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STATE OF MICHIGAN

IN THE SUPREME COURT

BRIAN ZEZULA,

Plaintiff/Appellee,

-vs-

INDEPENDENCE TOWNSHIP,

Defendant/Appellant.

and

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

Defendants.

Supreme Court No. 168483

COA Docket No. 368261

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

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DEFENDANT/APPELLANT INDEPENDENCE TOWNSHIP'S REPLY BRIEF ON APPEAL

**** ORAL ARGUMENT REQUESTED ****

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TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

LEGAL ARGUMENTS 1

I. The GTLA and the MISS DIG Act are clear and unambiguous, and when read together, provide an exclusive administrative remedy 1

II. Zezula cannot sustain a claim under MCL 691.1417(2), thus any amendment to the Complaint is futile 3

CONCLUSION AND RELIEF REQUESTED 5

CERTIFICATE OF COMPLIANCE 6

CERTIFICATE OF SERVICE 6

RECEIVED by MSC 1/12/2026 12:17:16 PM

INDEX OF AUTHORITIES

Cases

Milne v Robinson, 513 Mich 1, 13; 6 NW3d 40 (2024) FN 13, quoting *Malcolm v East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991) 1
Safdar v Aziz, 501 Mich 213, 218; 912 NW2d 511 (2018) 1
Steward v Panek, 251 Mich App 546, 558; 652 NW2d 232 (2002) 4
Zezula v Brown, ___ Mich ___; 25 NW3d 333 (2025) 4

Statutes

MCL 460.728 1
MCL 460.732 1
MCL 460.732(2) 1
MCL 460.732(3), (4) 1
MCL 691.1416(J) and (k) 3
MCL 691.1416(k)(*i*) and (*ii*) 4
MCL 691.1417 ..... 4, 5
MCL 691.1417(1) 3
MCL 691.1417(2) and (3) 4
MCL 691.1419(2) 4

Other Authorities

GTLA 2, 3, 4
MISS DIG Act. 1, 2, 5

RECEIVED by MSC 1/12/2026 12:17:16 PM

LEGAL ARGUMENTS

I. The GTLA and the MISS DIG Act are clear and unambiguous, and when read together, provide an exclusive administrative remedy.

Zezula argues that because MCL 460.728 "preserves" civil actions and does not contain a "carve out" for governmental agencies, the Township is not entitled to governmental immunity. However, Zezula's argument ignores the more specific statute, MCL 460.732(2), which explicitly provides the designated, exclusive administrative remedy for liability claims against a governmental agency. That statute embodies the referenced preservation of civil actions against municipalities. Indeed, MCL 460.732, specifically titled "Governmental liability," goes on to provide a definite process for holding a governmental entity liable for violations of the MISS DIG Act. See MCL 460.732(3), (4). The more general MCL 460.728 cited by Zezula contains no such specificity.

This Court has repeatedly held that where two statues "conflict," the specific statutory provisions trump more general provisions, especially if the statutes are *in pari material*, as is the case here. See *Milne v Robinson*, 513 Mich 1, 13; 6 NW3d 40 (2024) FN 13, quoting *Malcolm v East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991). See also *Safdar v Aziz*, 501 Mich 213, 218; 912 NW2d 511 (2018) ("'When the conduct at issue falls within the scope of *both* provisions, the specific presumptively governs, whether or not the specific provision also applies to some conduct that falls outside the general.'"). In *Milne*, this Court held that "[i]n such circumstances, courts generally presume that the Legislature gave more deliberate consideration to the specific issue when enacting the more specific statute and therefore treat this provision as 'an exception to the general act or provision' that would otherwise govern to avoid rendering the more specific provision nugatory." *Milne*, 513 Mich at 14 (citation omitted). If MCL 460.732 did not control over MCL 460.728, why would the Legislature have specifically titled that section "Governmental

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liability," and gone through the effort of prescribing explicit procedures and fines, and permitting the recovery of damages by facility owners and facility operators had it not intended it as an exclusive remedy as related to governmental entities? Moreover, to permit an administrative remedy as well as a state court civil tort remedy would result in duplicative recovery to an aggrieved facility owner or facility operator, and the potential for inconsistent rulings. Neither Zezula nor Kaltz point to any evidence that the Legislature intended to go against the public policy in the State of Michigan against double recovery. Nor can they, as no such evidence exists.

As is more fully explained in the Township's principal brief, when the GTLA and the MISS DIG Act are read together, it is abundantly clear that the MISS DIG Act creates liability for governmental agencies that violate the Act. The Act delineates a singular, exclusive administrative remedy whereby aggrieved facility owners can be awarded costs, fees, and damages. Notably, there is no statutory cap on the type or amount of damages that the Commission can award. Concurrently, the GTLA does not operate to preclude a facility owner or operator from pursuing such an administrative remedy, and a governmental agency cannot use the shield of the GTLA to avoid liability in the administrative setting. What the GTLA does, however, is preclude a facility owner or operator from pursuing a civil lawsuit in State court when an exclusive, adequate administrative remedy exists by operation of statute. The Court of Appeals has erred in concluding otherwise.

Briefly, the Township would be remiss to not address Zezula's "unmarked gas line" explosion hypothetical. Should an unmarked gas line explode because of the gas company's failure to mark the gas line, governmental immunity is not implicated, as municipalities do not maintain, own or operate gas lines. Rather, the hypothetical innocent victim would be free to file a personal

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injury lawsuit against the private entities responsible: the gas company as well as against the excavating company who caused the explosion.

II. Zezula cannot sustain a claim under MCL 691.1417(2), thus any amendment to the Complaint is futile.

Neither Kaltz nor Zezula dispute that it is Zezula's ***private line*** that is at issue in this case, ***not*** the Township's sewer main. Moreover, Kaltz admits to conducting the boring activity that damaged Zezula's private sewer lead, causing sewage from with the private lead to back up into Zezula's basement. There is no contention that the municipal sanitary main failed, or that sewage from that main entered Zezula's basement. Kaltz bored through Zezula's private lead to the sewer main, so Zezula's discharged home sanitary effluent could not get to the main. Quite simply, and most succinctly, this was not a "sewage system disposal event" as defined by MCL 691.1416(J) and (k). Nothing under the jurisdiction and control of the governmental agency overflowed or backed up into Zezula's basement. MCL 691.1417(1) only provides a remedy for an "event" meeting the statutory definition. This does not. Moreover, Kaltz has never disputed that it failed to obtain the services of a private locating company to determine where the private leads were located before it commenced boring. Indeed, Kaltz had a responsibility to do so. See https://www.missdig811.org/cm/dpl/downloads/content/1091/OCA_External_User_Guide_08-27-2024.pdf, p 17 ("It is the responsibility of the excavator to ensure private lines are marked prior to digging.). It is highly likely that if Kaltz had the private lines marked, the private line at issue here would not have been breached at all.

Regardless, as articulated in its principal brief, any amendment of Zezula's Complaint to add a sewage disposal system event exception claim under the GTLA is futile. The Court of Appeals has erred in concluding otherwise. Where Zezula and Kaltz ***admit*** that the line at issue is ***not*** a municipally operated system, but rather a private lead, i.e., a building drain, there are no

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circumstances under which Zezula could ever succeed on a claim brought under MCL 691.1417(2) and (3) because the operation and application of MCL 691.1416(k)(*i*) and (*ii*) preclude it.

Moreover, Zezula's pre-suit notice argument is a red herring. Zezula argues that the Township violated his statutory duty under MCL 691.1419(2) to provide written information regarding notice requirements, including how and where to file a claim. Accordingly, Zezula argues, the Township should be precluded from raising any notice arguments as a defense to his claim. However, not only is the notice issue not properly before this Court, *Zezula v Brown*, ___ Mich ___; 25 NW3d 333 (2025), this is the first instance in which Zezula even addresses his defective notice. Indeed, where the Township argued that Zezula failed to give proper notice at the summary disposition stage, Zezula failed to even address those arguments in the trial court. The trial court allowed supplemental briefing on the issue where it should have granted summary disposition to the Township for the failure of the non-movants to respond to the argument. Failure to brief an issue abandons it on appeal. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002). It should be no different in the trial court. Regardless, whether Zezula's failure to provide notice in accordance with the GTLA is irrelevant to whether Zezula can establish a claim in the first place. He cannot because, as explained *infra,* this cannot properly be characterized as "sewage disposal system event".

To be clear, Zezula cannot sustain a cause of action under MCL 691.1417, because the line at issue is not a municipally operated system, but rather a private building lead, and because the "defect" here was caused by Kaltz drilling through the private lead such that it was no longer an effective conduct or connection to the sewage disposal system. The trial court erred in finding otherwise, and the Court of Appeals compounded that error in its affirmance.

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CONCLUSION AND RELIEF REQUESTED

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

Respectfully submitted,

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Dated: January 12, 2026

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply Brief on Appeal contains 1,464 words, and otherwise complies with the requirements of MCR 7.212(B).

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

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2026, I electronically filed the foregoing paper with the Clerk of the Court using the Court's efile system, by selecting efile and eserve, which will send notification to all attorneys of record.

/s/ *Amanda P. Waske*