions of Defendant KALTZ; while similarly and concurrently failing to provide Plaintiff with any protection and instruction so Plaintiff could mitigate Defendant KALT'S wrongful damages to Plaintiff's land, sewer lead, property and personal possessions on December 2, 2020 and again on December 20, 2020.

38. That Defendant KALTZ failed to conduct basic, routine, commonly exercised practices of measurement to assure that no leads from the underground private sewer leads would be directly (or indirectly), negatively, adversely and destructively damaged, harmed or destroyed during Defendant's work-related conduct in boring underneath the ground where sewer leads were known to be connected to Plaintiff's home in the immediate area of said excavation by Defendants.

39. That Defendant KALTZ put Plaintiff and Plaintiff's family at great harm and risk due to the environmental mycobacteria and other harm caused by raw sewage wrongfully entering Plaintiff's home.

40. As a direct and proximate result of Defendant KALTZ'S negligence, Plaintiff has suffered harm to his property and person, including but not limited to:

h. Interior Home water & raw sewage damage to wall, support beams, flooring, carpeting, etc.

i. Significant water & raw sewage damage in the basement of Plaintiff's properties on Forrest View Drive in Clarkston, MI. in the County of Oakland, State of Michigan.

j. Loss of personal possessions including, but not limited to furniture, clothing, personal items, cabinets, home supplies, sporting gear, bedroom accessories to include bed, mattresses, sheets, etc., electronic equipment, books, hunting gear, etc.

k. Loss of use and enjoyment of Plaintiff's basement and other parts of his home.

l. Possible medical internal disease, sickness, and specifically right hand injury suffered during the emergency water & raw sewage flooding and clean-up process;

m. Emotional distress; past, present, and future;

n. Mental anguish; past, present, and future;

WHEREFORE, Plaintiff respectfully request that this Honorable Court enter a Judgment in their favor and against Defendant KALTZ EXCAVATING COMPANY, INC. in an amount in excess of $25,000, together with costs, interest and attorney fees so wrongfully incurred.

Respectfully submitted,
BASHORE GREEN LAW GROUP,
a Professional Corporation,

/s/ Daniel A. Groves
DANIEL A. GROVES (P-74026)
Attorneys for Plaintiff
17 South Saginaw Street, 2nd Floor
Pontiac, Michigan 48342
PH: (248) 209-6009 / FX (248) 209-6010

Dated: December 28, 2022

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APPENDIX 3

Ticket: 0003360157-00B EMER NEW LREQ GRID

Started : Tue Dec 01, 2020 07:30 AM Oper: DLF Chan: CSR
Completed: Tue Dec 01, 2020 07:35 AM Source: H5TE INHSE, 1.0.52
Original : Tue Dec 01, 2020 07:35 AM Oper: DLF Chan: CSR

Dig Start: Tue Dec 01, 2020 09:00 AM
Tkt Life : Tue Dec 22, 2020 11:59 PM Positive Response Required: Y
Resp Due : Tue Dec 01, 2020 10:35 AM

Firm   : KALTZ EXCAVATING   Caller: KEVIN ONEAL
Phone : 248-335-1717 Ext: 224   Fax: Text: 810-705-4563
Email : kevin.oneal@kaltzexcavating.com

Work Type : REPLC UG ELEC SERV - LTD SERV
Done for : D T E
Field Contact: KEVIN ONEAL (CELL)   Number: 810-705-4563

State: MI County: OAKLAND   Place: INDEPENDENCE /T
Subdivision:
Lots   :
Street : FORREST VW
1st x-st: Dir E of WESTVIEW RD
2nd x-st: Dir S of MAYBEE RD
Locate Info: LOCATE ENTIRE FRT OF PROP AND BTH SDS OF RD AT ADDRS 5112, 5116, & 5128

On-going project: NO
Joint Meet: NO   Boring: YES   Working in or Near Railroad Easement: NO   Marine: NO   Private Loc: NO
Private Loct: NO
Latitude: Longitude:
Grids: 4242A8321C 4242A8321D 4243D8321C 4243D8321D

Remarks:

Members: ATTD CEGDIS CEGTRN COMTV1CTV COMTV1FBR DE0010 INDSANI INDWTR OAKCDRSWR

Member	Name	Act	Shw	Dlv	Cty	Plc	Grd	Shp	Opr	Sty	Ctr
ATTD	ATT	Y	Y	Y			A				
CECO	CONSUMERS ENERGY	Y	N	Y						A	
CEEF	CONSUMERS ENERGY	Y	N	Y						A	
CEGDIS	CONSUMERS ENERGY GAS DIST	Y	Y	Y			A				
CEGTRN	CONSUMERS ENERGY - GAS TR	Y	Y	Y			A				
CHAR1CTV	CHARTER COMMUNICATIONS	N	N	N			A				
CHAR1FBR	CHARTER COMMUNICATIONS	N	N	N			A				
COMTV1	COMCAST	Y	N	Y						A	
COMTV1CTV	COMCAST	Y	Y	Y			A				
COMTV1FBR	COMCAST	Y	Y	Y			A				
CPCO12	CONSUMERS ENERGY T&S	N	N	N			A				
DE0010	DETROIT EDISON	Y	Y	Y			A				
DSGATTS	ATT	Y	N	N			A			R	
DSGCE	CONSUMERS ENERGY	Y	N	N			A			R	
DSGCOMC	COMCAST	Y	N	N			A			R	
DSGDE	DETROIT EDISON	Y	N	N			A			R	
DSGINDTWP	INDEPENDENCE TOWNSHIP	Y	N	N			A			R	
DSGOAKCDR	OAKLAND COUNTY DRAIN COMM	Y	N	N			A			R	
EMLCFM	EMAIL CONFIRMATION SYSTEM	Y	N	Y				A			
INDSANI	INDEPENDENCE TOWNSHIP	Y	Y	Y			A				
INDTWP	INDEPENDENCE TOWNSHIP	Y	N	Y						A	
INDTWPEM	INDEPENDENCE TOWNSHIP	Y	N	Y						A	
INDWTR	INDEPENDENCE TOWNSHIP	Y	Y	Y			A				
OAKCDR	OAKLAND COUNTY DRAIN COMM	Y	N	Y						A	
OAKCDRSWR	OAKLAND COUNTY DRAIN COMM	Y	Y	Y			A				

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SMSCFM	SMS CONFIRMATION SYSTEM M	Y	N	Y			A	
TESTBBNG	BRUCE'S BEST NATURAL GAS	N	N	N	A			
TESTCEGDIS	CONSUMERS ENERGY TEST COD	N	N	N		A		
URBINT	URBINT, INC.	Y	N	Y				A
URG	UTILITY RESOURCE GROUP LL	Y	N	Y				A

Member	Name	Delivered	Seq#	Type	SID
ATTD	ATT	12/01/2020 07:35:43 AM	144	MAIL	B
CECO	CONSUMERS ENERGY	12/01/2020 07:35:43 AM	102	MAIL	B
CEEF	CONSUMERS ENERGY	12/01/2020 07:35:42 AM	5	MAIL	B
CEGDIS	CONSUMERS ENERGY GAS DISTRIBUT	12/01/2020 07:35:44 AM	73	DUMY	B
CEGTRN	CONSUMERS ENERGY - GAS TRANSMI	12/01/2020 07:35:44 AM	21	DUMY	B
COMTV1	COMCAST	12/01/2020 07:35:42 AM	82	MAIL	B
COMTV1CTV	COMCAST	12/01/2020 07:35:53 AM	82	DUMY	B
COMTV1FBR	COMCAST	12/01/2020 07:35:52 AM	82	DUMY	B
DE0010	DETROIT EDISON	12/01/2020 07:35:37 AM	26	DUMY	B
EMLCFM	EMAIL CONFIRMATION SYSTEM MBR	12/01/2020 07:35:36 AM	24	SYSQ	B
INDSANI	INDEPENDENCE TOWNSHIP	12/01/2020 07:35:52 AM	3	DUMY	B
INDTWP	INDEPENDENCE TOWNSHIP	12/01/2020 07:35:43 AM	3	MAIL	B
INDTWPEM	INDEPENDENCE TOWNSHIP	12/01/2020 07:35:44 AM	1	MAIL	B
INDWTR	INDEPENDENCE TOWNSHIP	12/01/2020 07:35:45 AM	3	DUMY	B
OAKCDR	OAKLAND COUNTY DRAIN COMMISSIO	12/01/2020 07:35:43 AM	20	MAIL	B
OAKCDRSWR	OAKLAND COUNTY DRAIN COMMISSIO	12/01/2020 07:35:45 AM	11	DUMY	B
SMSCFM	SMS CONFIRMATION SYSTEM MBR	12/01/2020 07:35:35 AM	38	SYSQ	B
URBINT	URBINT, INC.	12/01/2020 07:35:33 AM	73	MAIL	B
URG	UTILITY RESOURCE GROUP LLC	12/01/2020 07:35:42 AM	90	MAIL	B

TRS Grids: T04NR09E26 T04NR09E35

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APPENDIX 4

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Ticket Response Inquiry

Ticket responses retrieved through this program are provided by participating utility owners and/or their authorized agents. MISS DIG System, Inc. assumes no liability for the provided response.

Please enter your nine digit ticket number which will start with an A or B.

B003360157 Inquire

Information for ticket B003360157

Work Date	Response Due	Expires	County	Place	Street Address
12/01/20 09:00:00	12/01/20 10:35:15	12/22/20 23:59:00	OAKLAND	INDEPENDENCE /T	FORREST VW

If your work date is before the response due date you are in violation of Public Act 174 of 2013. For more information please visit our website or call 811.

Scope of Work
LOCATE ENTIRE FRT OF PROP AND BTH SDS OF RD AT ADDRS 5112, 5116, & 5128

Responses for ticket B003360157

Member	Name	Type	Revision	Response	Description	Response date	By	URL	Comments
ATTD	ATT	NEW	00B	002	MARKED	12/01/20 10:24:11	USIC	show	
ATTD	ATT	NEW	00B	005	ON GOING COORDINATION	12/01/20 10:01:00	USIC	show	KEVIN ONEAL 248-335-1717 on 12/01/2020 at 02:59 PM. onsite with kaltz site checker going from last pole on the south side of the road to address 5122 on the north side of the road will mark after conference call. If you have any questions, please contact
CEGDIS	CONSUMERS ENERGY GAS DISTRIBUTION	NEW	00B	002	MARKED	12/01/20 10:53:08	URG		ON SITE WITH KEVIN ONEAL (CELL) Number: 810-705-4563 12/1/20 10AM AGREED TO HAVE TICKET STAKED BY

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									11AM 12/1/20 .WRONG ADDRESSES NEEDED LOTS 5128 5122 & 5116
CEGDIS	CONSUMERS ENERGY GAS DISTRIBUTION	NEW	00B	005	ON GOING COORDINATION	12/01/20 10:02:02	URG		ON SITE WITH CREW 12/1/20 10AM AGREED TO HAVE TICKET STAKED BY 11AM 12/1/20
CEGTRN	CONSUMERS ENERGY - GAS TRANSMISSION	NEW	00B	001	NO CONFLICT	12/01/20 08:01:21	CMS		
COMTV1CTV	COMCAST	NEW	00B	002	MARKED	12/01/20 10:52:09	COMT		
COMTV1CTV	COMCAST	NEW	00B	999	HAS NOT RESPONDED	12/01/20 10:35:15			
COMTV1FBR	COMCAST	NEW	00B	001	NO CONFLICT	12/01/20 10:01:13	COMT		
DE0010	DETROIT EDISON	NEW	00B	002	MARKED	12/01/20 10:52:09	URG		ON SITE WITH KEVIN ONEAL (CELL) Number 810-705-4563 12/1/20 10AM AGREED TO HAVE TICKET STAKED BY 11AM 12/1/20
DE0010	DETROIT EDISON	NEW	00B	005	ON GOING COORDINATION	12/01/20 10:02:07	URG		ON SITE WITH CREW 12/1/20 10AM AGREED TO HAVE TICKET STAKED BY 11AM 12/1/20
INDSANI	INDEPENDENCE TOWNSHIP	NEW	00B	001	NO CONFLICT	12/01/20 07:40:20	RMAINDTWP		
INDWTR	INDEPENDENCE TOWNSHIP	NEW	00B	001	NO CONFLICT	12/01/20 07:40:20	RMAINDTWP		
OAKCDRSWR	OAKLAND COUNTY DRAIN COMMISSIONER	NEW	00B	001	NO CONFLICT	12/04/20 14:19:55	RMAPWRC		
OAKCDRSWR	OAKLAND COUNTY DRAIN COMMISSIONER	NEW	00B	999	HAS NOT RESPONDED	12/01/20 10:35:15			

Attention: The following color coding applies to facility owner/ operator and are effective as of 3/1/15
GREEN- Dig with caution following PA174 requirements
YELLOW- Contact facility owner operator, Dig with caution following PA174 requirements
RED- Do not Dig

Response Definitions

What is my next step if I see a yellow or red response from a facility owner/ operator and my work date and time has arrived?

If you are ready to begin excavation on project and your response due date time has arrived or passed, but you see responses facility owner/ operator responses color coded yellow or red you will need to contact the notification center by dialing 811. Ask for additional assistance from those facility owner/ operators who have responded with yellow or red responses before you can begin your project. The facility owner/ operators will have set timelines to respond to the additional assistance request, which you can verify with the notification center representative when you call.

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APPENDIX 5

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Original - Return
1st copy - Witness
2nd copy - File
3rd copy - Extra

Approved, SCAO

STATE OF MICHIGAN 6th JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY PROBATE	SUBPOENA Order to Appear and/or Produce	CASE NO. 22-197937-NZ

Court address 1200 N. Telegraph, Pontiac, MI 48341

Court telephone no (248) 858-0344

Police Report No. (if applicable)

Plaintiff(s)/Petitioner(s)
People of the State of Michigan
✓ Brian Zezula

✓ Civil Criminal

v

Defendant(s)/Respondent(s)
Nina Brown et al.

Charge

Probate in the matter of

In the Name of the People of the State of Michigan TO:
Independence Township, 6483 Waldon Center Dr, Clarkston, MI 48346

If you require special accommodations to use the court because of disabilities, please contact the court immediately to make arrangements.

YOU ARE ORDERED TO:

✓ 1 ~~Appear personally~~ Please Produce at the time and place stated below. You may be required to appear from time to time and day to day until excused.

The court address above ✓ Other: 1050 Wilshire Drive, Ste. 320 Troy, MI 48084

Day	Date	Time
Tuesday	March 14, 2023	10:00 a.m.

2. Testify at trial / examination / hearing

✓ 3. Produce/permit inspection or copying of the following items. See attached Exhibit A.

4. Testify as to your assets, and bring with you the items listed in line 3 above.

5. Testify at deposition.

6. Abide by the attached prohibition against transferring or disposing of property. (MCL 600.6104(2), 600.6116, or 600.6119.)

7. Other:

✓ 8.

Person requesting subpoena	Telephone no
Michael F. Schmidt (P25213)	(248) 649-7800

Address
1050 Wilshire Drive, Ste. 320

City State Zip
Troy, MI 48084

NOTE: If requesting a debtor's examination under MCL 600.6110, or an injunction under item 6, this subpoena must be issued by a judge. For a debtor examination, the affidavit of debtor examination on the other side of this form must also be completed. Debtor's assets can also be discovered through MCR 2.305 without the need for an affidavit of debtor examination or issuance of this subpoena by a judge.

FAILURE TO OBEY THE COMMANDS OF THE SUBPOENA OR TO APPEAR AT THE STATED TIME AND PLACE MAY SUBJECT YOU TO PENALTY FOR CONTEMPT OF COURT.

SEAL OF THE MICHIGAN SUPREME COURT · LANSING · DISCITE JUSTITIAM MONITI

March 1, 2023
Date

Judge/Clerk/Attorney

P25213
Bar no

Court use only
☐ Served ☐ Not served

MC 11 (3/15) SUBPOENA, Order to Appear and/or Produce

MCL 600.1455, 600.1701, 600.6110, 600.6119, MCR 2.306

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SUBPOENA

Case No. 22-197937-NZ

PROOF OF SERVICE

TO PROCESS SERVER: You must make and file your return with the court clerk. If you are unable to complete service, you must return this original and all copies to the court clerk.

CERTIFICATE / AFFIDAVIT OF SERVICE / NONSERVICE

OFFICER CERTIFICATE

I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party [MCR 2.104(A)(2)], and that: (notarization not required)

OR

AFFIDAVIT OF PROCESS SERVER

Being first duly sworn, I state that I am a legally competent adult who is not a party or an officer of a corporate party, and that: (notarization required)

I served a copy of the subpoena, together with _____ (including any required fees) by
Attachment

personal service registered or certified mail (copy of return receipt attached) on

Name(s)	Complete address(es) of service	Day, date, time

I have personally attempted to serve the subpoena and required fees, if any, together with _____
Attachment
on the following person(s) and have been unable to complete service.

Name(s)	Complete address(es) of service	Day, date, time

Witness Fee	Miles traveled Fee	
$	$	
Registered address fee	Miles traveled Fee	TOTAL FEE
$	$	$

Signature

Name (type or print)

Title

Subscribed and sworn to before me on _____ in _____ County, Michigan.
Date

My commission expires: _____ Signature: _____
Date Deputy court clerk/Notary public

Notary public, State of Michigan, County of _____

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of the subpoena and required fees, if any, together with _____
Attachment

_____ on _____
Day, date, time

_____ on behalf of _____
Signature

AFFIDAVIT FOR JUDGMENT DEBTOR EXAMINATION

I request that the court issue a subpoena that orders the party named on this form to be examined under oath before a judge concerning the money or property of:
for the following reasons:

Signature

Subscribed and sworn to before me on _____ in _____ County, Michigan.
Date

My commission expires: _____ Signature: _____
Date Deputy court clerk/Notary public

Notary public, State of Michigan, County of _____

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EXHIBIT A

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.
    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.

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FILED Received for Filing Oakland County Clerk 3/1/2023 3:31 PM

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HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

vs.

Case No. 22-197937-NZ
Hon. Cheryl A. Matthews

NINA BROWN, DTE ENERGY COMPANY, and KALTZ EXCAVATING COMPANY, INC.,

Defendants.

Lionel E. Bashore (P58599)
Daniel A. Groves (P74026)
BASHORE GREEN LAW GROUP
Attorneys for Plaintiffs
17 South Saginaw Street, 2nd Floor
Pontiac, MI 48342
(248) 209-6009 / (248) 209-6010 – fax
lionel@bglawpc.com
daniel@bglawpc.com

Michael F. Schmidt (P25213)
HARVEY KRUSE, PC
Attorneys for Defendant Kaltz Excavating Company, Inc.
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Patrick D. Crandell (P76249)
COLLINS EINHORN FARRELL P.C.
Attorneys for Defendant Nina Brown
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(248) 351-6022
Patrick.crandell@ceflawyers.com

Tara S. Cannatella (P67532)
HUTCHINSON CANNATELLA P.C.
Attorney for Defendant DTE
1001 Woodward Ave., Ste. 900
Detroit, MI 48226
(313) 963-18060/Fax: (313) 963-9065
tcannatella@hutchlaw.com

NOTICE OF RECORDS DEPOSITION OF INDEPENDENCE TOWNSHIP

To: Attorneys of Record:

PLEASE TAKE NOTICE that on **Tuesday, March 14, 2023, beginning at 10:00 a.m.**, Independence Township is hereby required to produce records to Harvey Kruse, PC, 1050 Wilshire Drive, Ste. 320, Troy, MI 48084. This deposition is to be taken in accordance with the Michigan Court Rules governing such discovery.

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HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

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.
    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

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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.

Respectfully submitted,
HARVEY KRUSE, P.C.

BY:/s/Michael F. Schmidt
Michael F. Schmidt P25213
Attorneys for Defendant Kaltz Excavating Company, Inc.
1050 Wilshire Drive, Suite 320
Troy, MI 48084-1526
(248) 649-7800

DATED: March 1, 2023

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
Legal Assistant, Harvey Kruse, PC

DATED: March 1, 2023

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

RECEIVED by MSC 12/22/2025 5:49:28 PM

APPENDIX 6

RECEIVED by MSC 12/22/2025 5:49:28 PM

THE KELLY FIRM

Daniel J. Kelly
Brittney K. Ellis
Nancy L. Olind
Jake Mertes
Morgan McAtamney
Deja Vasquez
Wallace G. Long
Ralph (Skip) Maccarone, III, of counsel

2825 University Drive
Auburn Hills, Michigan 48326
Office: (248) 655-7025
morgan@kellyfirmpc.com

March 13, 2023

Mr. Michael F. Schmidt
1050 Wilshire Drive, Ste 320
Troy, MI 48084

Re: Response to Subpoena

Dear Mr. Schmidt,

Enclosed, please find Independence Township's response to your recent subpoena and Notice of Records Disposition.

Please feel free to contact our office with any questions or concerns.

Very truly yours,

THE KELLY FIRM, PLC

Morgan A. McAtamney

Morgan A. McAtamney

MAM/ndr

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THE CHARTER TOWNSHIP OF INDEPENDENCE'S RESPONSE TO NOTICE OF RECORDS DEPOSITION OF INTDEPENDENCE TOWNSHIP AND SUBPOENA TO INDEPENDENCE TOWNSHIP

GENERAL OBJECTIONS

1. The Charter Township of Independence objects to the Discovery Requests to the extent they call for the disclosure of information that is privileged, that constitutes attorney work product or that constitutes or encompasses attorney-client communications.

2. The Charter Township of Independence objects to the Discovery Requests to the extent they seek information not in their possession, custody, or control.

3. The Charter Township of Independence objects to the Discovery Requests to the extent they seek information that is not relevant to any party's claims or defenses and/or is not pertinent to the needs of the case and, therefore, is violative of mcr 2.302(B).

4. The Charter Township of Independence objects to the extent the Discovery Requests are vague, overbroad, or unduly burdensome.

5. The Charter Township of Independence objects to the Discovery Requests to the extent they seek to impose duties and obligations on The Charter Township of Independence beyond those imposed by the Michigan Court Rules.

6. The Charter Township of Independence objects to the Discovery Requests as the same do not comply with MCR 2.305(A)(3) as the same was not properly served on the Charter Township of Independence and did not provide a minimum of 14 days after service for the requested act.

Document received by the MI Macomb 16th Circuit Court.

7. The Charter Township of Independence objects to the Discovery Requests to the extent they seek information equally available, or more readily available, to Defendant.

8. Notwithstanding, the Charter Township of Independence provides the attached documents in response to the subpoena and notice of records deposition.

THE KELLY FIRM, PLC
/s/ Daniel J. Kelly
DANIEL J. KELLY (P41315)
Attorneys for Independence Township
2825 University Drive
Auburn Hills, Michigan 48326
(248) 655-7025
dan@kellyfirmpc.com

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RECEIVED by MSC 12/22/2025 5:49:28 PM

Miss Dig

From: OCARS_Pro@MissDig.org
Sent: Tuesday, December 1, 2020 7:36 AM
To: Miss Dig
Subject: MissDig INOTWP 2020/12/01 #00003 B03360157-00B EMER NEW LREQ

Importance: High

```
INOTWP 00003 MISDIGb 12/01/20 07:35:42 B03360157-00B EMER NEW GRID

**** Underground ****
Ticket  : B03360157  Rcvd: 12/01/20  07:30   Oper: DLF   Rev: 00B
Org Tkt : B03360157  Rcvd: 12/01/20  07:35   Oper: DLF

Digstart: 12/01/20   Time: 09:00
Tkt Life: 12/22/20   Time: 23:59   Positive response required: Y
Resp Due: 12/01/20   Time: 10:35

Firm    : KALTZ EXCAVATING                    Caller: KEVIN ONEAL
Phone   : 248-335-1717  Ext: 224             Fax   :
E-mail  : kevin.oneal@kaltzexcavating.com
FieldCnt: KEVIN ONEAL (CELL)            Number: 810-705-4563
Cell/Txt: 810-705-4563

County  : OAKLAND          Place : INDEPENDENCE /T
        :
Grids   : 4242A8321C    4242A8321D    4243D8321C    4243D8321D
Polygon : 42.717507/-83.356394 42.717593/-83.352913
        : 42.716122/-83.356360 42.716208/-83.352878
Lat     :                Long:
Work Typ: REPLC UG ELEC SERV - LTD SERV
Done For: D T E
Address :
Street  : FORREST VW
1st x-st: Dir E  of WESTVIEW RD
2nd x-st: Dir S  of MAYBEE RD
Subdivsn:                          Lots:
Stk Info: LOCATE ENTIRE FRT OF PROP AND BTH SDS OF RD AT ADDRS 5112, 5116, &
        : 5128
Boring  : Y  On-going project: N  Working In or Near R/R Easement: N
Members : ATTD   CEGDIS CEGTRN COMTV1CTV     COMTV1FBR     DE0010 INDSAN1
Members : INDWTR OAKCORSWR
```

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Flora

PERMIT NO 00-0154

JAMES R. WENGER
PAID
03 AUG 2000
By TOWNSHIP OF INDEPENDENCE WATER & SEWER DEPT.

CHARTER TOWNSHIP OF INDEPENDENCE
WATER/SEWER CONNECTION PERMIT

ACCOUNT NO 030-00674-01

DATE 8/2/00 SIDWELL NO 08-35-226-049

LOT NO _____ SUBDIVISION _____

PROPERTY ADDRESS 5116 Forrest View Drive

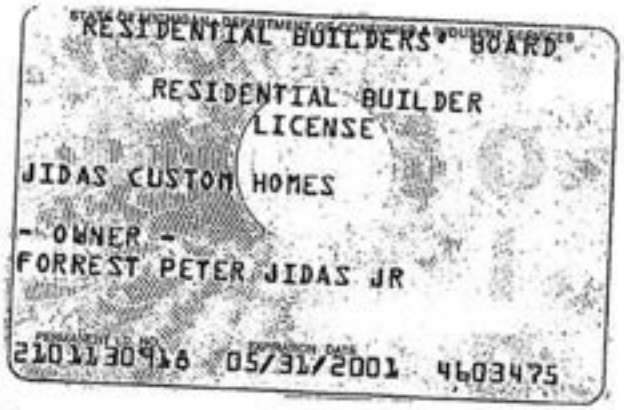
OWNER/AGENT Forrest Jidas PHONE (248) 618-9710

ADDRESS 5122 Forrest View Drive Clarkston MI 48346

CURB BOX LOCATION

PERMIT	(SEWER)	$ 90.00
	(WATER)	$
CAPITOL	(SEWER)	$ 960.00
	(WATER)	$
LATERAL	(SEWER)	$
UNIT FACTOR		NO. UNITS
METER	$	SIZE
METER INSTALL	$	
SERVICE	$	SIZE
CONST. WATER	$	
TOTAL CHARGES	$	1,050.00

TEMPLATE ISSUED
C of O ISSUED
SEWER FINALED
WATER FINALED



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RECEIVED by MSC 12/22/2025 5:49:28 PM

Cari Neubeck

From: B. Zezula <teach_5050@yahoo.com>
Sent: Friday, December 4, 2020 3:54 PM
To: David McKee
Subject: Re: Hi Dave--This is not a little puddle around the drain--just so you know.....thanks for fighting Kaltz for me and protecting us in Independence Township

Thank you.

Sent from Yahoo Mail for iPhone

On Friday, December 4, 2020, 3:45 PM, David McKee <dmckee@indtwp.com> wrote:

> Thanks Brian!
>
> Will keep you informed as we move this forward.
>
> Have a great weekend!
>
> David McKee
>
> DPW Director
>
> Charter Township of Independence
>
> dmckee@indtwp.com
>
> 248-625-8222
>
> **From:** B. Zezula <teach_5050@yahoo.com>
> **Sent:** Friday, December 4, 2020 3:14 PM
> **To:** David McKee <dmckee@indtwp.com>
> **Subject:** Hi Dave--This is not a little puddle around the drain--just so you know.....thanks for fighting Kaltz for me and protecting us in Independence Township
>
> IMG_1053.JPG

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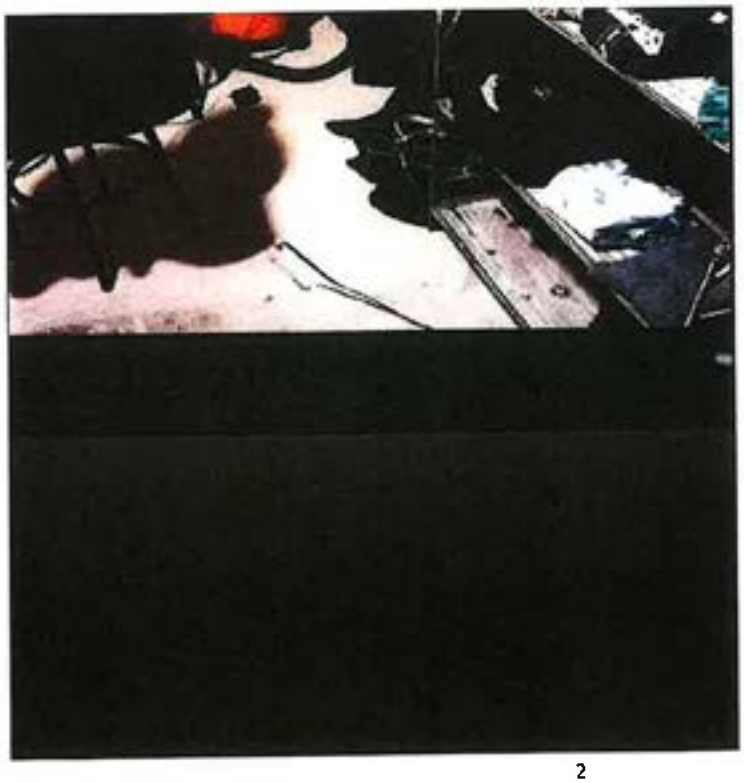
IMG_1053.JPG

IMG_1066.JPG



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IMG_1058.JPG

IMG_1064.JPG



IMG_1064.JPG

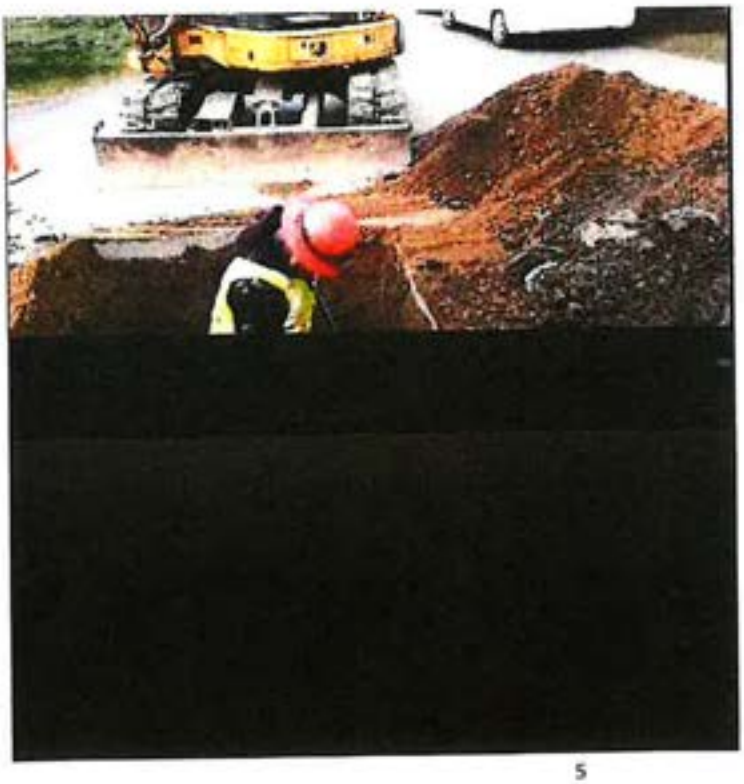
IMG_1073.JPG

RECEIVED by MSC 12/22/2025 5:49:28 PM



IMG_1073.JPG

IMG_1081.JPG



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IMG_1097.JPG



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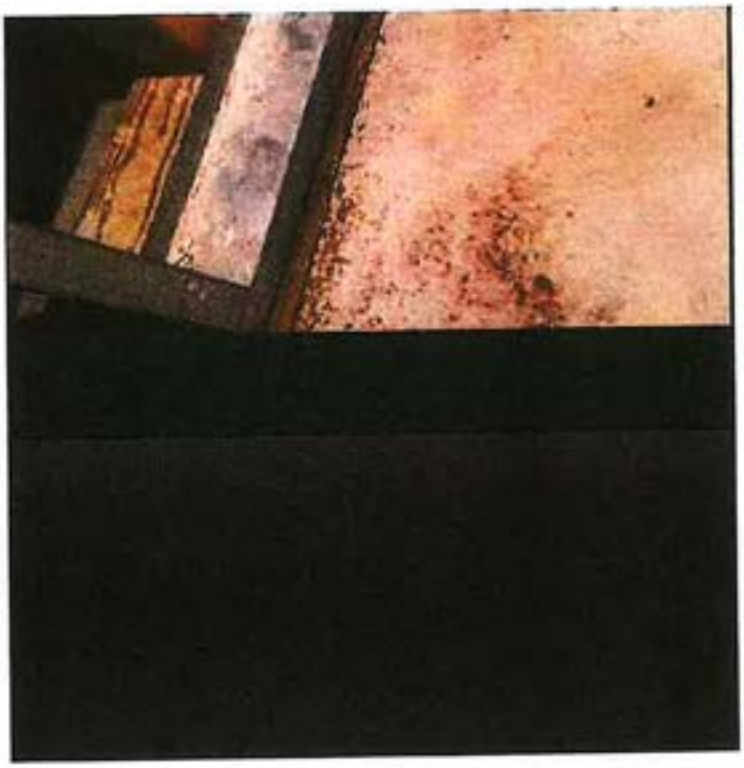
IMG_1100.JPG



IMG_1100.JPG

IMG_1065.JPG

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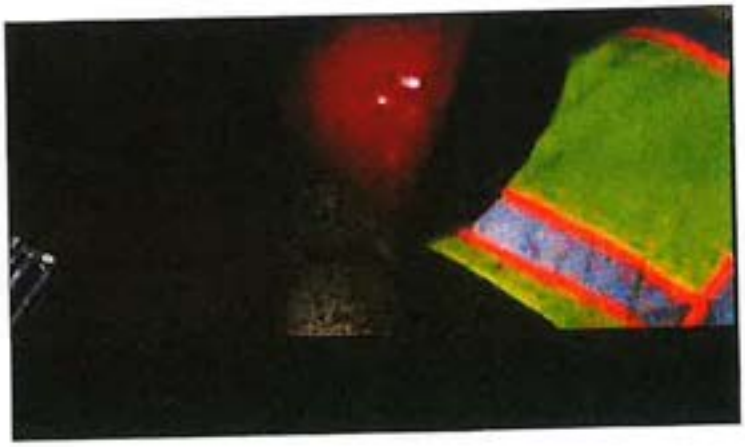
IMG_1065.JPG

And the top pic of them all:

IMG_1091.JPG





IMG_1091.JPG

Thanks,

Brian

Brian Zezula Cell 248.894.1963

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Suzette Page

From: David McKee
Sent: Monday, December 28, 2020 12:02 PM
To: David Ziegler
Subject: RE: message

Dave

Let him know the Twp attorney is aware of this and we have not heard back from him. I asked for an update and we'll contact him when we get it.

Thanks!

David McKee
DPW Director
Charter Township of Independence
dmckee@indtwp.com
248-625-8222

From: David Ziegler <dziegler@indtwp.com>
Sent: Monday, December 28, 2020 11:06 AM
To: David McKee <dmckee@indtwp.com>
Subject: message

Brian Zezula called to see if you found out anything from township attorney regarding Kaltz and the sewer line they hit / 248-894-1963. 11:00 am

David Ziegler
Administrative Assistant
Independence Township DPW
Phone: 1.248.625.8222 ext. 204
Fax: 1.248.625.4393
dziegler@indtwp.com

Independence Township
DEPARTMENT
PUBLIC WORKS

RECEIVED by MSC 12/22/2025 5:49:28 PM

Suzette Page

From: David Ziegler
Sent: Monday, December 28, 2020 11:06 AM
To: David McKee
Subject: message

Brian Zezula called to see if you found out anything from township attorney regarding Kaltz and the sewer line they hit / 248-894-1963. 11:00 am

David Ziegler
Administrative Assistant
Independence Township DPW
Phone: 1.248.625.8222 ext. 204
Fax: 1.248.625.4393
dziegler@indtwp.com

Independence Township
DEPARTMENT
PUBLIC WORKS

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THE KELLY FIRM

Daniel J. Kelly
Ralph (Skip) Maccarone III
Brittney K. Ellis
Wallace G. Long
2825 University Drive
Auburn Hills, Michigan 48326
Office: (248) 655-7025
Dan@kellyfirmpc.com

December 30, 2020

Kaltz Excavating
1030 Featherstone St.
Pontiac, MI. 48342

Re: Damage to Sewer Lead at 5116 Forrest View Court, Clarkston, Michigan

To Whom It May Concern,

Please be advised that this letter is being sent on behalf of my client, the Charter Township of Independence (the "Township"), who has requested our office contact you regarding damage to a private resident's sewer lead.

Between the dates of December 1 and 3, 2020, Kaltz Excavating ("Kaltz") installed a new service drop for a home located at 5122 Forrest View Court, Clarkston, MI 48346. In the course of completing the new service drop, Kaltz damaged a sewer lead located at 5116 Forrest View Court, Clarkston, MI 48346. While Kaltz repaired the line itself, it did not reimburse the property owner for the extensive damage to her property that resulted from the damage to the line. Kaltz has indicated it is the responsibility of the Township to reimburse the private homeowner.

As Kaltz should be aware, pursuant to MCL 691.1416, et seq., Township's **may not** be held liable for damage to a sewer lead when the obstruction in a service lead was not caused by a governmental agency. Under the Statute, a service lead is defined as "an instrumentality that connects an affected property, including a structure, fixture, or improvement on the property, to the sewage disposal system and **that is neither owned nor maintained by a governmental agency**." The sewer lead falls within the definition set forth under the Statute, and therefore, the Township is not liable for the damage caused by Kaltz.

In light of the above, we request you provide a letter to the undersigned stating that the Township has no duty to pay damages to the homeowner and confirm that Kaltz shall resolve all claims related to the sewer lead with the respective homeowner. If you fail to remit payment within thirty (30) days of receipt of this notice, I will discuss options with my client, including reporting

you to the Michigan Public Service Commission, reporting you to the Michigan Attorney General's Office or commence legal action, if necessary.

Sincerely,

THE KELLY FIRM, PLC

Daniel J. Kelly

Daniel J. Kelly

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RECEIVED by MSC 12/22/2025 5:49:28 PM

THE KELLY FIRM

Daniel J. Kelly
Ralph (Skip) Maccarone III
Brittney K. Ellis
Wallace G. Long
2825 University Drive
Auburn Hills, Michigan 48326
Office: (248) 655-7025
Dan@kellyfirmpc.com

December 30, 2020

DTE Energy
1970 Orchard Lake Rd,
Sylvan Lake, MI 48320

Re: Damage to Sewer Lead at 5116 Forrest View Ct.

To Whom It May Concern,

Please be advised that this letter is being sent on behalf of my client, the Charter Township of Independence (the "Township"), who has requested our office contact you regarding damage to a private resident's sewer lead.

Between the dates of December 1 and 3, 2020, DTE Energy and/or its contractor, Kaltz Excavating ("Kaltz"), installed a new service drop for a home located at 5122 Forrest View Court, Clarkston, MI 48346. In the course of completing the new service drop, DTE Energy and/or Kaltz damaged a sewer lead located at 5116 Forrest View Court, Clarkston, MI 48346. While DTE and/or Kaltz repaired the line itself, it did not reimburse the property owner for the extensive damage to her property that resulted from the damage to the line. DTE and/or Kaltz has indicated it is the responsibility of the Township to reimburse the private homeowner.

As DTE and/or its contractor Kaltz should be aware, pursuant to MCL 691.1416, et seq., Township's **may not** be held liable for damage to a sewer lead when the obstruction in a service lead was not caused by a governmental agency. Under the Statute, a service lead is defined as "an instrumentality that connects an affected property, including a structure, fixture, or improvement on the property, to the sewage disposal system and **that is neither owned nor maintained by a governmental agency**." The sewer lead falls within the definition set forth under the Statute, and therefore, the Township is not liable for the damage caused by DTE Energy and/or Kaltz.

In light of the above, we request you provide a letter stating that the Township has no duty to pay damages to the homeowner and that DTE Energy and/or Kaltz shall resolve all claims related to the sewer lead with the respective homeowner. If you fail to remit payment within thirty (30) days of receipt of this notice, I will discuss options with my client, including reporting you to

the Michigan Public Service Commission, reporting you to the Michigan Attorney General's Office or commence legal action, if necessary.

Sincerely,

THE KELLY FIRM, PLC

Daniel J. Kelly

Daniel J. Kelly

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Hi Brian,

Please be advised I have completed the investigation and have concluded Charter Township of Independence is the negligent party for failing to mark the sanitary sewer lateral that was subsequently damaged by Kaltz Excavating.

Section 48-84 of the Township ordinance states:

> 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.

"Sewer" is defined as follows:

Sewer means a pipe or conduit that carries wastewater or drainage water.

"Lateral sewer" is defined within subsection (6) of the "sewer" definition as follows:

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

The lateral sewer that was damaged was located under the street and within the street right-of-way. It is owned by the governing community and was the responsibility of Independence Township to have it fully marked.

Please be advised I have also communicated this to the Township's attorney, Brittney Ellis.

Ann Langschied | Sr. Claims Specialist

AMERISURE™

26777 Halsted Road
Farmington Hills, MI 48331

248.442.6525 (office) | 248.615.8602 (fax)

Mail to: PO Box 1515, Canonsburg, PA 15317 or AmerisureMail@Careworks.com

Report a Claim | Connect on LinkedIn

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RECEIVED by MSC 12/22/2025 5:49:28 PM

Warm Regards,

Brian Zezula
24.894.1963

---------- Forwarded message ---------
From: **Langschied, Ann** <ALangschied@amerisure.com>
Date: Wed, Apr 7, 2021 at 10:53 AM
Subject: Kaltz Excavating claim #2268682
To: Brian Zezula <brianzezula@gmail.com>
Cc: Langschied, Ann <ALangschied@amerisure.com>

Hi Brian,

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Ann Langschied | Sr. Claims Specialist

AMERISURE

26777 Halsted Road
Farmington Hills, MI 48331

248.442.6525 (office) | 248.615.8602 (fax)

Mail to: PO Box 1515, Canonsburg, PA 15317 or AmerisureMail@Careworks.com

Report a Claim | Connect on LinkedIn

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RECEIVED by MSC 12/22/2025 5:49:28 PM

To: David McKee <dmckee@indtwp.com>
Subject: [EXTERNAL]Fwd: Kaltz Excavating claim #2268682

CAUTION: This email originated from outside of the Township. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dave,

Kaltz's Insurance company made this ruling today. FYI. It has been over FOUR MONTHS and 1/2 my home is still not usable and I DID NOTHING wrong! I am out thousands of dollars.

I do not believe I have any remedies left except legal ones where only the attorneys win, correct?

Please advise.

Warm Regards,

Brian Zezula
24.894.1963

---------- Forwarded message ---------
From: **Langschied, Ann** <ALangschied@amerisure.com>
Date: Wed, Apr 7, 2021 at 10:53 AM
Subject: Kaltz Excavating claim #2268682
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Cc: Langschied, Ann <ALangschied@amerisure.com>

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Ann Langschied | Sr. Claims Specialist

<image001.jpg>
26777 Halsted Road
Farmington Hills, MI 48331

248.442.6525 (office) | 248.615.8602 (fax)

Mail to: PO Box 1515, Canonsburg, PA 15317 or AmerisureMail@Careworks.com

Report a Claim | Connect on LinkedIn

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RECEIVED by MSC 12/22/2025 5:49:28 PM

Cari Neubeck

From: Brian Zezula <brianzezula@gmail.com>
Sent: Wednesday, April 14, 2021 4:37 PM
To: David McKee
Subject: [EXTERNAL]Re: [EXTERNAL]Re: Kaltz Excavating claim #2268682

CAUTION: This email originated from outside of the Township. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dave their whole argument would be "blown out of the water" by the Township saying you NEVER mark private sewer laterals/leads when you mark for MissDig.

Which is your and most townships in the State of MI practice.

It is easily checked. The two firms I am interviewing for my legal claim will just get the MissDig tickets Indy Township did for the last 1-3 years for private homes and ask:

1) did Indy Township indicate "green" OK to Dig?

If yes,

2) Did the Township Mark individual private residence sewer laterals before they got to the Townships sewer Main?

And it is 100% clear to me that you told me you guys do not. And when I called surrounding Townships they said the same.

If this is the Industry Standard Practice why won't anyone put that in writing so I can end this "fantasy defense" Kaltz and Amerisure Insurance are hiding behind?

I hate to both you with this but you told me you would help me and to come to you.

This is only going to cost more time/money/meetings/headaches/tax payer money and time away from doing your job, why not try everything now to resolve it before all of that.....plus it's the right thing to do since my family has been harmed through no fault of our own.

Warm Regards,

Brian Zezula

On Apr 14, 2021, at 4:14 PM, David McKee <dmckee@indtwp.com> wrote:

Mr. Zezula,
The Township attorney did submit the attached demand letter, which was forwarded to the insurance company setting forth the Township's position and the liability of Kaltz. Unfortunately, it appears there is not much more we can do on our end. Our attorney has advised us that further communication with the insurance company is unlikely to bring about a satisfactory outcome.

RECEIVED by MSC 12/22/2025 5:49:28 PM

We appreciate the severity of the circumstances and recognize the frustration and aggravation this has caused.
Sincerely,
David McKee
DPW Director
Charter Township of Independence
dmckee@indtwp.com
248-625-8222

From: Brian Zezula <brianzezula@gmail.com>
Sent: Thursday, April 8, 2021 2:56 PM
To: David McKee <dmckee@indtwp.com>
Subject: [EXTERNAL]Re: Kaltz Excavating claim #2268682

CAUTION: This email originated from outside of the Township. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Mr McKee,
Will the Township (my Township) attorney issue a legal rebuttal to the Insurance company's interpretation of Township Ordinances and Policies that so clearly shows their error that maybe they will reverse their erroneous decision and pay this humble and wronged township resident for their property damage?
I know there is a low probability of Amerisure reversing their decision but if the argument is so clear then maybe to save a legal battle/fees/time they may reverse their position???
Warm Regards,
Brian Zezula

On Apr 8, 2021, at 2:30 PM, David McKee <dmckee@indtwp.com> wrote:

Mr. Zezula,
The Township is unable to give legal advice; however, you may want to seek an attorney's advice. We maintain that Kaltz is the at-fault party. The Township is very disappointed that the insurance company issued what is, in our opinion, an incorrect interpretation of both the Township's Ordinances and state law. I also sincerely regret that Kaltz has failed to admit its liability in this matter.
Again, I sincerely sympathize that you are out of thousands of dollars. If you retain an attorney, at your request, we are happy to provide them with the information we have on file regarding the matter to assist with any action you feel is necessary to recoup what you have paid to repair your damaged sewer lead and restore your home.
Sincerely
David McKee
DPW Director
Charter Township of Independence
dmckee@indtwp.com
248-625-8222

From: Brian Zezula <brianzezula@gmail.com>
Sent: Wednesday, April 7, 2021 12:58 PM
To: David McKee <dmckee@indtwp.com>
Subject: [EXTERNAL]Fwd: Kaltz Excavating claim #2268682

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Dave,
Kaltz's Insurance company made this ruling today. FYI. It has been over FOUR MONTHS and 1/2 my home is still not usable and I DID NOTHING wrong! I am out thousands of dollars.
I do not believe I have any remedies left except legal ones where only the attorneys win, correct?
Please advise.
Warm Regards,
Brian Zezula
24.894.1963

---------- Forwarded message ---------
From: **Langschied, Ann** <ALangschied@amerisure.com>
Date: Wed, Apr 7, 2021 at 10:53 AM
Subject: Kaltz Excavating claim #2268682
To: Brian Zezula <brianzezula@gmail.com>
Cc: Langschied, Ann <ALangschied@amerisure.com>

Hi Brian,

Please be advised I have completed the investigation and have concluded Charter Township of Independence is the negligent party for failing to mark the sanitary sewer lateral that was subsequently damaged by Kaltz Excavating.

Section 48-84 of the Township ordinance states:

> 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.

"Sewer" is defined as follows:

Sewer means a pipe or conduit that carries wastewater or drainage water.

"Lateral sewer" is defined within subsection (6) of the "sewer" definition as follows:

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

The lateral sewer that was damaged was located under the street and within the street right-of-way. It is owned by the governing community and was the responsibility of Independence Township to have it fully marked.

Please be advised I have also communicated this to the Township's attorney, Brittney Ellis.

Ann Langschied | Sr. Claims Specialist

<image001.jpg>
26777 Halsted Road
Farmington Hills, MI 48331

248.442.6525 (office) | 248.615.8602 (fax)

Mail to: PO Box 1515, Canonsburg, PA 15317 or AmerisureMail@Careworks.com

Report a Claim | Connect on LinkedIn

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<Demand Letter to Kaltz Property located at 5116 Forrest View Court.pdf>

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APPENDIX 7

FILED Received for Filing Oakland County Clerk 4/28/2023 1:04 PM

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HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

vs.

Case No. 22-197937-NZ
Hon. Cheryl A. Matthews

NINA BROWN, DTE ENERGY COMPANY, and KALTZ EXCAVATING COMPANY, INC.,

Defendants.

Lionel E. Bashore (P58599)
Daniel A. Groves (P74026)
BASHORE GREEN LAW GROUP
Attorneys for Plaintiffs
17 South Saginaw Street, 2nd Floor
Pontiac, MI 48342
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lionel@bglawpc.com
daniel@bglawpc.com

Michael F. Schmidt (P25213)
HARVEY KRUSE, PC
Attorneys for Defendant Kaltz Excavating Company, Inc.
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Nicole E. Wilinski (P61904)
Brian A. Catrinar (P76320)
COLLINS EINHORN FARRELL P.C.
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Brian.catrinar@ceflawyers.com

Tara S. Cannatella (P67532)
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Attorney for Defendant DTE
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(313) 963-18060/Fax: (313) 963-9065
tcannatella@hutchlaw.com

NOTICE OF NON-PARTY AT FAULT BY DEFENDANT KALTZ EXCAVATING COMPANY, INC.

NOW COMES the defendant, KALTZ EXCAVATING COMPANY, INC., by and through its attorneys, HARVEY KRUSE, P.C., and pursuant to MCR 600.2956, 2957, 2959 and 6301 and MCR 2.112(K), provides notice of claim against the following non-party:

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HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

1. Independence Township, 6483 Waldon Center Drive, Clarkston, MI 48346, for negligence and violation of statutes and ordinances including, but not limited to, the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq.* and Independence Township Ordinances including 48-53, 48-82, 48-84 including:

a. Failing to respond to a request to mark its facilities.

b. Failing and refusing to mark its facilities.

c. Responding to the request indicating "NO CONFLICT" to the request knowing that its facilities were unmarked and in the area and in direct conflict with the request.

d. Pursuant to MCL 460.727, Independence Township as the facility owner and operator failed to respond to a ticket requesting marking of its underground facilities in the area of the proposed excavation, failed to mark the location of each facility with the proper paint, stakes, flags or other customary methods using the uniform color code of the American National Standards Institute, failed to provide notification through the notification system of a positive response, but rather refused to mark its facilities and submitted a false statement of "NO CONFLICT."

e. Ignored its own ordinances and definitions of its own facilities including Chapter 48 Utilities Section 48-53, definitions of a sewer, building sewer, intercepting sewer and lateral sewer, Section 48-82 regarding building sewers and Section 48-84 regarding ownership, operations and maintenance responsibility for 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.

f. Failed to comply with the definitions provided by the MISS DIG Underground Facility Damage Prevention and Safety Act definitions of what is a "facility" as defined by MCL

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HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

460.723 to include "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." Independence Township as both a "facility operator" and a "facility owner" of a "facility" as defined by MCL 460.723 was required to mark any and all of its facilities including appurtenances which includes the connection between the main and any lead, which is an appurtenance to the sewer main.

g. The Michigan Damage Prevention Board Best Practice specifically provides that the facility owner/operator is the owner of the connection between the main and any lead which it is required to mark pursuant to a Miss Dig ticket request; and

in general, failing to exercise a reasonable duty of care for the circumstances then and there existing, all of which proximately resulted in the plaintiff's alleged injuries and damages.

Respectfully submitted,
HARVEY KRUSE, P.C.

BY:/s/Michael F. Schmidt
Michael F. Schmidt P25213
Attorneys for Defendant Kaltz Excavating Company, Inc.
1050 Wilshire Drive, Suite 320
Troy, MI 48084-1526
(248) 649-7800

DATED: April 28, 2023

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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
Legal Assistant, Harvey Kruse, PC

DATED: April 28, 2023

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

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APPENDIX 8

FILED Received for Filing Oakland County Clerk 6/13/2023 11:54 AM

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STATE OF MICHIGAN
6TH CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA

Plaintiff,

Case No. 22-197937-NZ
Hon. Cheryl A. Matthews

v

NINA BROWN, DTE ENERGY COMPANY, KALTZ EXCAVATING COMPANY INC, and INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendants.

LIONEL E. BASHORE (P58599)
DANIEL A. GROVES (P74026)
Bashore Green Law Group
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e-Mail: famisuraca@kaufmanlaw.com

MORGAN A. MCATAMNEY (P80047)
The Kelly Firm, PC
Attorney for Independence Township
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Auburn Hills, Michigan 48326-2544
PH (248) 655-7025
e-Mail: morgan@kellyfirmoc.com

THERE IS NO OTHER PENDING OR RESOLVED CIVIL ACTION ARISING OUT OF THE TRANSACTIONS OR OCCURRENCES ALLEGED IN THIS COMPLAINT

/s/ Daniel A. Groves
DANIEL A. GROVES (P-74026)

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SECOND AMENDED COMPLAINT BY RIGHT

NOW COMES Plaintiff, BRIAN ZEZULA, by and through his attorneys, Bashore Green Law Group, and for her COMPLAINT, hereby alleges as follows:

COMMON ALLEGATIONS, JUSIDICTION AND VENUE

1. Plaintiff, BRIAN ZEZULA, is a resident in the City of Clarkston, County of Oakland and State of Michigan.

2. Defendant NINA BROWN is a resident in the City of Clarkston, County of Oakland and State of Michigan.

3. Defendant DTE ENERGY COMPANY is a private domestic corporation with its primary place of business in the City of Detroit, County of Wayne and State of Michigan; DTE conducts business with separate offices throughout the State of Michigan to include Oakland County, Michigan and Defendant DTE ENERGY COMPANY has a registered agent located at 2900 West Road, Suite 500, East Lansing, Michigan, 48223.

4. Defendant KALTZ EXCAVATING COMPANY, INC. is a private domestic corporation with its primary place of business in the City of Pontiac, County of Oakland and State of Michigan and has a registered agent located at 6140 Green Drive, Harsens Island, Michigan, 48028.

5. Defendant INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY, MI. is a private domestic corporation with its primary place of business in the City of Clarkston, County of Oakland and State of Michigan and has a registered agent located at 6483 Waldon Dr., Clarkston, MI 48346.

6. This Court has proper jurisdiction over all parties and the amount in controversy exceeds $25,000.

COUNT I

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO NINA BROWN

7. Plaintiff incorporates by reference paragraphs 1 through 5.

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8. In the early month of December and in the year of 2020, Defendant Nina Brown requested and hired Defendant DTE ENERGY COMPANY and subsequently subcontractor KALTZ EXCAVATING COMPANY, INC. to complete electrical line work on her property address located at 5122 Forrest View Dr., Clarkston, Michigan, 48346. Defendant Brown ordered the outside work, to include digging and excavating into private property land that also had a private roadway with a private sewer lead beneath the private road in an easement to goes across the same road.

9. That due to the request, order, supervision and knowledge of Defendant Nina Brown having the underground digging work done by Defendant DTE ENERGY COMPANY and DEFENDANT KALTZ EXCAVATING COMPANY, INC., Defendant Brown knew or should have known that the same work could lead to and be liable for damages done to any of the underground private sewer leads that connected to Plaintiff's home also located on private property.

10. That on December 2, 2020, and again on December 29, 2020, Defendant Nina Brown's outside groundwork as requested, ordered, supervised and with knowledge by Defendant Brown caused damage to Plaintiff's underground private sewer lead due to mechanical boring. Plaintiff's sewer lead was severely punctured and drilled through, thus causing raw sewage and Category III waste to flood into Plaintiff's basement drainage pipes into his home, as well as also causing other harm.

11. That Defendant Brown breached her duties in the following manners including, but not limited to, her disregard, her knowing or should have known of the inherent risk of having work done that included boring beneath the ground and hazardously jeopardizing and compromising the existing private sewer lead into other residents' private homes, to include Plaintiff, wherein such hazardous damage consisting of piercing a private sewer lead was the proximate cause for raw sewage flooding and destruction of Plaintiff's property and personal possessions within Plaintiff's home.

12. That Defendant Nina Brown breached her duties as a direct and proximate result of her negligence for any and all other acts of negligence that may be learned or discovered through the litigative discovery process.

13. That Defendant Nina Brown's negligence was foreseeable and avoidable.

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14. That at all times herein, Defendant Nina Brown owed Plaintiff BRIAN ZEZULA a duty to reasonably assure no harm or damage due to any outside work done by Defendant Brown on her private property would wrongfully damage and adversely affect Plaintiff BRIAN ZEZULA'S physical (structural) and personal property.

15. That Defendant Nina Brown failed to take adequate and reasonable measures to warn and assure Plaintiff BRIAN ZEZULA of the inherent risk and damage to Plaintiff's land and personal property due to the actions of Defendant Nina Brown; while similarly and concurrently failing to provide Plaintiff with any protection and instruction so Plaintiff could mitigate Defendant Nina Brown's wrongful damages to Plaintiff's land and personal property on December 2, 2020, and again on December 29, 2020.

16. That Defendant Brown put Plaintiff and Plaintiff's family at great harm and risk due to the environmental mycobacteria and other hazardous harm caused by raw sewage wrongfully entering Plaintiff's home.

17. As a direct and proximate result of Defendant Brown's negligence, Plaintiff has suffered harm to his property and person, including but not limited to:

a) Interior Home water & raw sewage damage to wall, support beams, flooring, carpeting, etc.

b) Significant water & raw sewage damage in the basement of Plaintiff's properties on Forrest View Drive in Clarkston, MI. in the County of Oakland, State of Michigan.

c) Loss of personal possessions including, but not limited to furniture, clothing, personal items, cabinets, home supplies, sporting gear, bedroom accessories to include bed, mattresses, sheets, etc., electronic equipment, books, hunting gear, etc.

d) Loss of use and enjoyment of Plaintiff's basement and other parts of his home.

e) Possible medical internal disease, sickness, and specifically right-hand injury suffered during the emergency water & raw sewage flooding and clean-up process;

f) Emotional distress; past, present, and future;

g) Mental anguish; past, present, and future.

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WHEREFORE, Plaintiff respectfully request that this Honorable Court enter a Judgment in their favor and against Defendant NINA BROWN in an amount in excess of $25,000, together with costs, interest and attorney fees so wrongfully incurred.

COUNT II

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO DTE ENERGY COMPANY

18. Plaintiff incorporates by reference paragraphs 1 through 16.

19. At all material times, Defendant DTE ENERGY COMPANY (DTE) was in the business of providing, generating, processing, transmitting, distributing, maintaining, modifying, repairing, installing and working with all aspects of electrical output to over two million (2,000,000) Michigan residents in the southeastern portion of the State of Michigan.

20. That in the early month of December and in the year of 2020, Defendant DTE (and subcontractor KALTZ EXCAVATING COMPANY, INC.) was hired by Defendant Nina Brown to complete electrical line work on Defendant Brown's property address located at 5122 Forrest View Dr., Clarkston, Michigan, 48346. As such, Defendant DTE engaged in work, to include digging and excavating into private property land that also had Plaintiff's private sewer lead beneath the private road in an easement to goes across the same road.

21. That on December 2, 2020, and again on December 29, 2020, Defendant DTE's outside groundwork as conducted by, supervised and with knowledge of/by Defendant DTE caused damage to Plaintiff's underground private sewer lead due to mechanical boring. Plaintiff's sewer lead was severely punctured and drilled through, thus causing raw sewage and Category III waste to flood into Plaintiff's basement drainage pipes into his home, as well as also causing other harm.

22. That Defendant DTE breached its duties in the following manners including, but not limited to its disregard, DTE's knowing or should have known of the inherent risk of having this work done (that included boring beneath the ground and hazardously jeopardizing and compromising the Plaintiff's existing private sewer leads) wherein such hazardous damage consisting of piercing a private sewer lead was the proximate cause for raw sewage flooding and destruction of Plaintiff's property and personal possessions within Plaintiff's home.

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23. That Defendant DTE breached its duties and as a direct and proximate result of DTE's negligence, DTE is liable for any and all other acts of negligence that may be learned or discovered through the litigative discovery process.

24. That Defendant DTE's negligence was foreseeable and avoidable.

25. That at all times herein, Defendant DTE owed Plaintiff BRIAN ZEZULA a duty to reasonably assure no harm or damage due to any outside work done by Defendant DTE on private property would wrongfully damage and adversely affect Plaintiff BRIAN ZEZULA'S physical (structural) property and Plaintiff's personal possessions.

26. That Defendant DTE failed to take adequate and reasonable measures to warn and assure Plaintiff ZEZULA of the inherent risk and damage to Plaintiff's land and property due to the actions of Defendant DTE; while similarly and concurrently failing to provide Plaintiff with any protection and instruction so Plaintiff could mitigate Defendant DTE's wrongful damages to Plaintiff's property and personal possessions on December 2, 2020 and again on December 20, 2020.

27. That Defendant DTE failed to conduct basic, routine, commonly exercised practices of measurement to assure that no sewer leads from the underground private sewer line would be directly (or indirectly), negatively, adversely and destructively damaged, harmed or destroyed during Defendant's work-related conduct in boring underneath the ground where sewer leads were known to be connected to Plaintiff's home in the same area of said excavation by Defendants.

28. That Defendant DTE put Plaintiff and Plaintiff's family at great harm and risk due to the environmental mycobacteria and other harm caused by raw sewage wrongfully entering Plaintiff's home.

29. As a direct and proximate result of Defendant DTE's negligence, Plaintiff has suffered harm to his property, possessions, and person, including but not limited to:

a. Interior Home water & raw sewage damage to wall, support beams, flooring, carpeting, etc.

b. Significant water & raw sewage damage in the basement of Plaintiff's properties on Forrest View Drive in Clarkston, MI. in the County of Oakland, State of Michigan.

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c. Loss of personal possessions including, but not limited to furniture, clothing, personal items, cabinets, home supplies, sporting gear, bedroom accessories to include bed, mattresses, sheets, etc., electronic equipment, books, hunting gear, etc.

d. Loss of use and enjoyment of Plaintiff's basement and other parts of his home.

e. Possible medical internal disease, sickness, and specifically right-hand injury suffered during the emergency water & raw sewage flooding and clean-up process;

f. Emotional distress; past, present, and future;

g. Mental anguish; past, present, and future;

WHEREFORE, Plaintiff respectfully request that this Honorable Court enter a Judgment in their favor and against Defendant DTE ENERGY COMPANY in an amount in excess of $25,000, together with costs, interest and attorney fees so wrongfully incurred.

COUNT III

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO KALTZ EXCAVATING COMPANY, INC.

30. Plaintiff incorporates by reference paragraphs 1 through 28.

31. At all material times, Defendant KALTZ EXCAVATING COMPANY, INC. (KALTZ) was in the business of providing all aspects of outdoor land and ground digging and excavating work as directly related to the work Defendant Nina Brown and DTE requested for electrical work to be done on Defendant Brown's private property as previously described.

32. That in the early month of December and in the year of 2020, Defendant KALTZ was hired by Defendant Nina Brown and DTE to complete electrical line work on Defendant Nina Brown's property address located at 5122 Forrest View Dr., Clarkston, Michigan, 48346. As such, Defendant KALTZ engaged in work, to include digging and excavating into private land that also had a private roadway and Plaintiff's private sewer lead beneath the private road in an easement to goes across the same road.

33. That on December 2, 2020, and again on December 29, 2020, Defendant KALTZ'S outside groundwork as conducted by, supervised and with knowledge of/by Defendant KALTZ

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caused damage to Plaintiff's underground private sewer lead due to mechanical boring. Plaintiff's sewer lead was severely punctured and drilled through, thus causing raw sewage and Category III waste to flood into Plaintiff's basement drainage pipes into his home, as well as also causing other harm.

34. That Defendant KALTZ breached its duties in the following manners including, but not limited to its disregard, KALTZ'S knowing or should have known of the inherent risk of having this work done (that included boring beneath the ground and hazardously jeopardizing and compromising the existing sewer leads into Plaintiff's private home) wherein such hazardous damage consisting of piercing a sewer lead was the proximate cause for raw sewage flooding and destruction of Plaintiff's property (structural) and personal possessions within Plaintiff's home.

35. That Defendant KALTZ breached its duties and as a direct and proximate result of KALTZ'S negligence, KALTZ is liable for any and all other acts of negligence that may be learned or discovered through the litigative discovery process.

36. That Defendant KALTZ'S negligence was foreseeable and avoidable.

37. That at all times herein, Defendant KALTZ owed Plaintiff BRIAN ZEZULA a duty to reasonably assure no harm or damage due to any outside work done by Defendant KALTZ on private property would wrongfully damage and adversely affect Plaintiff BRIAN ZEZULA'S physical and personal possessions / property.

38. That Defendant KALTZ failed to take adequate and reasonable measures to warn and assure Plaintiff ZEZULA of the inherent risk and damage to Plaintiff's land and property due to the actions of Defendant KALTZ; while similarly and concurrently failing to provide Plaintiff with any protection and instruction so Plaintiff could mitigate Defendant KALT'S wrongful damages to Plaintiff's land, sewer lead, property and personal possessions on December 2, 2020 and again on December 20, 2020.

39. That Defendant KALTZ failed to conduct basic, routine, commonly exercised practices of measurement to assure that no leads from the underground private sewer leads would be directly (or indirectly), negatively, adversely and destructively damaged, harmed or destroyed during Defendant's work-related conduct in boring underneath the ground where sewer leads were known to be connected to Plaintiff's home in the immediate area of said excavation by Defendants.

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40. That Defendant KALTZ put Plaintiff and Plaintiff's family at great harm and risk due to the environmental mycobacteria and other harm caused by raw sewage wrongfully entering Plaintiff's home.

41. As a direct and proximate result of Defendant KALTZ'S negligence, Plaintiff has suffered harm to his property and person, including but not limited to:

h. Interior Home water & raw sewage damage to wall, support beams, flooring, carpeting, etc.

i. Significant water & raw sewage damage in the basement of Plaintiff's properties on Forrest View Drive in Clarkston, MI. in the County of Oakland, State of Michigan.

j. Loss of personal possessions including, but not limited to furniture, clothing, personal items, cabinets, home supplies, sporting gear, bedroom accessories to include bed, mattresses, sheets, etc., electronic equipment, books, hunting gear, etc.

k. Loss of use and enjoyment of Plaintiff's basement and other parts of his home.

l. Possible medical internal disease, sickness, and specifically right hand injury suffered during the emergency water & raw sewage flooding and clean-up process;

m. Emotional distress; past, present, and future;

n. Mental anguish; past, present, and future;

COUNT IV

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY

42. Upon information and belief, Defendant Independence Township of Oakland County, State of Michigan was, leading up to and on the date of incidents, in violation of MCL 460.721's MISS DIG UNDERGROUND FACILITY DAMAGE AND SAFETY ACT.

43. Upon information and belief, Defendant Independence Township of Oakland County,

State of Michigan was, leading up to and on the date of incidents, in violation of township and county ordinances found in Chapter 48, Utilities, Section 48-84.

44. Upon information and belief that government immunity does not apply when the government entity is operating or failing to operate outside the descriptions and duties of the prescribed government duties.

WHEREFORE, Plaintiff respectfully request that this Honorable Court enter a judgment in their favor and against Defendant Independence Township of Oakland and/or any and all other named Defendants in an amount in excess of $25,000, together with costs, interest and attorney fees so wrongfully incurred.

Respectfully submitted,
BASHORE GREEN LAW GROUP,
a Professional Corporation,

/s/ Daniel A. Groves
DANIEL A. GROVES (P-74026)
Attorneys for Plaintiff
17 South Saginaw Street, 2nd Floor
Pontiac, Michigan 48342
PH: (248) 209-6009 / FX (248) 209-6010

Dated: June 08, 2023

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APPENDIX 9

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

NINA BROWN, DET ENERGY COMPANY, KALTZ EXCAVATING COMPANY INC and INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendants.

CA: 22-197937-NZ

HON: CHERYL A. MATTHEWS

/

BASHORE GREEN LAW GROUP
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Daniel A. Groves (P74026)
Attorneys for Plaintiff
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THE KELLY FIRM, PC
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ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC
BY: Margaret T. Debler (P43905)
Attorney for Independence Twp.
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
mdebler@rsjalaw.com

/

STIPULATED ORDER EXTENDING TIME FOR DEFENDANT INDEPENDENCE TOWNSHIP TO FILE ANSWER TO SECOND AMENDED COMPLAINT

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At a session of said Court held in
the Courthouse, City of Pontiac,
County of Oakland, State of Michigan,

on 7/5/2023

PRESENT: HONORABLE Cheryl A. Matthews
CIRCUIT COURT JUDGE

The parties, by their respective counsel, hereby stipulate and agree to an Order Extending Time for Defendant Independence Township to Answer Plaintiff's Second Amended Complaint. The Answer was originally due on July 10, 2023. Counsel has agreed to a 21-day extension of time. Accordingly, Defendant Independence Township will file its Answer on or before July 31, 2023.

This is not a final Order and does not resolve this case.

IT IS HEREBY ORDERED.

/s/ Cheryl Matthews
July 5, 2023
HON. CHERYL A. MATTHEWS

kn

Stipulated and Agreed to by:

/s/ Margaret T. Debler
Attorney for Independence Twp.
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
mdebler@rsjalaw.com
(P43905)

/s/ Daniel A. Groves (w/consent)
Attorney for Plaintiff
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APPENDIX 10

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

vs.

Case No. 22-197937-NZ
Hon. Cheryl A. Matthews

NINA BROWN, DTE ENERGY COMPANY, and KALTZ EXCAVATING COMPANY, INC.,

Defendants.

Lionel E. Bashore (P58599)
Daniel A. Groves (P74026)
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HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

REQUESTS TO PRODUCE BY DEFENDANT KALTZ EXCAVATING COMPANY, INC. TO DEFENDANT INDEPENDENCE TOWNSHIP

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NOW COMES the defendant, KALTZ EXCAVATING COMPANY, INC., by and through its attorneys, HARVEY KRUSE, P.C., and for its Requests to Produce pursuant to MCR 2.310 requests that the defendant Independence Township produce the following documents as required by MCR. 2.310 within twenty-eight (28) days:

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.
   m. Any and all municipal sewers.
   n. Any and all public sewers.
   o. Any and all sanitary sewers.

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HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

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 connections.

ANSWER:

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.

ANSWER:

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.

ANSWER:

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.

ANSWER:

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
Legal Assistant, Harvey Kruse, PC

DATED: August 1, 2023

Respectfully submitted,
HARVEY KRUSE, P.C.

BY:/s/Michael F. Schmidt
Michael F. Schmidt P25213
Attorneys for Defendant Kaltz
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APPENDIX 11

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

NINA BROWN, DET ENERGY COMPANY, KALTZ EXCAVATING COMPANY INC and INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendants.

CA: 22-197937-NZ

HON: CHERYL A. MATTHEWS

/

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/

INDEPENDENCE TOWNSHIP'S OBJECTIONS AND RESPONSE TO DEFENDANT KALTZ EXCAVATING COMPANY'S REQUESTS TO PRODUCE

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NOW COMES Defendant, **INDEPENDENCE TOWNSHIP**, by and through its attorneys, **ROSATI, SCHULTZ, JOPPICH & AMTSBUECHLER, P.C.**, and for its Objections and Response to Defendant Kaltz Excavating Company's Request to Produce, states as follows:

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 all 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.
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 sere main and sewer leads or sewer laterals.
t. Any and all building sewers, sewer laterals, and/or sewer connections.

RESPONSE:

Defendant Independence Township objects to the corresponding request, including its subsections a. – t., as it is vague, ambiguous, and overbroad. This case involves damage to a private sewer lead that drains to a public lateral. Insofar as this request is overbroad, it is also irrelevant and immaterial. It is not relevant to any claim or defense raised in this matter. This case does not involve damage to, or a defect in, a municipal main/lateral operated by Independence Township. It involves alleged damage to a privately-owned sewer drain pipe located on private property. Further, as explained in Defendant's Motion for Summary Disposition (currently pending before the Court), because the damaged pipe is not under the ownership, operation, or control of Independence Township, it has no duty with respect to it, and no liability for Plaintiff's damages can be assessed

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against it; thus, it should not have been made a party to this litigation and discovery should not be afforded against it. Independence Township, if served with a Freedom of Information Act request (outside this litigation) would not be required to provide information the information related to included portions of its road and attendant sewer infrastructure, sought here. 15.243(y) and (aa), for example. Matters not subject to public safety and security concerns are accessible on its website, and need not be reproduced here as this would be cumulative, duplicative, a waste of municipal resources, subjecting the Township to undue burden and expense, weighing the value of the information sought to its logical tendency to resolve the issues or make a fact at issue more, or less, likely to be true. Based on the foregoing, the information sought in this request is not discoverable from Independence Township.

Without waiving the foregoing exceptions, to the extent that the Township has information related to the location of Plaintiff's building sewer/lead at issue herein, it will compile and provide that.

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

RESPONSE:

Defendant Independence Township objects to the corresponding request, including its subsections a. – t., as it is vague, ambiguous, and overbroad. This case involves damage to a private sewer lead that drains to a public lateral. Insofar as this request is overbroad, it is also irrelevant and immaterial. It is not relevant to any claim or defense raised in this matter. This case does not involve damage to, or a defect in, a municipal main/lateral operated by Independence Township. It involves alleged damage to a privately-owned sewer drain pipe located on private property. Further, as explained in Defendant's Motion for Summary Disposition (currently pending before the Court), because the damaged pipe is not under the ownership, operation, or control of Independence Township, it has no duty with respect to it, and no liability for Plaintiff's damages can be assessed against it; thus, it should not have been made a party to this litigation and discovery should not be afforded against it. Independence Township, if served with a Freedom of Information Act request (outside this litigation) would not be required to provide information the information related to included portions of its road and attendant sewer infrastructure, sought here. 15.243(y) and (aa), for example. Matters not subject to public safety and security concerns are accessible on its website, and need not be reproduced here as this would be cumulative, duplicative, a waste of municipal resources, subjecting the Township to undue burden and expense, weighing the value of the information sought to its logical tendency to resolve the issues or make a fact at issue more, or less, likely to be true. Based on the foregoing, the information sought in this request is not discoverable from Independence Township.

Without waiving the foregoing exceptions, to the extent that the Township has information related to the location of Plaintiff's building sewer/lead at issue herein, it will compile and provide that. This case does not involve damage to a water main.

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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 form 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.

RESPONSE:

Defendant Independence Township objects to the corresponding request, including its subsections a. – t., as it is vague, ambiguous, and overbroad. This case involves damage to a private sewer lead that drains to a public lateral. Insofar as this request is overbroad, it is also irrelevant and immaterial. It is not relevant to any claim or defense raised in this matter. This case does not involve damage to, or a defect in, a municipal main/lateral operated by Independence Township. It involves alleged damage to a privately-owned sewer drain pipe located on private property. Further, as explained in Defendant's Motion for Summary Disposition (currently pending before the Court), because the damaged pipe is not under the ownership, operation, or control of Independence Township, it has no duty with respect to it, and no liability for Plaintiff's damages can be assessed against it; thus, it should not have been made a party to this litigation and discovery should not be afforded against it. Independence Township, if served with a Freedom of Information Act request (outside this litigation) would not be required to provide information the information related to included portions of its road and attendant sewer infrastructure, sought here. 15.243(y) and (aa), for example. Matters not subject to public safety and security concerns are accessible on its website, and need not be reproduced here as this would be cumulative, duplicative, a waste of municipal resources, subjecting the Township to undue burden and expense, weighing the value of the information sought to its logical tendency to resolve the issues or make a fact at issue more, or less, likely to be true. Based on the foregoing, the information sought in this request is not discoverable from Independence Township.

Without waiving the foregoing exceptions, to the extent that the Township has information related to the location of Plaintiff's building sewer/lead at issue herein, it will compile and provide that. This case does not involve damage to a sewer main/lateral operated or owned by the Township.

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.

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RESPONSE:

Defendant Independence Township objects to the corresponding request, including its subsections a. – t., as it is vague, ambiguous, and overbroad. This case involves damage to a private sewer lead that drains to a public lateral. Insofar as this request is overbroad, it is also irrelevant and immaterial. It is not relevant to any claim or defense raised in this matter. This case does not involve damage to, or a defect in, a municipal main/lateral operated by Independence Township. It involves alleged damage to a privately-owned sewer drain pipe located on private property. Further, as explained in Defendant's Motion for Summary Disposition (currently pending before the Court), because the damaged pipe is not under the ownership, operation, or control of Independence Township, it has no duty with respect to it, and no liability for Plaintiff's damages can be assessed against it; thus, it should not have been made a party to this litigation and discovery should not be afforded against it. Independence Township, if served with a Freedom of Information Act request (outside this litigation) would not be required to provide information the information related to included portions of its road and attendant sewer infrastructure, sought here. 15.243(y) and (aa), for example. Matters not subject to public safety and security concerns are accessible on its website, and need not be reproduced here as this would be cumulative, duplicative, a waste of municipal resources, subjecting the Township to undue burden and expense, weighing the value of the information sought to its logical tendency to resolve the issues or make a fact at issue more, or less, likely to be true. Based on the foregoing, the information sought in this request is not discoverable from Independence Township.

Without waiving the foregoing exceptions, to the extent that the Township has information related to its response to Kaltz' 12/01/2020 Miss Dig request, it will compile and provide that.

5. Any and all record, 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.

RESPONSE:

Defendant Independence Township objects to the corresponding request, including its subsections a. – t., as it is vague, ambiguous, and overbroad. This case involves damage to a private sewer lead that drains to a public lateral. Insofar as this request is overbroad, it is also irrelevant and immaterial. It is not relevant to any claim or defense raised in this matter. This case does not involve damage to, or a defect in, a municipal main/lateral operated by Independence Township. It involves alleged damage to a privately-owned sewer drain pipe located on private property. Further, as explained in Defendant's Motion for Summary Disposition (currently pending before the Court), because the damaged pipe is not under the ownership, operation, or control of Independence Township, it has no duty with respect to it, and no liability for Plaintiff's damages can be assessed against it; thus, it should not have been made a party to this litigation and discovery should not be afforded against it. Independence Township, if served with a Freedom of Information Act request (outside this litigation) would not be required to provide information the information related to included portions of its road and attendant sewer infrastructure, sought here. 15.243(y) and (aa),

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for example. Matters not subject to public safety and security concerns are accessible on its website, and need not be reproduced here as this would be cumulative, duplicative, a waste of municipal resources, subjecting the Township to undue burden and expense, weighing the value of the information sought to its logical tendency to resolve the issues or make a fact at issue more, or less, likely to be true. Based on the foregoing, the information sought in this request is not discoverable from Independence Township.

Without waiving the foregoing exceptions, to the extent that the Township has information related to emails, videos and photos, regarding any damage claims, sewer backup claims, or injury claims regarding Brian Zezula and/or 5116 Forrest View Road, it will compile and provide that.

AS TO OBJECTIONS ONLY:

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

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DATED: August 29, 2023

PROOF OF SERVICE

The undersigned certifies that the foregoing was served upon each of the attorneys/parties of record herein at their respective addresses disclosed on the pleadings on 8/29/23.

BY: ☐ U.S. Mail ☐ Facsimile Transmission
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/s/ Paula M. Rosenthal

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APPENDIX 12

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

NINA BROWN, DET ENERGY COMPANY, KALTZ EXCAVATING COMPANY INC and INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendants.

/

CA: 22-197937-NZ

HON: CHERYL A. MATTHEWS

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/

DEFENDANT INDEPENDENCE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITSION

FEE

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Defendant, INDEPENDENCE TOWNSHIP, by and through its attorneys, ROSATI, SCHULTZ, JOPPICH & AMTSBUECHLER, P.C., requests that this Honorable Court grant its Motion for Summary Disposition pursuant to MCR 2.116(C)(7), (8) and (10), and for the reasons stated in the attached Brief in Support.

Defendant sought, but was unable to obtain, concurrence in the relief sought herein on August 15, 2023, necessitating the filing of this Motion for Summary Disposition.

WHEREFORE, Defendant respectfully requests this Honorable Court grant its Motion for Summary Disposition, dismissing all Plaintiff's claims against Defendant Independence Township, in their entirety, with prejudice, and award costs and attorney's fees so wrongfully incurred in defending this action.

Respectfully submitted,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

/s/ Margaret T. Debler
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DATED: August 16, 2023

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

NINA BROWN, DET ENERGY COMPANY, KALTZ EXCAVATING COMPANY INC and INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendants.

CA: 22-197937-NZ
HON: CHERYL A. MATTHEWS

/

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BRIEF IN SUPPORT OF DEFENDANT INDEPENDENCE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION

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STATEMENT OF FACTS

Plaintiff filed a Second Amended Complaint (**Ex. 1**) adding Independence Township as an Defendant after Defendant Kaltz filed its Notice of Non-Party Fault on April 23, 2023. Kaltz contended that the Township was negligent in allegedly violating statutes, and Township Ordinances, including 48-84. (**Ex. 2,** Notice of Non-Party Fault). Count IV of Plaintiff's Second Amended Complaint alleges General Negligence and Common Law Negligence as to Independence Township, the same claims he asserts against Kaltz in Count III. But unlike Kaltz, or other Defendants name in this lawsuit, Independence Township is not a "private domestic corporation". It is indisputable that Independence Township is a municipal corporation, a governmental entity, and Plaintiff admits this. (**Ex. 1,** paragraph 34). Further, as Plaintiff also correctly states, Kaltz engaged in digging, excavating, and drilling on private land and in so doing, drilled through a private sewer lead, causing effluent from the sewer lead to enter into, and damage his basement. (**Ex. 1,** paragraphs 31-34). Mr. Zezula asserts that as a direct and proximate cause of this action by Kaltz, he suffered harm.

Plaintiff's theory of liability, advanced against Independence Township, is "negligence", and he posits, "[u]pon information and belief that governmental immunity does not apply when the governmental entity is operating or failing to operate outside the descriptions and duties of prescribed governmental duties". (**Ex. 1.** paragraph 44). While Plaintiff admits Independence Township's existence as a governmental entity he somehow seems to be suggesting that by allegedly acting contrary to Ordinance Chapter 48, Utilities, Section 48-84, it is deprived of governmental immunity. (**Ex. 1.** paragraph 43). As shown below, the Township did not violate its ordinances but even it had, this would not deprive it of governmental immunity. *Reid by Ried v Allen,* 133 Mich App 448, 450; 349 NW2d 806, 807 (1984). The alleged violation of MISS-DIG

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statutes (though not pleaded expressly herein), similarly, does not avoid immunity. *State Farm Fire & Cas. Co. v Corby Energy Servs., Inc.*, 271 Mich App 480, 489, 722 N.W.2d 906 (2006).

Independence Township Ordinance, Sec. 48-53. – Definitions, provides:

> Sewer means a pipe or conduit that carries wastewater or drainage water. See the following definitions modifying sewer:
>
> (1) *Building sewer means, in plumbing, the extension from the building drain to the public sewer* or other place of disposal. Also called house connection.
>
> (2) Combined sewer means a sewer intending to receive both wastewater and stormwater, surface or drainage water.
>
> (3) Common sewer means a sewer in which all owners of abutting properties have equal rights.
>
> (4) County sewer means a public sewer controlled by the county agency.
>
> (5) Intercepting sewer means a sewer that received dry-weather flow from a number of transverse sewers of outlets in frequently additional predetermined quantities of stormwater (if from a combined system) and conducts such waters to a point for treatment of disposal).
>
> (6) Lateral sewer means that portion of the sewer system located under the street, within the street right-of-way, or easement and which collects sewage from a particular property for transfer to the trunk line or interceptor. A sewer that is designed to receive a building sewer.
>
> (7) Municipal sewer means a public sewer exclusive of a county sewer or City of Detroit sewer.
>
> (8) *Public sewer means a common sewer controlled by a governmental agency or public utility.*
>
> (9) Sanitary sewer means a sewer that carries liquid and water-carried waste from residences, commercial buildings, industrial plants, and institutions, together with minor quantities of groundwater, stormwater, surface water and drainage water and are not admitted intentionally.
>
> (10) Storm sewer means a sewer that carries stormwater and surface water, street wash and other wash waters, or drainage, but excludes

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> domestic wastewater and industrial wastewater. Also called a storm drain.
>
> (11) Trunk sewer or trunk line means a sewer that connects the lateral sewer to the intercepting sewer and to which building sewers may be connected. (**Ex. 3,** selected Ordinance provisions).

Sec. 48-84. - Ownership, operations and maintenance responsibility, the section that Plaintiff alleges that the Township violated, reads:

> *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. (emphasis added.) (**Ex. 3,** selected Ordinance provisions).

While it is unclear from Plaintiff's Complaint how he believes that Independence Township violated the above ordinance, it is beyond cavil that Plaintiff did not plead a cause of action in avoidance of immunity and he could not amend to allege a sustainable claim, based on the indisputable facts that give rise to this case. Therefore, the Township must be dismissed.

STANDARD OF REVIEW

I. MCR 2.116(C)(8)

Under MCR 2.116(C)(8), the Court may grant summary disposition if "[t]he opposing party has failed to state a claim on which relief can be granted." That type of motion tests the legal sufficiency of a claim based on the complaint alone. *Mack v City of Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). To bring a tort claim against a municipality, a plaintiff must plead in avoidance of governmental immunity. *Id.* Summary disposition is appropriate when, taking all the plaintiff's well-pleaded facts as true, his or her claims are clearly unenforceable as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817(1999).

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II. MCR 2.116(C)(7)

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

ARGUMENT

Independence Township, as a governmental agency presumed to be immune from suit unless a plaintiff establishes that his case falls within one of the recognized exceptions to governmental immunity. MCL 691.1407; *Mack v City of Detroit*, 467 Mich 186, 201; 649 NW2d 47 (2002); see also *Lash v Traverse City*, 479 Mich 180, 199; 735 NW2d 628 (2007). "Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a governmental agency." *Nawrocki v Macomb County Road Comm'n*, 463 Mich 143, 155-156; 615 NW2d 702 (2000) (citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 621; 363 NW2d 641 (1984)).

There are statutorily created exceptions to governmental immunity, but "there is one basic

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

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

MCL 691.1417 provides the only avenue for relief for compensation of property damages, sustained in connection with a sewer back up. But it states, unambiguously, that the property damages must have been sustained because of problem with the municipally operated system:

> Sec. 17. (1) To afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages or physical injuries caused by a *sewage disposal system event*, a claimant and a governmental agency subject to a claim shall comply with this section and the procedures in sections 18 and 19.
>
> (2) *A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow*

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> *or backup is a sewage disposal system event* and the governmental agency is an appropriate governmental agency. *Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages* or physical injuries caused by a sewage disposal system event *regardless of the legal theory*. (Emphasis added.)

I. PLAINTIFF'S CLAIM FOR DAMAGES AGAINST INDEPENDENCE TOWNSHIP FAILS AS THE "SEWER EXCEPTION" DOES NOT APPLY BECAUSE HIS BASEMENT BACK UP DID NOT ARISE FROM A "SEWAGE DISPOSAL SYSTEM EVENT".

Plaintiff claims damages because Kaltz severed his private building sewer. His building sewer was connected to the public sewer, otherwise known as the municipal lateral. As a result of the private building sewer being severed or punctured, as alleged, it was unable to drain properly into the municipal lateral. As such, Plaintiff is alleging that because of a condition or defect occurring in the private lead, not in the municipal lateral, his basement flooded.

MCL 691.1416(j) defines "[se]wage disposal system" to include sanitary sewers under the jurisdiction and control of the governmental agency, and subsection (k) further defines "[s]ewage disposal system event" or "event" to mean "the overflow or backup of a sewage disposal system onto real property". Subsection (k) goes on to expressly exclude operational defects in building drains, stating:

> An overflow or backup is not a sewage disposal system event if any of the following was a substantial proximate cause of the overflow or backup:
>
> (*i*) An obstruction in a service lead that was not caused by a governmental agency.
>
> (*ii*) A connection to the sewage disposal system on the affected property, including, but not limited to, a sump system, building drain, surface drain, gutter, or downspout.
>
> (*iii*) An act of war, whether the war is declared or undeclared, or an act of terrorism. (Emphasis added).

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According to Plaintiff's Complaint, the drilling through and/or severely puncturing of his private service lead caused his damages. (**Ex. 1,** paragraphs 31-34). Plaintiff's sewer service lead is not owned or maintained by Independence Township. It is privately-owned, on private land, as alleged. As such, basement back up cannot be construed as a "sewage disposal system event", Plaintiff has no recourse against this Defendant. As the Court of Appeals has held, in creating this exception, the Legislature "intended to provide limited relief to persons who suffer damages as a result of a sewage disposal system event." *Willett v Waterford Charter Twp*, 271 Mich App 38, 46; 718 NW2d 386 (2006).

II. PLAINTIFF'S CLAIM FOR DAMAGES AGAINST INDEPENDENCE TOWNSHIP FAILS AS HE FAILED TO COMPLY WITH THE PRE-SUIT NOTICE REQUIREMENTS OF MCL 691.1419.

The Michigan Supreme Court has strictly enforced notice requirements under the GTLA and other statutes involving liability claims against government agencies. Similar requirements in other statutes requiring pre-suit notice to governmental agencies have also been enforced. These notice requirements are now well-established. *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012). Indeed, "[a]s of 1969 . . . the enforceability of notice requirements and the particular notice requirements in governmental immunity cases as well settled and had been enforced for almost a century." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 205; 731 NW2d 41 (2007). The Michigan Supreme Court enforced the pre-suit notice requirement included in the sidewalk exception to governmental immunity. MCL 691.1404. The trial court had denied the defendant's Motion for Summary Disposition, and the Court of Appeals affirmed. Reversing both lower courts, the Supreme Court held that the defective highway exceptions 120-day time limit should be "enforced as written", because the language in the notice provision is clear and unambiguous. 477 Mich at 200. The Court reasoned that:

> [W]e must say that the legislature intended to give defendants in

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> such cases some protection against unjust raids upon their treasuries by unscrupulous prosecution of trumped-up, exaggerated, and stale claims, by requiring a claimant to give definite information to the city or village against whom it is asserted, at a time when the matter is fresh, conditions unchanged, and witnesses thereto, and to the accident within reach. It is a just law, necessary to the protection of the taxpayer, who bears the burden of unjust judgments. It requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of the statutes that would be applicable to any other statute of limitation. *Id.*, at 211.

Likewise, under long-standing law, a plaintiff must presume to know the terms of the statute on which it bases its claim. See, e.g., *Curley v Beryllium Dev Corp*, 281 Mich 554, 557; 275 NW 246 (1937) (stating that "[i]gnorance of the statutory provision was no good reason for plaintiff not exercising earlier concern relative to the right of review".)

In order to bring a claim under MCL 691.1417, as previously cited, a plaintiff must demonstrate his claim compliance with MCL 691.1419. This statute requires that within 45 days of discovering the damage, the claimant give written notice as to the details of his claim. MCL 691.1419(1). The necessary contents of the notice include: the claimant's name, address, and telephone number; the address of the affected property; the date of discovery of any property damages or physical injuries; and a brief description of the claim. MCL 691.1419(2)(c). MCL 691.1419 speaks to the procedure for giving notice to the governmental agency that the claimant believes operated a "sewage disposal system" that had a defect, resulting in an "event". Here, Mr. Zezula, based on his Second Amended Complaint, understood that his basement did not take on sewage because of an "event" caused by the sewer operated by Independence Township. Thus, he never provided notice of his intention to file a claim against the Township, until after Kaltz filed its Notice of Non-Party Fault. As such, any claim that would be cognizable under MCL 691.1417 is barred.

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RELIEF

Wherefore, this Defendant respectfully requests that this Honorable Court dismissed this action, in its entirety, as to Independence Township and award it reasonable costs and attorney fees pursuant to MCR 2.625(A)(2) in connection with the defense of this matter.

Respectfully submitted,

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& AMTSBUECHLER PC

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DATED: August 16, 2023

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

NINA BROWN, DET ENERGY COMPANY, KALTZ EXCAVATING COMPANY INC and INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendants.

/

CA: 22-197937-NZ

HON: CHERYL A. MATTHEWS

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/

NOTICE OF HEARING

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TO: All Counsel of Record

PLEASE TAKE NOTICE that the attached motion will be brought on for hearing before the Honorable Cheryl A. Matthews on a date and time to be scheduled by the Court upon receipt of filed motion.

Respectfully submitted,

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DATED: August 16, 2023

CERTIFICATE OF SERVICE

I certify that on 8/16/23, the foregoing document was served on all parties or their counsel of record through the Court's efile system.

/s/Paula M. Rosenthal

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APPENDIX 13

FILED Received for Filing Oakland County Clerk 9/8/2023 10:04 AM

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

vs.

Case No. 22-197937-NZ
Hon. Cheryl A. Matthews

NINA BROWN, DTE ENERGY COMPANY, KALTZ EXCAVATING COMPANY, INC., and INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendants.

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RESPONSE BY DEFENDANT KALTZ EXCAVATING COMPANY, INC. TO DEFENDANT INDEPENDENCE TOWNSHIP'S MOTION FOR PROTECTIVE ORDER

NOW COMES the defendant, KALTZ EXCAVATING, INC., by and through its attorneys, HARVEY KRUSE, P.C., and for its response to the motion by defendant Independence Township for protective order states as follows:

STATEMENT OF FACTS

The plaintiff, Brian Zezula, filed suit against the defendants Nina Brown, DTE Energy Company and Kaltz Excavating Company alleging damage to his home from a sanitary sewage backup of 12/23/2022.

On 06/08/2023, plaintiff filed a second amended complaint adding Independence Township of Oakland County as a defendant alleging that Independence Township violated the MISS DIG Underground Facilities Damage and Safety Act resulting in the sewage backup.

After filing an evasive and incomplete response to a subpoena served on Independence Township before it was added to the case, and after filing evasive non-responsive answers to discovery requests after being added to the case, Independence Township filed a motion for summary disposition claiming it is entitled to the defense of governmental immunity and has now filed a motion to stay proceedings or to prevent any and all discovery regarding Independence Township until the court rules on Independence Township's motion for summary disposition.

As will be pointed out hereafter:

1. Independence Township's motion for summary disposition based on governmental immunity is meritless and based on multiple misrepresentations of the facts and law.

2. Independence Township has engaged in continued violation of the court rules by failing to properly respond to a subpoena and filing evasive non-responsive answers to discovery requests and now by seeking a protective order to avoid disclosing information.

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3. The record shows that Independence Township violated the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721, *et seq.*, which resulted in the sanitary sewer backup to the plaintiff Zezula's property.

ARGUMENT

I. INDEPENDENCE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION IS BASED ON MISREPRESENTATIONS OF THE LAW AND FACTS.

Independence Township filed the current motion for protective order on the Friday of Labor Day weekend at 3:32 p.m. and defense attorney was out of town at that time until 09/11/2023 but prepared this response while away from the office. The motion for protective order is based on Independence Township claiming it has a valid motion for summary disposition and does not belong in the case and should not have to participate in discovery until the court grants its motion for summary disposition.

Independence Township's motion for summary disposition is based on blatant misrepresentations of the facts and law.

Independence Township's motion for summary disposition states on page 1:

> "The alleged violation of MISS-DIG statutes (though not pleaded expressly herein), similarly, does not avoid immunity. *State Farm Fire & Cas. Co. v Corby Energy Servs., Inc.*, 271 Mich App 480, 49; 722 N.W.2d 906 (2006)." (Motion for summary disposition, p 1-2)

This is false. Independence Township is relying on the version of the governmental immunity statute, MCL 691.1407 as it existed ***before*** it was amended effective 04/01/2014, ***over nine years ago***, to provide an exception ***exactly the opposite*** of Independence Township's argument stating:

> "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."

Independence Township's argument could not be more incorrect. It appears to be intentional and intended to mislead the court since Independence Township and its attorneys are obviously well aware

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of the provisions of the governmental immunity act which have been in effect since 04/01/2014, ***over nine years ago.***

In addition, Independence Township misrepresented the law by citing in support of its argument *State Farm v Cory Energy, supra,* which was decided in 2006, ***eight years before*** the governmental immunity statute was amended to specifically except liability for violation of the MISS DIG Underground Facility Damage Prevention and Safety Act from governmental immunity.

Independence Township's brief goes on to argue that there are only six exceptions to governmental immunity, none of which apply to the facts of the case and conveniently excludes mentioning the exception for violation of the MISS DIG Underground Facility Damage Prevention and Safety Act:

> There are only six exceptions to governmental immunity, none of which apply to the facts of this case; therefore, any attempt at amendment would be futile. *Wesche v Mecosta Cty Rd Comm'n,* 480 Mich 75, 84; 746 NW2d 847 (2008). *Wesche* listed the statutory exceptions: the highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3). *Id.* n.10. (Motion for summary disposition, p 5)

This argument makes no mention of MCL 691.1407(7) which specifically provides that the immunity provided does ***not*** apply to liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act. It also cites in support *Wesche v Mecosta County Road Commission,* 480 Mich 75, 84; 746 NW2d 847 (2008), a 2008 Supreme Court case which was issued six years ***before*** the statute was amended.

As will be pointed out hereafter, in response to the Miss Dig marking request made by Kaltz excavating before the project, Independence Township refused and failed to mark all of its facilities in the area and responded by indicating "NO CONFLICT." (See Exhibit A).

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Independence Township continues its misrepresentation regarding what it calls the "sewage-disposal-system-event exception, MCL 691.1417(2)(3) by stating that:

> "As such, basement backup cannot be construed as a 'sewage disposal system event,' Plaintiff has no recourse against this Defendant." (Motion for summary disposition, p 7).

Once again, this is false.

The portion of the governmental immunity statute pertaining to sewage disposal events, MCL 691.1417(3), provides that there is no governmental immunity where a sewage disposal system had a defect:

> (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, 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. (emphasis added).

MCL 691.1416 defines "defect" as:

> (e) 'Defect' means a construction, design, maintenance, operation or repair defect.

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In *State Farm v Corby Energy, supra,* the very case relied upon by Independence Township, the Court of Appeals noted that properly complying with the Miss Dig Act and marking its facilities "is within the scope of the water department's operations":

> 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 . . . .We conclude that the prevention of accidental damage to the City's water system through notification is within the scope of the water department's operations. . . (271 Mich App at 484, n2)

Failing to mark facilities is considered a "defect" which is not entitled to governmental immunity per MCL 691.1417, providing another exception to governmental immunity, which Independence Township misrepresents.

Thus, Independence Township's motion for summary disposition is meritless, and Kaltz will be filing a response seeking sanctions for the multiple misrepresentations of the facts and law. The amendment of the governmental immunity act in 2014 was in response to the exact conduct engaged in by Independence Township in this case in failing and refusing to mark facilities resulting in property damage.

II. KALTZ FULLY COMPLIED WITH THE MISS DIG ACT AND INDEPENDENCE TOWNSHIP VIOLATED THE MISS DIG ACT RESULTING IN THE PLAINTIFF'S DAMAGES.

In compliance with the Miss Dig Act, Kaltz submitted a Miss Dig request for a boring job in the area of the three lots on Forrest View Drive, including the plaintiff's lot and Forrest View Drive itself. (Copy attached as Exhibit B).

Multi entities replied including Independence Township sanitary and water. Independence Township's response for sanitary and water stated "NO CONFLICT." (See Exhibit A).

Independence Township's motions and brief repeatedly blame Kaltz for damaging plaintiff Zezula's sanitary sewer lead. The only reason Kaltz had any conflict with plaintiff Zezula's sanitary

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sewer lead is because Independence Township refused to mark its facilities in the area and indicated in response to the Miss Dig request "NO CONFLICT."

The Miss Dig Act requires that any facility owner or operator shall respond to a Miss Dig ticket request by marking the facilities in the area of the proposed excavation in a manner that permits the excavator to employ soft excavation to establish the precise location of the facility:

> (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, stakes, flags, or other customary methods using the uniform color code of the American national standards institute as follows:
>
> . . . .
>
> (h) Green — sewers and drain lines.

The statute, MCL 460.723(o) defines a "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. (emphasis added).

MCL 460.729 provides that an excavator such as Kaltz in this case that complies with the Miss Dig Act is ***not*** responsible for damages that occur to a facility that is improperly marked, not marked or determined to be within the safe zone:

> (2) An excavator or a farmer engaged in farming operations that complies with this act is not responsible for

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> damages that occur to a facility that is improperly marked, not marked, or determined to be within the safe zone.

The Michigan Damage Prevention Board released its Best Practice on 5/25/15. (See Exhibit C) This Best Practice specifically states that the Miss Dig definition of "facility" quoted above from MCL 460.723(o) specifically includes in the definition the underground pipe or structure, including, but not limited to ***its appurtenances*** used to transmit specified items including sewage.

It states that "appurtenances" is defined by Webster's New College Dictionary 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 (Exhibit C)

The Best Practice states that unmarked appurtenances are a threat to safety because the excavator such as Kaltz in this case would not be aware of the presence of the facility and particularly in the case of sanitary sewer leads such as Zezula's in this case, which is connected to the main ***and the connection is an appurtenance and a "facility" owned by Independence Township***, which Independence Township is required by statute to mark.

The Best Practice states a municipal sewer system consists of a main in a public right-of-way and sewer leads on private property. It further states that 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 also considered owned or operated by the municipality and are subject to the requirements of the Miss Dig Act:

> 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

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> 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. (See Exhibit C)

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

> ***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. (emphasis added.)

III. SINCE THE PLAINTIFF ZEZULA'S DAMAGE OCCURRED, INDEPENDENCE TOWNSHIP HAS BEEN ENGAGED IN A COVER-UP AND REFUSAL TO COMPLY WITH A SUBPOENA OR ANSWER DISCOVERY REQUESTS AND NOW IS ATTEMPTING TO STAY DISCOVERY TO PREVENT DISCOVERY OF ITS LIABILITY AND NEGLIGENCE.

From the time of the damage to the plaintiff's property, Kaltz has advised Independence Township that Independence Township failed to comply with the Miss Dig Act and properly mark its facilities in the area. Independence Township has engaged in a campaign to deny all liability and place blame on Kaltz, DTE and Zezula's neighbor, Brown.

In the post-incident investigating, Kaltz and investigators repeatedly requested information from Independence Township and Independence Township and its attorneys refused to respond.

After suit was filed, Kaltz served Independence Township with a notice of records deposition per copy attached as Exhibit D. The request specifically requested that Independence Township disclose any and all records pertaining to any and all of its facilities in the area of the incident including the definitions of such facilities as described in Independence Township's own ordinance, any and all water service or sanitary sewer leads to any of the six addresses on the street, any and all records including drawings, sketches, plans and permits for any such facilities, all records and photos and all investigation regarding the incident. There were five requests.

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Independence Township's response was absolutely unresponsive providing only a document regarding the Miss Dig call, a permit for the water/sewer connection for one of the addresses on the street, several photos provided by the plaintiff Zezula to Independence Township, and emails between the plaintiff and Independence Township where Independence Township claims it has no liability. ***None of the requested documents were provided.*** (See copy attached as Exhibit E).

After Independence Township was added as a defendant, Kaltz immediately filed a request to produce to Independence Township as soon as Independence Township filed responsive pleadings on August 1, 2023. The request was the identical request made in the subpoena. (Copy attached as Exhibit F).

On August 29, 2023, Independence Township filed what it called "Objections and Response to Defendant Kaltz Excavating Company's Request to Produce." (Copy attached as Exhibit G). There was absolutely no response. ***Nothing was produced.*** All that was provided was a continued objection to everything claiming that Independence Township has governmental immunity and has no liability and does not have to produce anything.

The failure to respond to the subpoena was a direct violation of MCL 2.305.

Independence Township's response to Kaltz' discovery requests is a direct violation of MCL 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.

Defendant Kaltz will be filing a motion to compel responses along with sanctions and attorney fees and expenses.

Now Independence Township has filed the current motion for protective order to terminate all discovery involving Independence Township pending its motion for summary disposition.

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As indicated in this brief, it is clear that Independence Township has filed its motion for summary disposition by misrepresenting the facts and law. Its purpose is attempting to avoid liability. It has also refused to engage in discovery. Its conduct in doing so is to attempt to run out discovery before anything can be discovered from it to establish its liability.

Plaintiff filed a motion to add Independence Township as an additional party on 05/23/2023. This court entered its order on 06/07/2023 granting the motion to file the amended complaint by 06/14/2023.

The plaintiff filed plaintiff's second amended complaint adding Independence Township as a defendant on 06/13/2023.

Independence Township then sought to continue its practice of delay by obtaining a stipulation and order on 07/05/2023 allowing it to have until 07/31/2023 to file its responsive pleadings.

Independence Township did not file its answer to complaint until 07/31/2023. At that time, there was only two and a half months left in discovery to 10/20/2023.

Kaltz filed its discovery request to Independence Township on 08/01/2023, the day after Independence Township filed its answer. The response was then due on 08/29/2023 and Independence Township filed its evasive non-answers on 08/29/2023 (Exhibit G). ***Thus, there is now only six weeks left in discovery and there has been no discovery obtained from Independence Township and Independence Township now wants to enter a stay of discovery to prevent any discovery at all from Independence Township.***

Independence Township is clearly in violation of the court rules.

The motion to stay should be denied, costs and sanctions should be imposed on Independence Township for filing this motion and for failing to participate in discovery and it is requested that discovery should be extended by an additional 90 days to allow the parties to obtain discovery which Independence Township should have already been provided.

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The parties cannot engage in discovery as to liability in this matter and have not been able to engage in any because they need the information from Independence Township as to what facilities they have in the area.

The pleadings filed by Independence Township are in violation of MCL 1.109 including the motion for summary disposition and the motion for protective order and the objection and non-response to defendant Kaltz' discovery requests.

RELIEF REQUESTED

It is respectfully requested that this Honorable court deny the motion for Independence Township for protective order and impose sanctions including attorney fees pursuant to MCR 1.109 and 2.313 and extend discovery by 90 days.

Respectfully submitted,
HARVEY KRUSE, P.C.

BY: /s/Michael F. Schmidt
Michael F. Schmidt P25213
Attorneys for Defendant Kaltz Excavating Company, Inc.
1050 Wilshire Drive, Suite 320
Troy, MI 48084-1526
(248) 649-7800

DATED: September 8, 2023

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
Legal Assistant, Harvey Kruse, PC

DATED: September 8, 2023

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APPENDIX 14

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STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

BRIAN ZEZULA

Plaintiff,

Case No. 2022-197937-NZ
Honorable Cheryl A. Matthews

-vs-

NINA BROWN, DTE ENERGY COMPANY, KALTZ EXCAVATING COMPANY, INC., and INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendants,

And

DTE ENERGY COMPANY,

Cross-Plaintiff,

-vs-

KALTZ EXCAVATING COMPANY, INC.,

Cross-Defendant.

/

OPINION AND ORDER ON DEFENDANT INDEPENDENCE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION

The Court considered the above titled motion, Plaintiff's Response, Defendant Kaltz Excavating Company's (Kaltz) Answer, Defendant Independence Township's Reply, and the oral arguments placed on the record on October 11, 2023. The Court took the motion under advisement.

Independence Township brought its motion pursuant to MCR 2.116(C)(7) and (8). The motion is denied for the reasons argued by Kaltz. Although not clearly alleged in the Second Amended Complaint, Kaltz has shown Plaintiff may sustain a claim against Independence Township because there are two basis to exclude Independence Township from the immunity conferred by the Governmental Tort Liability Act (GTLA).

First, Independence Township is not entitled to governmental immunity pursuant to MCL 691.1407(7) which states "[t]he immunity provided by this act [GTLA] does not apply to liability of a governmental agency under the MISS DIG underground facility damage prevention

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and safety act [MCL 460.721]." Second, the Plaintiff may amend its Complaint for a third time to specifically state a claim pursuant to MCL 691.1417(3). The Court finds that the sewage disposal system had a defect pursuant to MCL 691.1417(3)(b). Pursuant to MCL 691.1416(e), a defect means a construction, design, maintenance, operation or repair defect. In *State Farm Fire & Cas Co. v Corby Energy Servs*, 271 Mich App 480, 484, n2, the Court stated "[w]e conclude that the prevention of accidental damage to the City's water system through notification is within the scope of the water department's operations". Because the failure to mark is an operation of Independence Township, the failure to mark is a defect. This is consistent with the holding in *State Farm*. The Court notes that although *State Farm* examined the former version of MCL 691.1407, MCL 691.1416(e) has an effective date of January 2, 2002, is current, and thus the discussion of "defect" in *State Farm* is applicable to this action. The Plaintiff may amend its Complaint to plead allegations consistent with the requirement of MCL 691.1417(3)(c) – (e).

The Third Amended Complaint must be filed by Wednesday, October 25, 2023.

The Court has addressed statutory immunity but questions whether Plaintiff gave the notice required by MCL 691.1419. Independence Township argued in its motion that Plaintiff had not given the requisite notice. Plaintiff did not respond to that argument. Notice was insufficiently discussed during oral argument. Independence Township's request for summary disposition premised on notice is held in abeyance pending supplemental filing by the parties. Independence Township shall file a supplemental brief discussing whether Plaintiff gave the requisite notice pursuant to MCL 691.1419 by October 27, 2023. Plaintiff and/or Kaltz may file a response by November 3, 2023. The Court will issue an order directing oral argument on the issue if necessary.

This order does not resolve the last pending claim and does not close the case.

IT IS SO ORDERED.

10/18/2023
DATE

/s/ Cheryl Matthews
October 18, 2023
HON. CHERYL A. MATTHEWS

kn

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APPENDIX 15

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Michigan Damage Prevention Board
Best Practice 2015-03

Facilities and Appurtenances

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.

Public Act 174 References

Section 3 (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.

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

Discussion

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.

Submission Date 4/22/15

Adoption Date 5/28/15

Revision 1 Date 7/1/15 (corrected PA 174 sec number from 5 to 3)

Revision 2 Date _____

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