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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.

COA Docket No. 368261

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

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APPLICATION FOR LEAVE TO APPEAL

**** ORAL ARGUMENT REQUESTED ****

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TABLE OF CONTENTS

INDEX OF AUTHORITIES ii
JURISDICTIONAL STATEMENT iv
ORDER APPEALED FROM AND GROUNDS FOR REVIEW v
STATEMENT OF QUESTIONS PRESENTED vii
STATEMENT OF FACTS 1
I. Factual Background 1
II. Procedural History 3
ARGUMENT 7
I. Preservation and Standard of Review 7
II. The Court of Appeals' majority opinion contains factual errors. 8
III. The Court of Appeals has palpably erred in concluding that Zezula has successfully pleaded an exception to governmental immunity for an alleged violation of the MISS DIG Act. 10
A. The majority opinion ignores longstanding jurisprudence regarding governmental immunity. 10
B. The majority opinion misinterprets interplay between the GTLA and MISS DIG, as well as the plain language of MCL 460.732(2). 11
IV. The Court of Appeals' majority opinion's conclusion that an amendment to the complaint would not be futile constitutes additional palpable legal error. 14
V. The Township's notice arguments were ripe for review, and should have been decided in its favor. 19
CONCLUSION AND RELIEF REQUESTED 20
CERTIFICATE OF COMPLIANCE 21
CERTIFICATE OF SERVICE 21

RECEIVED by MSC 5/7/2025 12:11:43 PM

INDEX OF AUTHORITIES

Cases

Fane v Detroit Library Com'n, 465 Mich 68, 74; 631 NW2d 678 (2001) 8
Grubaugh v City of St. Johns, 384 Mich. 165, 180 N.W.2d 778 (1970) 20
K2 Retail Construction Serv, Inc v West Lansing Retail Development, LLC, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 367762) 12
Klooster v City of Charlevoix, 488 Mich 289, 296; 795 NW2d 578 (2011) 11
Lash v Traverse City, 479 Mich 180, 199; 735 NW2d 628 (2007) 14
Mack v City of Detroit, 467 Mich 186, 193; 649 NW2d 47 (2002) 7, 8, 14
Madbak v City of Farmington Hills, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 364734) 10
Madugula v Taub, 496 Mich 685, 696; 853 NW2d 75 (2014) 11
Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817(1999). 8
Nawrocki v Macomb County Road Comm'n, 463 Mich 143, 158; 615 NW2d 702 (2000) 8, 10, 14
Norman v Department of Transportation, 338 Mich App 141, 162; 979 NW2d 390 (2021) 11
O'Connell v Dir of Elections, 316 Mich App 91, 99; 891 NW2d 240 (2016) 12
Odom v Wayne Co, 482 Mich 459, 478 n 62; 760 NW2d 217 (2008) 11
Ross v Consumers Power Co (On Rehearing), 420 Mich 567, 621; 363 NW2d 641 (1984) 14
Rowland v Washtenaw Co Rd Comm, 477 Mich 197, 203; 731 NW2d 41 (2007) 10, 20
Scheurman v Dep't of Trans, 434 Mich 619, 630; 456 NW2d 66 (1990) 15
Sunrise Resort Ass'n, Inc v Cheboygan Co Rd Comm, 511 Mich 325, 334; 999 NW2d 423 (2023) 10, 11
Thurman v Pontiac, 295 Mich App 381, 384; 819 NW2d 90 (2012) 10
Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC, 347 Mich App 280, 289; ___ NW3d ___ (2023) 7
TOMRA of North America, Inc v Dep't of Treasury, 505 Mich 333, 350; 952 NW2d 384 (2020) 13
Walby v City of Caro, unpublished opinion per curium of the Court of Appeals, issued May 13, 2021 (Docket No 354155) 15
Wesche v Mecosta Cty Rd Comm'n, 480 Mich 75, 84; 746 NW2d 847 (2008) 15
Wilmore-Moody v Zakir, 511 Mich 76, 82; 999 NW2d 1 (2023) 7
Zezula v Independence Twp, ___ Mich App ___; ___ NW3d ___ (2025) (Docket No. 368261) 6, 13, 14, 19

Statutes

MCL 460.721 3
MCL 460.721 *et seq* 11
MCL 460.723(o) 17
MCL 460.729 5
MCL 460.731(2) 13
MCL 460.731(3) 13

MCL 460.732(2) 12, 13
MCL 691.1401 to 691.1419 12
MCL 691.1402 ..... 11, 15
MCL 691.1405 ..... 11, 15
MCL 691.1406 ..... 11, 15
MCL 691.1407 ..... 7, 14, 15
MCL 691.1407(1) 10
MCL 691.1407(4) 11, 15
MCL 691.1407(7) 5, 12, 13
MCL 691.1413 ..... 11, 15
MCL 691.1416(e) 16, 18
MCL 691.1416(j) 16
MCL 691.1416(j) and (k) 16, 17
MCL 691.1416(k) 15, 16
MCL 691.1416(k)(*i*) and (*ii*) 19
MCL 691.1416(*l*) 19
MCL 691.1417 ..... 5, 15, 17, 20
MCL 691.1417(2) 15, 19
MCL 691.1417(2) and (3) 15
MCL 691.1417(2), (3) 11
MCL 691.1417(3)(b) 18
MCL 691.1417(3)(e) 19
MCL 691.1419 ..... 5, 20, 21
MCL 691.1419(2)(c) 19

Other Authorities

1964 PA 170 12
GTLA 11, 12, 13, 14, 16, 18
Independence Township Ordinance 48-53 17
Independence Township Ordinance 48-84 ..... 3, 16
MISS DIG Act 5, 6, 9, 11, 12, 13, 14, 17, 20

Rules

MCR 1.109(E)(5)(6)(7) 6
MCR 2.116(C)(7) 7
MCR 2.116(C)(7) and (C)(8) 5, 7
MCR 2.116(C)(8) 8
MCR 2.313 6

RECEIVED by MSC 5/7/2025 12:11:43 PM

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JURISDICTIONAL STATEMENT

Defendant/Appellant Independence Township of Oakland County, ("Independence Township" or "the Township"), seeks leave to appeal the Court of Appeals' March 11, 2025, published opinion affirming the trial court's denial of the Township's Motion for Summary Disposition under MCR 2.116(C)(7) (governmental immunity) and MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). See *Zezula v Independence Twp of Oakland County*, ___ Mich App ___; ___ NW3d ___ (2025) (Docket No. 368261), attached hereto as **APPX_1-7**. The Court of Appeals denied Appellant's timely Motion for Reconsideration on April 16, 2025. *Zezula v Independence Twp of Oakland County*, unpublished order of the Court of Appeals, entered April 16, 2025 (Docket No. 368261), attached hereto as **APPX_15-40**. Thus, this Court has discretion to exercise its jurisdiction and consider the timely filed instant Application for Leave to Appeal under MCR 7.303(B)(1).

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ORDER APPEALED FROM AND GROUNDS FOR REVIEW

Defendant/Appellant Independence Township seeks leave to appeal the Court of Appeals' March 11, 2025, published opinion affirming the trial court's denial of the Township's Motion for Summary Disposition under MCR 2.116(C)(7) (governmental immunity) and MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). See Zezula, ___ Mich App ___. **APPX_1-7**. Defendant/Appellant submits that grounds exist to consider the instant application under MCR 7.305(B)(3), as well as MCR 7.305(5)(a) and (b).

This Application raises issues regarding legal principles of major significance to the State of Michigan's jurisprudence, making this Court's review warranted by MCR 7.305(B)(3). Specifically, it raises issues concerning the Legislature's longstanding commitment to ensuring that municipal entities are afforded broad immunity from tort claims and the adherence to this Court's consistent instruction that accordingly, the specifically enumerated exceptions to governmental immunity are to be narrowly construed by our courts. The Court of Appeals' majority opinion does the opposite; it creates, as the Court of Appeals described it, a new "broad" exception to governmental immunity, one that our Legislature did not intend. It also stretches an existing statutory exception, expanding that exception beyond reasonable interpretation of the Legislature's intent. The Court of Appeals' majority decision cannot be allowed to stand for multiple reasons. If the parties are required to proceed through discovery and a trial before this Court's review, valuable municipal resources will be unnecessarily expended to defend claims that should not be viable, and the Township will lose the ability to undo this published and precedent-setting adverse decision. In the interim, while this case stands as law, other municipalities will fall victim to having similar claims brought against them, vastly increasing litigation costs for already financially strapped communities throughout Michigan. Definite resolution of the issues presented

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herein benefits not only benefits the parties to the instant action, but Michigan jurisprudence as a whole.

Grounds also exist to review the Court of Appeals' decision under MCR 7.305(B)(5)(a) and (b). The Court of Appeals' majority opinion contains substantive factual errors that have affected its legal analysis. Allowing these factual errors to stand causes material injustice to Independence Township and its resident taxpayers because it binds the parties to litigate this case with factual record that is plainly wrong. Further and perhaps most importantly, the majority opinion conflicts with longstanding jurisprudence from this Court and the Court of Appeals. Specifically, the Court of Appeals has effectively legislated from the bench, ignoring decades of case law regarding the broad application of governmental immunity. Additionally, the majority opinion contains palpable error not only where it concludes that Plaintiff/Appellee Brian Zezula's proffered claim under the sewage-disposal-system-event exception to governmental immunity is potentially viable but also where it declines to consider the Township's arguments regarding lack of notice.

As is more fully discussed below, multiple grounds exist for this Court's review. Defendant/Appellant respectfully requests this Court exercise is discretionary jurisdiction and grant the instant Application for Leave to Appeal to consider the legal issues presented herein.

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STATEMENT OF QUESTIONS PRESENTED

I. Does the Governmental Tort Immunity Act, ("GTLA"), MCL 691.1401 *et seq*., preclude Plaintiff/Appellee from pursing a tort claim against Defendant/Appellant for an alleged failure to comply with the MISS DIG Underground Facility Damage and Safety Act, MCL 460.721 *et seq*.?

Plaintiff/Appellee answers, "No."

Defendant/Appellant answers, "Yes."

The trial court answered, "No."

The Court of Appeals answered, "No."

This Court should answer "Yes."

II. Is an amendment of Plaintiff/Appellee's Complaint to add a sewage-disposal-system-event claim futile?

Plaintiff/Appellee answers, "No."

Defendant/Appellant answers, "Yes."

The trial court answered, "No."

The Court of Appeals answered, "No."

This Court should answer "Yes."

III. Are Defendant/Appellant's pre-suit notice arguments ripe for review?

Plaintiff/Appellee answers, "No."

Defendant/Appellant answers, "Yes."

The trial court answered, "No."

The Court of Appeals answered, "No."

This Court should answer "Yes."

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STATEMENT OF FACTS

I. Factual Background

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

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

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

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

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

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

II. Procedural History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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in rendering its conclusions. The majority opinion contains substantive factual errors that affected its legal analysis. Further, as discussed herein, the Court effectively legislated from the bench, ignoring decades of Michigan jurisprudence regarding the broad application of governmental immunity. Instead of deferring to the Michigan Legislature, the majority created a new exception governmental immunity. Additionally, the majority further erred by finding Zezula's proffered claim under the sewage-disposal-system-event exception to governmental immunity potentially viable, and by declining to consider the Township's arguments regarding lack of notice. The Township sought reconsideration of the Court's opinion, and that motion was denied. **APPX_8-14**; *Zezula v Independence Twp of Oakland County*, unpublished order of the Court of Appeals, entered April 16, 2025 (Docket No. 368261).This timely Application for Leave to Appeal now follows.

ARGUMENT

I. Preservation and Standard of Review

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

A trial court's decision on summary disposition de novo. *Wilmore-Moody v Zakir*, 511 Mich 76, 82; 999 NW2d 1 (2023). The Township's Motion sought summary disposition under MCR 2.116(C)(7) and (C)(8). MCR 2.116(C)(7) states that "[e]ntry of judgment [or] dismissal of the action… is appropriate because of… immunity granted by law." A governmental agency is presumed immune from suit unless a plaintiff establishes that his case falls within one of the recognized exceptions to governmental immunity. MCL 691.1407; *Mack*, 467 Mich at 201. While there are statutorily-created exceptions to governmental immunity, "there is one basic principle"

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that guides our courts in their decisions involving governmental immunity: "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb County Road Comm'n*, 463 Mich 143, 158; 615 NW2d 702 (2000) (internal citations omitted) (emphasis in original). "To survive [a (C)(7)] motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Com'n*, 465 Mich 68, 74; 631 NW2d 678 (2001). If immunity is granted by law, summary disposition is proper. *Fane*, 465 Mich at 74.

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

II. The Court of Appeals' majority opinion contains factual errors.

The Court of Appeals' majority opinion contains factual errors that cannot be allowed to stand. Specifically, the Court of Appeals majority opinion states:

> Kaltz alleged that it requested Independence Township mark its facilities. Independence Township replied there was "no conflict" and *failed to mark the facilities*. [*Zezula*, slip op at 2 (emphasis added).]

The Court of Appeals further concluded that:

> [W]hile it appears there may be factual support regarding whether the event proximately caused the alleged damage, *a question of fact remains as to the location of Independence Township's markings*, and thus whether proximate cause has been presented. In fact, at oral argument, *the parties could not reach consensus as to whether Independence Township had visited the site before boring began and if they had, whether they*

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> *demarcated any pipelines with green spray paint, flags, or not at all*. [*Zezula*, slip op at 7 (emphasis added).]

Both statements are factually incorrect.

In response to Kaltz's MISS DIG request, the Township issued a "no conflict" response because there were no *public facilities* owned, operated, or controlled by the Township located on any of the properties identified on the MISS DIG request. Despite Kaltz's misrepresentations to the contrary, the Township did not simply ignore its request. At oral argument, counsel for Plaintiff went out of his way to *agree* that the Township had not ignored the MISS DIG request Counsel for Plaintiff criticized counsel for co-Defendant Kaltz for misstating those facts. See Oral Argument Audio, beginning at 42:40.

To be clear, this case does not involve a dispute regarding whether Independence Township failed to mark public facilities in response to a MISS DIG request. This dispute is about whether the Township had an obligation under the MISS DIG Act to also mark *private lines*, i.e., building drains, private sewer leads that it did not own, operate, or maintain. In particular in this case, the building drain owned by Zezula, whose property adjoins and is across the private road from Nina Brown's address is at issue. The precise Township Ordinances on which Plaintiff (and more so, Kaltz) relies, put contractor Kaltz on notice that the Township does not own or operate private leads or building drains appurtenant to the Township sewer and thus would have no reason to mark them. The fact that the Township only owned and operated the main, not the lead or its connection, as established by the Ordinances impacts the remaining analysis. Thus, the Township respectfully requests this Court grant the instant application, and at a minimum, remand this matter to the Court of Appeals for it to correct the factual record and reconsider its majority opinion to the extent that it is based upon factual inaccuracies.

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III. The Court of Appeals has palpably erred in concluding that Zezula has successfully pleaded an exception to governmental immunity for an alleged violation of the MISS DIG Act.

The Court of Appeals' majority opinion contains palpable legal errors regarding governmental immunity that cannot be allowed to stand. As explained herein, the majority opinion has effectively legislated from the bench, ignored clear and unambiguous interplay between two statutory schemes, and disregarded longstanding Michigan jurisprudence regarding the breadth of governmental immunity.

A. The majority opinion ignores longstanding jurisprudence regarding governmental immunity.

The majority opinion first errs in failing to give deference to longstanding Michigan jurisprudence regarding governmental immunity. In the GTLA, the Michigan Legislature "established a general rule that a 'governmental agency is immune from tort liability of the governmental agency is engaged in the exercise or discharge of a governmental function.'" MCL 691.1407(1). The Michigan Supreme Court has consistently made clear that, "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Sunrise Resort Ass'n, Inc v Cheboygan Co Rd Comm*, 511 Mich 325, 334; 999 NW2d 423 (2023), quoting *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). See also *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 203; 731 NW2d 41 (2007) ("…governmental agencies, *with few exceptions*, are generally statutorily immune from tort liability.") (emphasis added); *Madbak v City of Farmington Hills*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 364734), quoting *Thurman v Pontiac*, 295 Mich App 381, 384; 819 NW2d 90 (2012) ("The immunity conferred upon governmental agencies is broad, and the statutory exceptions thereto are to be narrowly construed."); *Norman v Department of*

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Transportation, 338 Mich App 141, 162; 979 NW2d 390 (2021) ("In Michigan, unless a specified exception exists, governmental agencies have broad immunity from tort liability.").

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

B. The majority opinion misinterprets interplay between the GTLA and MISS DIG, as well as the plain language of MCL 460.732(2).

This case requires interpretation of both the GTLA and the MISS DIG Act. The purpose of statutory interpretation is to give effect to the Legislature's intent. *Sunrise Resort Ass'n, Inc,* 511 Mich at 334. This starts with examining the words of the statute itself, as they are "the most reliable evidence of" the Legislature's true intent. *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011) (quotation marks and citation omitted). A statute that is unambiguous "must be enforced as written," and "[n]o further judicial construction is required or permitted." *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (quotation marks and citation omitted).

The majority opinion erroneously goes beyond a plain reading of unambiguous statutes to reach its conclusions. Here, the relevant provisions of the GTLA and the MISS DIG Act are *in pari materia*. See *K2 Retail Construction Serv, Inc v West Lansing Retail Development*, LLC, ___

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

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

When read together, these provisions make clear that the MISS DIG Act creates liability for governmental agencies who violate the Act and a singular, exclusive *administrative* remedy, whereby aggrieved facility owners can be awarded costs, fees, *and damages*. As expressly stated, the GTLA does not operate to preclude a facility owner or operator from pursuing such an administrative remedy in MPSC, and a governmental agency cannot use the shield of the GTLA to avoid liability when faced with a complaint brought before the MPSC, which has exclusive jurisdiction. What the MISS DIG Act does not do, however, is provide a facility owner or operator with an avenue for a civil lawsuit, i.e., a tort claim, for an alleged violation of MISS DIG. The

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GTLA continues to provide broad immunity from claims of tort liability, including alleged violations of the MISS DIG Act filed in Michigan courts, characterized as negligence claims. The way the majority opinion has construed these statutes is not in keeping with the proposition that governmental immunity is broad, and its statutorily enumerated exceptions are subject to narrow construction.

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

The majority has substantially erred in its statutory construction by declaring that MCL 691.1407(7) created a "broad exception to governmental immunity for alleged violations of the MISS DIG Act," *Zezula*, slip op at 5, and that the administrative remedy provided for in MCL 460.732(2) is not exclusive. The majority's conclusions ignore years of well-established case law requiring the immunity provided by the GTLA be interpreted broadly, and its exceptions construed narrowly. Indeed, when MCL 691.1407(7) and MCL 460.732(2) are considered *in pari materia*, it is clear that the Legislature's intent was to provide clarification, and to acknowledge the existence of the MISS DIG Act and the remedies that exist within that Act. This includes an acknowledgement of the exclusive, administrative remedy for wrongs committed by governmental

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agencies in violation of the Act. The Legislature did not, by referencing the Act in the GTLA, create a vehicle for asserting a tort claim against municipalities in Michigan courts based on violations of the MISS DIG Act. Thus, the Township respectfully requests this Court grant the instant Application to correct the Court of Appeals' grave errors of law.

IV. The Court of Appeals' majority opinion's conclusion that an amendment to the complaint would not be futile constitutes additional palpable legal error.

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

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

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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) (**APPX_104-108**).[1]

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. MCL 691.1417(2) provides, in relevant part:

> A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system *unless* the overflow or backup is a *sewage disposal system event* and the governmental agency is an appropriate governmental agency. [Emphasis added.]

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

> "Sewage disposal system event" or "event" means the overflow or backup of a sewage disposal system onto real property. *An overflow or backup is not a sewage disposal system event* if any of the following was a substantial proximate cause of the overflow or backup [Emphasis added.]:

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

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

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

The Township's Ordinances, cited by Zezula in his Second Amended Complaint, mirror MCL 691.1416(k), and clearly state that individual building sewers, i.e., private leads are not owned by the Township. See Ordinance 48-84, which provides that "all new sanitary sewer systems, **except individual building sewers** . . . shall be owned, operated and maintained by the governing community. Moreover, a building sewer is defined by Township Ordinance as the extension from a building drain to the public sewer or other place of disposal, i.e., a house

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connection. See Ordinance 48-53, cited in full *supra*. Because no sewage disposal system under the jurisdiction and control of Independence Township caused an "event," Zezula could never successfully plead a sewage-disposal-system-event claim, and thus, amendment of the Complaint for a third time is futile. Yet the Court of Appeals' majority opinion simply ignores MCL 691.1416(j) and (k) in reaching its erroneous conclusions.

In the trial court, and again in the Court of Appeals, Kaltz has argued that the Township's failure to not only mark the main, but also any appurtenances, constitutes a violation of the MISS DIG Act, and that violation can form the basis of a sewage-disposal-system-event claim. Not so. Under the MISS DIG Act, the Township had a responsibility to mark any of its facilities in the proposed work zone. The Miss Dig Act defines "facility" as "an underground or submerged conductor, *pipe*, or structure, including, but not limited to, a conduit, duct, line, pipe, wire, or other device *and its appurtenances* used to produce, store, *transmit*, or distribute a utility service, *including ... sewage*…." MCL 460.723(o). Kaltz focuses on the word "appurtenance", tries to argue the Township had to mark more than just its main, but it both misunderstands the Township's obligation under MISS DIG's statutory language, and misconstrues MCL 691.1417.

Zezula's private lead/drain was not a Township pipe used by the Township to transmit sewage – it was a drain used by Zezula to transmit or convey sewage out of his home. As admitted by Zezula, the Township did not own the affected drain. Since the MISS DIG Act does not define "appurtenance," Kaltz relies on the Best Practices of the Michigan Damage Prevent Board, which references the Webster's New College Dictionary definition of "appurtenance." **APPX_187**; Best Practices, attached to Kaltz's Response to the Township's Motion as Exhibit G. In Kaltz's view, the Best Practices necessitated that the Township to mark not only the sewer main, but also the connector stub between the sewer main the Zezula's private lead. Kaltz seems to think that if those

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two items had been marked with green paint or green flags, it would have prevented it from hitting Zezula's private lead. However, this argument is a red herring. Best Practices are not a law of rule, or even a regulation, they are but mere suggestions or practices. Indeed, the Best Practices, which are drafted by the Michigan Damage Prevention Board and not MISS DIG, state "MDPB Best Practices are presented as a general guide. The MDPB encourages all users to consult and consider not only the MDPB Best Practices, but also (i) employer practices, (ii) industry practices, (iii) federal and state statutes and regulations, (iv) building and fire codes, and (v) local laws, regulations, and ordinances." **APPX_187**. However, even assuming that the Township had a duty to mark not only the sewer main, but also the connector between the sewer main and Zezula's private lead, it is clear from the map provided *supra* that the sewer main *and the connector* were not even close to where Kaltz hit the private lead. Not only did the Township have no obligation to mark the private lead but the location at which the private line was breached is not in the public right of way, making even the Best Practices inapplicable. Kaltz says the Best Practices requires marking a main that is in a *public right-of-way*, yet it is undisputed that Plaintiff's damaged lead was "a private sewer lead beneath a private road," not in a "public" right-of-way. See Second Amended Complaint; **APPX_42-52**.

Finally, the Township agrees, as should this Court, that Judge Boonstra's dissent correctly concludes that Plaintiff/Appellant's proffered claim is not viable under the MCL 691.1417(3)(b) because an alleged failure to properly mark facilities under the MISS DIG Act does not constitute a "defect" as contemplated by the GTLA. According to MCL 691.1416(e), defect "means a construction, design, maintenance, operation, or repair defect". Kaltz tries to pound a square peg into a round hole by arguing that alleged failing to MISS DIG mark, constitutes a defect in operating the sanitary sewer system. But this construction is an illogical stretch when the statute

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is view in congruity with its other provisions. That language makes clear a defect must be both within the municipal system and must have caused the alleged overflow of municipal sewage flow onto private land. For that reason, the majority opinion has palpably erred in reaching the opposite conclusion. There cannot be any dispute that a substantial proximate cause (a MCL 691.1416(*l*) 50% or more cause), if not the sole proximate cause, of the overflow or backup was Kaltz's boring into Zezula's service lead. This created an obstruction to the drainage of flow *from* Zezula's home *to* the sewage disposal system under the Township's jurisdiction and control (not vice versa). MCL 691.1417(3)(e). Consequently, the majority erred in finding Zezula could bring a sustainable cause of action under MCL 691.1417(2) when the obstruction to drainage of Zezula's service lead, the "defect", was indisputably caused by Kaltz drilling through the service lead such that it was no longer an effective conduct or connection to the sewage disposal system. Such "connections" can never form the basis for a claim as by definition this was not a "sewage disposal system event" or "event" compensable under this immunity exception. MCL 691.1416(k)(*i*) and (*ii*).

V. The Township's notice arguments were ripe for review, and should have been decided in its favor.

The Township also appealed the trial court's findings, or lack thereof, regarding its argument that Plaintiff/Appellee failed to comply with the pre-suit notice requirements of MCL 691.1419(2)(c). This Court declined to consider the issue in its majority opinion, concluding that because the trial court ordered supplemental briefing on this issue and has not yet rendered an opinion regarding notice, "there is nothing for this Court to review." *Zezula*, slip op at 7. The Township respectfully submits that this Court's position constitutes palpable error.

On summary disposition, the Township argued that Zezula failed to comply with pre-suit notice requirements. In its majority opinion, this Court correctly notes that the trial court found that "[Zezula] did not respond to that argument," and ordered supplemental briefing. In fact, Zezula

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did not respond to *any* legal argument advanced by the Township. Zezula had the opportunity to respond to the Township's notice argument. He chose not to. The trial court erred in allowing him an additional opportunity to respond, particularly where the issue involves strict compliance with a governmental immunity notice statute, provisions that have been enforced for over a century. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 206; 731 NW2d 41 (2007), citing *Grubaugh v City of St. Johns*, 384 Mich. 165, 180 N.W.2d 778 (1970). The trial court was presented with sufficient evidence from the Township to make a definitive decision regarding the notice issue. In turn, the record on appeal was sufficiently developed for the Court of Appeals to conclude that Zezula failed to comply with the notice requirements of MCL 691.1419, and thus it was erroneous for the trial court to not rule on that issue.

CONCLUSION AND RELIEF REQUESTED

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

RECEIVED by MSC 5/7/2025 12:11:43 PM

and further, that Plaintiff/Appellee failed to comply with the statutory notice requirements of MCL 691.1419.

Respectfully submitted,

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Dated: May 7, 2025

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Application for Leave to Appeal contains 6016 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 May 7, 2025, I electronically filed the foregoing paper with the Clerk of the Court using the Court's efile system, by selecting efile and eserve, which will send notification all attorneys of record.

/s/ Amanda P. Waske