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

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

DANIEL A. GROVES LAW PRACTICE
Daniel A. Groves, (74026)
Attorneys for Plaintiff
6725 Daly Rd., #252561
West Bloomfield, MI 48325
(734) 644-4996
danielagroveslaw@gmail.com

HARVEY KRUSE, PC
Michael F. Schmidt (P25213)
Attorney for Defendant Kaltz
1050 Wilshire Dr., Ste. 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC
Attorneys for Independence Township
Margaret T. Debler (P43905)
Amanda P. Waske (P81128)
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
mdebler@rsjalaw.com
awaske@rsjalaw.com

APPENDIX TO DEFENDANTS/APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

DOCUMENT	DESCRIPTION	PAGES
Appendix 1	Court of Appeals Majority Opinion	1-7
Appendix 2	Court of Appeals Dissent	8-14
Appendix 3	Twp's Motion for Reconsideration-COA	15-40

Appendix 4	COA Order Denying Reconsideration	41
Appendix 5	Second Amended Complaint	42-52
Appendix 6	Notice of Non-Party Fault	53-56
Appendix 7	Twp's Motion for Summary Disposition	57-108
Appendix 8	Plaintiff's Resp to Twp MSD	109-112
Appendix 9	Kaltz's Resp to Twp MSD	113-187
Appendix 10	Twp's Reply to Kaltz's Resp to Twp MSD	188-215
Appendix 11	Twp's Reply to Plaintiff's Resp to Twp MSD	216-243
Appendix 12	Transcript of MSD Hearing	244-293
Appendix 13	Order Denying Township's MSD	294-295

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

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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

STATE OF MICHIGAN

COURT OF APPEALS

BRIAN ZEZULA,

Plaintiff-Appellee,

v

NINA BROWN and DTE ENERGY COMPANY,

Defendants,

and

KALTZ EXCAVATING CO INC.,

Defendant-Appellee,

and

INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendant-Appellant.

FOR PUBLICATION
March 11, 2025
12:02 PM

No. 368261
Oakland Circuit Court
LC No. 22-197937-NZ

Before: BOONSTRA, P.J., and K. F. KELLY and YOUNG, JJ.

YOUNG, J.

Plaintiff, Brian Zezula, suffered a sewage overflow in his home after defendant and neighbor Nina Brown ("Brown") hired contractors to do some work on her property. One contractor, defendant Kaltz Excavating ("Kaltz"), drilled a hole into the ground and struck a pipe, causing the backup in Zezula's home. The question at this point in the litigation is whether Independence Township of Oakland County ("Independence Township"), the location of these homes, is immune from any liability arising from this overflow. The trial court denied Independence Township's motion for summary disposition under MCR 2.116(C)(7)

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

(governmental immunity) and MCR 2.116(C)(8) (failure to state a claim on which relief can be granted).[1] We affirm and remand for further proceedings.

I. FACTUAL BACKGROUND

Brown hired Detroit Energy Company ("DTE"), to perform electrical line groundwork at her property. DTE subcontracted the work to Kaltz, an excavating company. During the groundwork, Kaltz performed mechanical boring,[2] which punctured and drilled through Zezula's underground sewer lead, causing waste and sewage to flood into Zezula's basement drainage pipes.

Zezula initially brought a complaint for negligence against DTE, Kaltz, and Brown. Kaltz filed a notice of nonparty at fault, alleging Independence Township was liable for violations of the MISS DIG Underground Facility Damage and Safety Act, MCL 460.721 *et seq*. ("the MISS DIG Act") and other local ordinances. Specifically, Kaltz alleged that it requested Independence Township mark its facilities. Independence Township replied there was "no conflict" and failed to mark the facilities. Zezula filed a second amended complaint, adding Independence Township as a defendant.

Independence Township then moved for summary disposition, arguing governmental immunity. Independence Township also argued Zezula failed to comply with the pre-suit notice requirements of MCL 691.1419. The trial court denied Independence Township's motion for summary disposition, reasoning Zezula could sustain a claim against Independence Township because Independence Township was not entitled to governmental immunity regarding violations of the MISS DIG act. The trial court did not rule on the issue of notice, requiring additional briefing. This appeal followed.

II. STANDARDS OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7)." *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law." *Burise v City of Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009) (quotation marks and citations omitted). "The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence,

---

[1] Independence Township's motion for summary disposition requested the trial court grant summary disposition under MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10) (no genuine issue of material fact). However, Independence Township only advanced arguments under MCR 2.116(C)(7) and MCR 2.116(C)(8). To the extent Independence Township sought summary disposition under MCR 2.116(C)(10), the issue is abandoned. "Insufficiently briefed issues are deemed abandoned on appeal." *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 413; 766 NW2d 874 (2009).

[2] "Boring machining is a hole-making process that follows other types, like drilling, to enlarge holes to meet required dimensions and surface finishes." Xometry, *All About Boring Machining* <https://www.xometry.com/resources/machining/boring-machining/> (accessed March 6, 2025).

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

the substance of which would be admissible at trial. The contents of the complaint are accepted as true unless contradicted by the evidence provided." *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008) (quotation marks and citations omitted).

"This Court also reviews de novo the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8) . . . ." *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint; a court considers only the pleadings when deciding a motion brought under this section." *Id*. at 509. When "reviewing a motion for summary disposition under MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possible justify recovery." *Id*.

"Issues of statutory interpretation are reviewed de novo." *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). "[T]he applicability of governmental immunity is a question of law that this Court reviews de novo." *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010).

III. MISS DIG ACT EXCEPTION TO GOVERNMENTAL IMMUNITY

Independence Township argues the trial court erred by determining Independence Township was not entitled to governmental immunity for alleged violations of the MISS DIG Act. We disagree.

"[G]overnmental agencies, with a few exceptions, are generally statutorily immune from tort liability." *Rowland v Washtenaw County Rd Comm'n*, 477 Mich 197, 203; 731 NW2d 41 (2007). Under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, governmental agencies are shielded from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). "The act enumerates several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency." *Rowland*, 477 Mich at 203. The parties dispute whether MCL 691.1407 and MCL 460.732 create an exception to governmental immunity for alleged violations of the MISS DIG Act.

Before 2014, MCL 691.1407 did not include any specific reference to violations of the MISS DIG Act. See MCL 691.1407, as amended 2005 PA 318. In 2006, we considered whether "the MISS-DIG act created an exception to the general immunity provided by the GTLA." *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 485; 722 NW2d 906 (2006). We held: "Because the immunity provided by the GTLA is broad and its exceptions are to be narrowly construed . . . the MISS-DIG act does not waive or abrogate the immunity provided by the GTLA, either expressly or by necessary inference from the statute." *Id.* at 491 (citation omitted).

Effective April 1, 2014, MCL 691.1407 was amended to include the following provision: "The immunity provided by [the GTLA] does not apply to liability of a governmental agency under the MISS DIG underground facility damage prevention and safety act." MCL 691.1407(7), as amended 2013 PA 173. Additionally, effective April 1, 2014, MCL 460.732 was enacted, stating:

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

"Except as provided in this section, [the MISS DIG 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." MCL 460.732(1). Further, "[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).

In this case, Independence Township moved for summary disposition, arguing Zezula's claims were barred by governmental immunity. The trial court disagreed, reasoning, in part, "Independence Township is not entitled to governmental immunity pursuant to MCL 691.1407(7)." We hold that the trial court's conclusion is supported by the plain language of the relevant statutes.

A. STATUTORY INTERPRETATION GENERALLY

We also review issues of statutory interpretation *de novo* and always begin with the plain language of the statute in question. *Bronson Health Care Group, Inc v USAA Cas Ins Co*, 335 Mich App 25, 31–32; 966 NW2d 393 (2020). "While terms must be construed according to their plain and ordinary meaning, words and phrases "as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013). "Moreover, when the Legislature chooses to employ a common-law term without indicating an intent to alter the common law, the term will be interpreted consistent with its common-law meaning." *Id*.

B. THE PLAIN LANGUAGE OF THE GTLA

Under the GTLA, the statutorily-afforded broad governmental immunity "does not apply to liability of a governmental agency under the MISS DIG underground facility damage prevention and safety act." MCL 691.1407(7). This begs the question then: what is the scope of liability under MISS DIG?

The Michigan Supreme Court answered a similar question with respect to the governmental immunity statute. Specifically, in the case *In re Bradley Estate*, 494 Mich at 385, the Court looked at the term "tort liability" used in MCL 691.1407(1). Like in *Bradley*, here the term "liability" is not defined by statute. So, like in *Bradley*, we defer to its "commonly understood meaning" which *Bradley* itself provides: liability is "all legal responsibility." *Id*. It follows that the GTLA precludes any governmental immunity for "all legal responsibility under MISS DIG." Our statutory interpretation need not go further—the GTLA has a broad exception to immunity for violations of MISS DIG.

Looking through the MISS DIG statute though, only confirms that interpretation. The MISS DIG act contains MCL 460.732, the "governmental liability" section of the MISS DIG act. That section begins with:

> Except as provided in this section, this act does not affect the liability of a governmental agency for damages for tort or the application of [the GTLA]. [MCL 460.732(1).]

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

This means that, except as that section may elsewhere provide, the law of tort and the application of governmental immunity are unaffected by the MISS DIG act and apply as they otherwise would. And, as previously stated, the governmental immunity statute expressly precludes coverage for liability under MISS DIG.

The MISS DIG statute does, in at least two sections, identify a process by which the Michigan Public Service Commission (MPSC) can impose fines. MCL 460.731(2); MCL 460.732(2). It is likewise clear that these commission-based remedies are not the exclusive pathway to relief. MCL 460.731(3) expressly states that "[a] complaint filed under subsection (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."

We affirm the trial court's holding that the GTLA has a broad exception to governmental immunity for alleged violations of the MISS DIG act. Because Zezula alleges Independence Township violated MISS DIG, Independence Township cannot claim governmental immunity.

IV. SEWAGE DISPOSAL SYSTEM EVENT EXCEPTION TO GOVERNMENTAL IMMUNITY

The trial court also allowed Zezula to file a third amended complaint to add an additional exception to governmental immunity—the sewage disposal event exception. Independence Township argues the sewage disposal system event exception to governmental immunity does not apply to the facts of this case. We believe questions of fact remain as to whether this exception applies.

"The scope of governmental immunity is construed broadly, while exceptions to it are construed narrowly." *Linton v Arenac County Rd Comm'n*, 273 Mich App 107, 112; 729 NW2d 883 (2006). Under MCL 691.1417:

> (2) 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. 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.
>
> (3) If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:
>
> (a) The governmental agency was an appropriate governmental agency.
>
> (b) The sewage disposal system had a defect.

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

> (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. [MCL 691.1417.]

"To successfully bring an action, a plaintiff cannot merely satisfy subsection 2 but must, instead, establish all the requirements of subsection 3." *Bosanic v Motz Dev, Inc*, 277 Mich App 277, 282; 745 NW2d 513 (2007). Under the statute:

> "Sewage disposal system" means all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency. [MCL 691.1416(j).]

Additionally:

> "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:
>
> (*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. [MCL 691.1416(k).]

" 'Appropriate governmental agency' means a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury." MCL 691.1416(b). " 'Defect' means a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). " 'Substantial proximate cause' means a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury." MCL 691.1416(*l*).

We agree with the trial court's decision to allow the amendment of the complaint. Questions of fact exist, including but not limited to, whether the sewage disposal system had a

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

defect[3] and whether the event in issue constitutes an obstruction. Further, while 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 demarcated any pipelines with green spray paint, flags, or not at all. On this issue, too, we affirm the trial court and remand to allow for amendment of the complaint.

V. NOTICE

Independence Township argues Zezula failed to comply with the pre-suit notice requirements of MCL 691.1419. We decline to address this issue.

Independence Township's motion for summary disposition argued Zezula failed to comply with pre-suit notice requirements of MCL 691.1419. This issue was not significantly addressed during the hearing on Independence Township's motion. The trial court's order denying summary disposition stated:

> The Court has addressed statutory immunity but questions whether [Zezula] gave the notice required by MCL 691.1419. Independence Township argued in its motion that [Zezula] had not given the requisite notice. [Zezula] 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 then appealed as of right the trial court's denial of summary disposition in favor of Independence Township. See MCR 7.202(6)(a)(v). Lower court proceedings were stayed during this appeal. The parties never filed supplemental briefs on the issue of notice and the trial court never ruled on the issue of notice. Independence Township's notice claim is still being held in abeyance. Because the trial court did not render an opinion on the issue of notice, there is nothing for this Court to review.

VI. CONCLUSION

We affirm the trial court's decision that Independence Township is not entitled to governmental immunity for alleged violations of the MISS DIG Act. We also affirm the trial court's decision to allow Zezula to amend his complaint to include allegations under MCL 691.1417.

/s/ Adrienne N. Young
/s/ Kirsten Frank Kelly

[3] As the trial court identified, caselaw exists that identifies the MISS DIG notification requirements as a government function and constitutes "operation and maintenance." *State Farm Fire & Cas Co v Corby Energy Services Inc*, 271 Mich App 480, 481 n2; 722 NW2d 906 (2006).

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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

STATE OF MICHIGAN

COURT OF APPEALS

BRIAN ZEZULA,

Plaintiff-Appellee,

v

NINA BROWN and DTE ENERGY COMPANY,

Defendants,

and

KALTZ EXCAVATING COMPANY INC.,

Defendant-Appellee,

and

INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendant-Appellant.

FOR PUBLICATION
March 11, 2025
12:02 PM

No. 368261
Oakland Circuit Court
LC No. 22-197937-NZ

Before: BOONSTRA, P.J., and K. F. KELLY and YOUNG, JJ.

BOONSTRA, P.J. (*dissenting*).

I respectfully dissent. It is the role of the Legislature, and not of this Court, to enact exceptions to governmental immunity. See *State Farm Fire & Cas Co v. Corby Energy Services, Inc*, 271 Mich App 480, 485; 711 NW2d 906 (2006). The majority errs, in my view, by misinterpreting the scope of our Legislature's actions, by failing to interpret those actions narrowly as is required, by instead reading into the law what it describes as a "broad exception to governmental immunity for alleged violations of the [MISS DIG underground facility damage prevention and safety act, MCL 460.721 *et seq*. (MISS DIG act)]," and, by doing so, failing to properly defer to the Legislature on matters within its purview. And, in my judgment, the majority also errs by finding potentially viable a proffered claim under the sewage-disposal-system-event exception to governmental immunity.

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

As the majority recognizes, "governmental agencies, with a few exceptions, are generally statutorily immune from tort liability." *Rowland v Washtenaw County Rd Comm'n*, 477 Mich 197, 203; 731 NW2d 41 (2007). "[T]he immunity provided by the [governmental tort liability act, MCL 691.1401 *et seq*. (GTLA)] is broad and its exceptions are to be narrowly construed . . . ." *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 485; 722 NW2d 906 (2006). The established "statutory exceptions to the governmental immunity provided to the state and its agencies are 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)." *Odom v Wayne County*, 482 Mich 459, 478 n 62; 760 NW2d 217 (2008) (citation omitted).

I. MISS DIG ACT LIMITED EXCEPTION TO GOVERNMENTAL IMMUNITY

In 2006, this Court held in *State Farm* that "[b]ecause the immunity provided by the GTLA is broad and its exceptions are to be narrowly construed . . . the MISS-DIG act does not waive or abrogate the immunity provided by the GTLA, either expressly or by necessary inference from the statute." *State Farm*, 271 Mich App at 491. Eight years later, in 2014, the Legislature amended the GTLA to provide 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), as amended 2013 PA 173. Additionally, the Legislature amended the MISS DIG act in certain respects, as I will describe.

The principal question in this case is whether or to what extent the Legislature has enacted an exception to governmental immunity for violations of the MISS DIG act. The majority concludes that the Legislature enacted a "broad exception," contending that it "need look no further" than the simple fact that the Legislature used the word "liability" in MCL 691.1407(7) of the GTLA. I conclude that the Legislature did not enact the "broad exception" the majority endorses. It instead enacted a much more limited exception that allows only for complaints against governmental agencies to be filed with the Michigan Public Service Commission (MPSC), and that authorizes the MPSC to impose fines and damage awards.

As noted, MCL 691.1407(7) provides:

> The immunity provided by this act does not apply to liability of a governmental agency under the MISS DIG underground facility damage prevention and safety act." [MCL 691.1407(7).]

Of course, the Legislature did not simply use the word "liability" in this provision, but used the phrase "liability . . . *under the MISS Dig [act]*." *Id*. (emphasis added). Simply put, that means that we must look to the MISS DIG act itself to see what liability arises under that act. More on that later.

First, I note that the majority relies on *In re Bradley Estate*, 494 Mich 385; 835 NW2d 545 (2013), to define the term "liability." Our Supreme Court in *Bradley Estate* broadly defined the term "tort liability," as used in MCL 691.1407(1), to encompass "all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages." *Bradley Estate*, 494 Mich at 385. Thus, the majority concludes, the term

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

"liability" means "all legal responsibility." Fair enough, I suppose. But it bears noting that the decision in *Bradley Estate* was *expansive* of governmental immunity, inasmuch as the Court in that case employed its definition of "tort liability" to *preclude* a claim for indemnification damages. The majority, by contrast, employs its definition to *restrict* governmental immunity by creating a *broad exception* to governmental immunity even though, as noted, "the immunity provided by the GTLA is broad and its exceptions are to be narrowly construed . . . ." *State Farm*, 271 Mich App at 485.

According to the majority, "[i]t follows [from the use of the word 'liability' in MCL 691.1407(7)] that the GTLA precludes any governmental immunity for 'all legal responsibility under MISS DIG.' " But the majority ignores the word "under" when it simply concludes: "Our statutory interpretation need go no further—the GTLA has a broad exception to immunity for violations of MISS DIG." The majority, despite making this pronouncement, does go on to delve a bit further into the statutory scheme, but in my judgment its analysis still falls short. The majority correctly notes that the MISS DIG act provides that:

> Except as provided in this section, this act does not affect the liability of a governmental agency for damages for tort or the application of [the GTLA]. [MCL 460.732(1).]

I agree entirely with the majority that "this means that, except as that section may elsewhere provide, the law of tort and the application of governmental immunity are unaffected by the MISS DIG act and apply as they otherwise would." In other words, a governmental agency continues to enjoy immunity from tort liability unless MCL 460.732 provides otherwise or one of the established exceptions to governmental immunity applies. But instead of examining this, the majority just circularly reaches back to its broad definition of "liability" to simplistically conclude, without any real analysis, that the GTLA "expressly precludes coverage for liability under MISS DIG."

As noted, the Legislature did not simply use the word "liability" in MCL 691.1407(7), but used the phrase "liability . . . *under the MISS DIG [act]*." MCL 691.1407(7) (emphasis added). A proper analysis of this issue therefore requires us to consider what the GTLA means by the phrase in its entirety.

The GTLA does not define the term "under," so it is appropriate to turn to a dictionary definition of the term. See *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). The most salient definitions of the preposition "under" as used in the phrase "under the MISS DIG [act]" are "subject to the authority or influence of" and "in accordance with." See *Random House Webster's College Dictionary* (2d ed), p 1422. Regarding the latter definition, *Random House Webster's College Dictionary* provides the example phrase "under the provisions of the law." *Id.*

Our caselaw is replete with examples of courts assessing whether and when parties are liable "under the provisions of" a law or a contract through analysis of the relevant statute or contractual provision. See, e.g., *Auto Owners Ins Co v Seils*, 310 Mich App 132; 871 NW2d 530 (2015) (liability under the dramshop act); *Johnson v Pastoriza*, 491 Mich 417; 818 NW2d 279 (2012) (liability under the fetal wrongful-death statute); *Elezovic v*

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

Ford Motor Co, 472 Mich 408; 697 NW2d 851 (2005) (liability under the Elliot-Larsen civil rights act); *Flanders Indus, Inc v Mich*, 203 Mich App 15; 512 NW2d 328 (1993) (liability under the Michigan Environmental Response Act, now recodified into the Natural Resources and Environmental Protection Act); *Chrysler Corp v Skyline Indus Servs Inc*, 448 Mich 113, 125; 528 NW2d 698 (1995) (rights and liabilities under a contract). It follows then that, in assessing the phrase "liability . . . *under the MISS DIG [act]*," MCL 691.1407(7), we must look to the MISS DIG act itself to ascertain whether, or to what extent, it provides for liability of a governmental agency for alleged violations of the MISS DIG act. And, as the majority correctly notes, the MISS DIG act expressly says that it does not affect the existing status of liabilities or immunities "except as provided in [MCL 460.732]." MCL 460.732(1).

MCL 460.732 provides, in pertinent part:

> (2) A facility owner[1] or a facility operator may file a complaint with the commission[2] 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).]

MCL 460.732(2) thus provides for the filing of a complaint with the MPSC seeking a civil fine and damages. It provides for no other liability of a governmental agency. It provides for no other exceptions to governmental immunity. It provides no mechanism for pursuing liability in a court of law, but only provides for a right of appeal (to the Ingham circuit court) from a commission order. MCL 460.732(4).

The majority acknowledges that the MPSC can receive complaints, adjudicate a government agency's liability under the MISS DIG act, and impose fines under MCL 460.732(2).[3] But the majority concludes that "it is likewise clear that these commission-based remedies are not the exclusive pathway to relief." For that proposition, the majority cites only to MCL 460.731(3), which provides that "[a] complaint filed under subsection (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." *Id*.

---

[1] The MISS DIG act defines a "[f]acility owner" as "a person that owns a facility." MCL 460.723(q). It further defines a "[f]acility" or "underground 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 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." MCL 460.723(o).

[2] The MISS DIG act defines the "commission" as the MPSC. MCL 460.723(g).

[3] The majority appears to ignore that the MPSC can also hold a governmental agency liable for monetary damages under MCL 460.732(2).

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

Of course, the reference to "subsection (2)" in MCL 460.731(3) is not to the pertinent statutory section concerning governmental agencies, i.e., MCL 460.732(2), but is rather to MCL 460.731(2). And MCL 460.731(2) has nothing whatsoever to do with the liability of a governmental agency under the MISS DIG act. To the contrary, MCL 460.731(2) expressly makes clear that it relates *only* to complaints filed with the MPSC against a person "*other than a governmental agency*":

> Upon complaint filed with the commission or upon the commission's own motion, following notice and hearing, a person, *other than a governmental agency*, who violates any of the provisions of this act may be ordered to pay a civil fine of not more than $5,000.00 for each violation. . . . [MCL 460.731(2).]

Consequently, MCL 460.731(3) merely provides that the right of a party to file a complaint with the MPSC against a person *other than a governmental agency* does not limit the party's otherwise-available right to sue that (non-governmental) person for damages. Hence, in this case, plaintiff had a right to bring suit against defendant Kaltz Excavating Company, Inc., regardless of whether plaintiff filed a complaint with the MPSC. MCL 460.731(3).

By contrast, MCL 460.732(2) exclusively addresses the liability of a *governmental agency* under the MISS DIG act. As earlier noted, MCL 460.732(1) expressly provides that it does not affect liability or immunity "[e]xcept as provided in this section [i.e., MCL 460.732]," and MCL 460.732 provides *only* for potential fines and damages pursuant to an order of the *MPSC*. MCL 460.732(2), (3). Consequently, as applied to this case, plaintiff, as a "facility owner," may file a complaint with the MPSC seeking fines and damages from defendant Independence Township, but Independence Township, as a governmental agency, otherwise remains immune from liability under the GTLA.

There is one other section of the MISS DIG act that bears mentioning, although neither the parties nor the majority refers to it. MCL 460.728 states, in pertinent part:

> This act does not limit the right of an excavator, facility owner, or facility operator to seek legal relief and recovery of actual damages incurred and equitable relief in a civil action arising out of a violation of the requirements of this act, or to enforce the provisions of this act, nor shall this act determine the level of damages or injunctive relief in any such civil action. This section does not affect or limit the availability of any contractual or legal remedy that may be available to an excavator, facility owner, or facility operator under any contract to which they may be a party. [MCL 460.728][4]

[4] I note that "tort liability for purposes of the GTLA encompasses claims of noncontractual civil wrongs seeking compensatory damages, not those seeking declaratory or injunctive relief." *Eplee v City of Lansing*, 327 Mich App 635, 648; 935 NW2d 104 (2019). Consequently, neither the GTLA nor MCL 460.728 would affect or limit contractual claims or claims for declaratory, injunctive, or equitable relief. *Id*.

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

But MCL 460.728 does not operate to *authorize* the filing of civil actions for tort damages; it merely "does not limit," *id.*, any pre-existing right to file one. Consequently, *if* a right to file a civil action for tort damages arises elsewhere, then the MISS DIG act does not limit it. But again, MCL 460.732(1) expressly provides that it does not affect liability or immunity with respect to a governmental agency "[e]xcept as provided in this section [i.e., MCL 460.732]," and MCL 460.732 provides *only* for potential fines and damages pursuant to an order of the *MPSC*. MCL 460.732(2), (3).

The majority errs, in my judgment, by ignoring the limited nature of the governmental immunity exception created by MCL 460.732(2) (allowing for a complaint to be filed in the MPSC and for the MPSC to impose "a civil fine and, if applicable, damages," *id.*), by failing to interpret it narrowly, *State Farm*, 271 Mich App at 485, and by instead engrafting onto the law a broad and all-encompassing exception that our Legislature has not seen fit to adopt.[5] Accordingly, I respectfully dissent and would instead reverse the trial court's order denying defendant's motion for summary disposition with respect to plaintiff's negligence claim premised on alleged violations of the MISS DIG act.

II. SEWAGE DISPOSAL SYSTEM EVENT EXCEPTION

I further respectfully dissent from the majority's affirmance of the trial court's order allowing plaintiff to amend his complaint for a third time to assert a claim under MCL 691.1417(3), the sewage-disposal-system-event exception to governmental immunity.

For a claim to fall within the sewage-disposal-system-event exception to governmental immunity, the GTLA requires, among other things, that "[t]he sewage disposal system had a defect." [MCL 691.1417(b).] A "defect" under the statute "means a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). And

> "Sewage disposal system" means all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency. [MCL 691.1416(j).]

I note that although the majority concludes that there is a question of fact as to whether the sewage disposal system in this case had a defect, the trial court has already held, even before amendment of plaintiff's complaint to assert such a claim, that "[t]he Court finds that the sewage disposal system had a defect pursuant to MCL 691.1417(3)(b)." That, to me, is troubling in and of itself. But I also conclude that the proffered claim is not viable under the sewage-system-disposal-event exception to governmental immunity.

[5] If the Legislature wishes to create a broad exception to governmental immunity in relation to the MISS DIG act, it should say so with clarity.

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

As the majority notes, the trial court cited *State Farm* for the proposition that "the prevention of accidental damage to the City's water system through notification is within the scope of the water department's operations." *State Farm*, 271 Mich App at 484 n 2. The trial court concluded therefrom that "[b]ecause the failure to mark is an operation of Independence Township, the failure to mark is a defect." However, the Court in *State Farm* was not addressing whether there was a "defect" in a sewage disposal system, but was merely assessing whether the alleged conduct of the defendant city qualified as a "governmental function" under the GTLA. It is a stretch indeed to conclude from a brief statement in a footnote in *State Farm* that an alleged failure to mark is a "defect" of the sewage disposal system; yet it seems the trial court has already done so, and the majority now affirms that conclusion. I conclude that, under any reasonable interpretation, the failure to properly mark facilities as required by the MISS DIG act does not constitute a "defect" in the sewage disposal system and that the proffered amendment of plaintiff's complaint to assert a claim under MCL 691.1417(3) should have been denied.

For these reasons, I respectfully dissent and would instead reverse and remand for entry of an order granting summary disposition in favor of Independence Township.

/s/ Mark T. Boonstra

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

STATE OF MICHIGAN
IN THE COURT OF APPEALS

BRIAN ZEZULA,

Plaintiff/Appellee,

-vs-

INDEPENDENCE TOWNSHIP,

Defendant/Appellant.

and

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

Defendants.

Docket No. 368261

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

DANIEL A. GROVES LAW PRACTICE
Daniel A. Groves, (74026)
Attorneys for Plaintiff/Appellee
6725 Daly Rd., #252561
West Bloomfield, MI 48325
(734) 644-4996
danielagroveslaw@gmail.com

HARVEY KRUSE, PC
Michael F. Schmidt (P25213)
Attorney for Defendant Kaltz
1050 Wilshire Dr., Ste. 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC
Attorneys for Def/Appellant Township
Margaret T. Debler (P43905)
Amanda P. Waske (P81128)
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
mdebler@rsjalaw.com
awaske@rsjalaw.com

DEFENDANT/APPELLANT INDEPENDENCE TOWNSHIP'S MOTION FOR RECONSIDERATION

NOW COMES Defendant/Appellant, INDEPENDENCE TOWNSHIP, ("the Township"), by and through its counsel ROSATI, SCHULTZ, JOPPICH & AMTSBUECHER, PC, and for its

RECEIVED by MCOA 3/28/2025 2:09:36 PM

Motion for Reconsideration of this Court's March 11, 2025, Opinion, brought pursuant to MCR 7.215(I), states as follows.

I. Introduction

On March 11, 2025, this Court 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), attached as **Exhibit A**. However, the Townships submits that this Court has palpably erred in rendering its conclusions. The majority opinion contains substantive factual errors that affected its legal analysis. Further, as discussed herein, this Court has 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 has created a new exception governmental immunity. Additionally, the majority has further committed palpable error by finding Plaintiff/Appellee'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. For these reasons more fully discussed herein, the Township respectfully requests this Court reconsider its March 11, 2025, Opinion.

II. Standard of Review

MCR 7.215(I) provides that motions for reconsideration brought in this Court are "subject to the restrictions contained in MCR 2.119(F)(3)." In turn, MCR 2.119(F)(3) states:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been mislead and show that a different disposition of the motion must result from correction of the error.

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

Courts have "considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Sanders v McLaren-Macomb*, 323 Mich App 254, 264-265; 916 NW2d 305 (2018) (quotation marks and citation omitted). Nothing prevents this Court from giving a second chance to its previous conclusions, "it has every right to do so, and . . . MCR 2.119(F)(3) does nothing to prevent this exercise of discretion." *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000) (quotation marks, citation, and brackets omitted).

III. Argument

A. The Court's majority opinion contains factual errors.

As an initial matter, the Township brings this motion, in part, to request this Court correct the misrepresentation of the factual record contained within its Opinion. This Court states in its opinion:

> 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).]

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

Both statements are factually incorrect.

There is no factual dispute as to the location of the Township's markings. In response to Kaltz's MISS DIG request, the Township did mark its *public facilities*, i.e., the sanitary sewer main and its connector, and issued a "no conflict" response because there were no *public facilities*

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

owned, operated, or controlled by the Township located on any of the properties identified on the MISS DIG request. See Kaltz's Brief on Appeal, Exhibit A. At oral argument, counsel for Plaintiff went out of his way to *agree* that the Township had marked the sewer main and the connector, and criticized counsel for co-Defendant Kaltz Excavating Co, Inc., 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 Plaintiff Zezula, whose property is next to Defendant Nina Brown's address, which was listed in the MISS DIG request. Thus, the Township respectfully requests this Court correct the factual record and reconsider its opinion to the extent that it is based upon factual inaccuracies.

B. This Court's majority opinion contains palpable legal errors which cannot stand.

i. 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 Governmental Tort Liability Act, ("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*

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

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 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. The majority opinion errs in concluding otherwise.

ii. 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

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

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 unnecessarily 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, ___ 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 for an administrative remedy for the liability of 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).]

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

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 GTLA continues to provide broad immunity from claims of tort liability, including alleged violations of the MISS DIG Act filed in Michigan courts. 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, this Court'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 palpably erred in its statutory construction by declaring that MCL 691.1407(7) created a "broad exception to governmental immunity for alleged violations of the

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

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 to 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 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 reconsider Section III of its majority opinion.

iii. The majority opinion's conclusion that an amendment to the complaint would not be futile constitutes a palpable legal error.

Next, the Township submits that the majority has palpably erred 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 Plaintiff/Appellee to further amend the Complaint, where such an amendment is futile.

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

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

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

> 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.

As noted by Judge Boonstra in his dissent, only if a claimant clears the hurdle of demonstrating the backup was not caused by a connection to system, such as a defect in a building drain, but was instead caused by an defect in the governmental sewage disposal system, is there an "event" that can provide grounds for relief. MCL 691.1416(j) and (k). The GTLA further 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." MCL 691.1416(e).

The Township agrees 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. 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 Co-Defendant's boring into Plaintiff/Appellee'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 and was the operative cause. MCL 691.1417(3)(e). Consequently, the majority erred in finding Plaintiff/Appellee could bring a sustainable cause of action under MCL

RECEIVED by MCOA 3/28/2025 2:09:36 PM

691.1417(2) when the obstruction to drainage of Zezula's service lead 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*). Given the foregoing, the Township respectfully requests this Court reconsider Part IV of its majority opinion and correct its palpable error.

iv. The Township's notice arguments were ripe for review.

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 Plaintiff/Appellee 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. Plaintiff/Appellee 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 . 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

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

developed for this Court to conclude that Plaintiff/Appellee 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. This Court has now compounded the error by affirming.

IV. Conclusion and Relief Requested

For the reasons discussed herein, Defendant/Appellant Independence Township respectfully requests this Court reconsider its March 11, 2025, Opinion affirming the trial court's determination that it is not entitled to governmental immunity for alleged violations of the MISS DIG Act, and further, affirming the trial court's decision to allow Plaintiff/Appellee to amend his Complaint to include allegations under MCL 691.1417, and instead reverse the trial court's order denying the Township's motion for summary disposition, and remand for entry of an order dismissing the Township from this litigation, with prejudice.

Respectfully submitted,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

/s/ Amanda P. Waske
Amanda P. Waske (P81128)
Attorneys for Defendant/Appellant
Independence Township
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
awaske@rsjalaw.com

Dated: March 28, 2025

CERTIFICATE OF SERVICE

I certify that on March 28, 2025, the foregoing document was served on all parties or their counsel of record through the Court's efile system.

/s/ Julie Doll

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

EXHIBIT A

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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

STATE OF MICHIGAN

COURT OF APPEALS

BRIAN ZEZULA,

Plaintiff-Appellee,

v

NINA BROWN and DTE ENERGY COMPANY,

Defendants,

and

KALTZ EXCAVATING CO INC.,

Defendant-Appellee,

and

INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendant-Appellant.

FOR PUBLICATION
March 11, 2025
12:02 PM

No. 368261
Oakland Circuit Court
LC No. 22-197937-NZ

Before: BOONSTRA, P.J., and K. F. KELLY and YOUNG, JJ.

YOUNG, J.

Plaintiff, Brian Zezula, suffered a sewage overflow in his home after defendant and neighbor Nina Brown ("Brown") hired contractors to do some work on her property. One contractor, defendant Kaltz Excavating ("Kaltz"), drilled a hole into the ground and struck a pipe, causing the backup in Zezula's home. The question at this point in the litigation is whether Independence Township of Oakland County ("Independence Township"), the location of these homes, is immune from any liability arising from this overflow. The trial court denied Independence Township's motion for summary disposition under MCR 2.116(C)(7)

RECEIVED by MCOA 3/28/2025 2:09:36 PM

(governmental immunity) and MCR 2.116(C)(8) (failure to state a claim on which relief can be granted).[1] We affirm and remand for further proceedings.

I. FACTUAL BACKGROUND

Brown hired Detroit Energy Company ("DTE"), to perform electrical line groundwork at her property. DTE subcontracted the work to Kaltz, an excavating company. During the groundwork, Kaltz performed mechanical boring,[2] which punctured and drilled through Zezula's underground sewer lead, causing waste and sewage to flood into Zezula's basement drainage pipes.

Zezula initially brought a complaint for negligence against DTE, Kaltz, and Brown. Kaltz filed a notice of nonparty at fault, alleging Independence Township was liable for violations of the MISS DIG Underground Facility Damage and Safety Act, MCL 460.721 *et seq*. ("the MISS DIG Act") and other local ordinances. Specifically, Kaltz alleged that it requested Independence Township mark its facilities. Independence Township replied there was "no conflict" and failed to mark the facilities. Zezula filed a second amended complaint, adding Independence Township as a defendant.

Independence Township then moved for summary disposition, arguing governmental immunity. Independence Township also argued Zezula failed to comply with the pre-suit notice requirements of MCL 691.1419. The trial court denied Independence Township's motion for summary disposition, reasoning Zezula could sustain a claim against Independence Township because Independence Township was not entitled to governmental immunity regarding violations of the MISS DIG act. The trial court did not rule on the issue of notice, requiring additional briefing. This appeal followed.

II. STANDARDS OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7)." *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law." *Burise v City of Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009) (quotation marks and citations omitted). "The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence,

---

[1] Independence Township's motion for summary disposition requested the trial court grant summary disposition under MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10) (no genuine issue of material fact). However, Independence Township only advanced arguments under MCR 2.116(C)(7) and MCR 2.116(C)(8). To the extent Independence Township sought summary disposition under MCR 2.116(C)(10), the issue is abandoned. "Insufficiently briefed issues are deemed abandoned on appeal." *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 413; 766 NW2d 874 (2009).

[2] "Boring machining is a hole-making process that follows other types, like drilling, to enlarge holes to meet required dimensions and surface finishes." Xometry, *All About Boring Machining* <https://www.xometry.com/resources/machining/boring-machining/> (accessed March 6, 2025).

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

the substance of which would be admissible at trial. The contents of the complaint are accepted as true unless contradicted by the evidence provided." *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008) (quotation marks and citations omitted).

"This Court also reviews de novo the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8) . . . ." *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint; a court considers only the pleadings when deciding a motion brought under this section." *Id*. at 509. When "reviewing a motion for summary disposition under MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possible justify recovery." *Id*.

"Issues of statutory interpretation are reviewed de novo." *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). "[T]he applicability of governmental immunity is a question of law that this Court reviews de novo." *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010).

III. MISS DIG ACT EXCEPTION TO GOVERNMENTAL IMMUNITY

Independence Township argues the trial court erred by determining Independence Township was not entitled to governmental immunity for alleged violations of the MISS DIG Act. We disagree.

"[G]overnmental agencies, with a few exceptions, are generally statutorily immune from tort liability." *Rowland v Washtenaw County Rd Comm'n*, 477 Mich 197, 203; 731 NW2d 41 (2007). Under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, governmental agencies are shielded from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). "The act enumerates several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency." *Rowland*, 477 Mich at 203. The parties dispute whether MCL 691.1407 and MCL 460.732 create an exception to governmental immunity for alleged violations of the MISS DIG Act.

Before 2014, MCL 691.1407 did not include any specific reference to violations of the MISS DIG Act. See MCL 691.1407, as amended 2005 PA 318. In 2006, we considered whether "the MISS-DIG act created an exception to the general immunity provided by the GTLA." *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 485; 722 NW2d 906 (2006). We held: "Because the immunity provided by the GTLA is broad and its exceptions are to be narrowly construed . . . the MISS-DIG act does not waive or abrogate the immunity provided by the GTLA, either expressly or by necessary inference from the statute." *Id.* at 491 (citation omitted).

Effective April 1, 2014, MCL 691.1407 was amended to include the following provision: "The immunity provided by [the GTLA] does not apply to liability of a governmental agency under the MISS DIG underground facility damage prevention and safety act." MCL 691.1407(7), as amended 2013 PA 173. Additionally, effective April 1, 2014, MCL 460.732 was enacted, stating:

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

"Except as provided in this section, [the MISS DIG 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." MCL 460.732(1). Further, "[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).

In this case, Independence Township moved for summary disposition, arguing Zezula's claims were barred by governmental immunity. The trial court disagreed, reasoning, in part, "Independence Township is not entitled to governmental immunity pursuant to MCL 691.1407(7)." We hold that the trial court's conclusion is supported by the plain language of the relevant statutes.

A. STATUTORY INTERPRETATION GENERALLY

We also review issues of statutory interpretation *de novo* and always begin with the plain language of the statute in question. *Bronson Health Care Group, Inc v USAA Cas Ins Co*, 335 Mich App 25, 31–32; 966 NW2d 393 (2020). "While terms must be construed according to their plain and ordinary meaning, words and phrases "as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013). "Moreover, when the Legislature chooses to employ a common-law term without indicating an intent to alter the common law, the term will be interpreted consistent with its common-law meaning." *Id*.

B. THE PLAIN LANGUAGE OF THE GTLA

Under the GTLA, the statutorily-afforded broad governmental immunity "does not apply to liability of a governmental agency under the MISS DIG underground facility damage prevention and safety act." MCL 691.1407(7). This begs the question then: what is the scope of liability under MISS DIG?

The Michigan Supreme Court answered a similar question with respect to the governmental immunity statute. Specifically, in the case *In re Bradley Estate*, 494 Mich at 385, the Court looked at the term "tort liability" used in MCL 691.1407(1). Like in *Bradley*, here the term "liability" is not defined by statute. So, like in *Bradley*, we defer to its "commonly understood meaning" which *Bradley* itself provides: liability is "all legal responsibility." *Id*. It follows that the GTLA precludes any governmental immunity for "all legal responsibility under MISS DIG." Our statutory interpretation need not go further—the GTLA has a broad exception to immunity for violations of MISS DIG.

Looking through the MISS DIG statute though, only confirms that interpretation. The MISS DIG act contains MCL 460.732, the "governmental liability" section of the MISS DIG act. That section begins with:

> Except as provided in this section, this act does not affect the liability of a governmental agency for damages for tort or the application of [the GTLA]. [MCL 460.732(1).]

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

This means that, except as that section may elsewhere provide, the law of tort and the application of governmental immunity are unaffected by the MISS DIG act and apply as they otherwise would. And, as previously stated, the governmental immunity statute expressly precludes coverage for liability under MISS DIG.

The MISS DIG statute does, in at least two sections, identify a process by which the Michigan Public Service Commission (MPSC) can impose fines. MCL 460.731(2); MCL 460.732(2). It is likewise clear that these commission-based remedies are not the exclusive pathway to relief. MCL 460.731(3) expressly states that "[a] complaint filed under subsection (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."

We affirm the trial court's holding that the GTLA has a broad exception to governmental immunity for alleged violations of the MISS DIG act. Because Zezula alleges Independence Township violated MISS DIG, Independence Township cannot claim governmental immunity.

IV. SEWAGE DISPOSAL SYSTEM EVENT EXCEPTION TO GOVERNMENTAL IMMUNITY

The trial court also allowed Zezula to file a third amended complaint to add an additional exception to governmental immunity—the sewage disposal event exception. Independence Township argues the sewage disposal system event exception to governmental immunity does not apply to the facts of this case. We believe questions of fact remain as to whether this exception applies.

"The scope of governmental immunity is construed broadly, while exceptions to it are construed narrowly." *Linton v Arenac County Rd Comm'n*, 273 Mich App 107, 112; 729 NW2d 883 (2006). Under MCL 691.1417:

> (2) 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. 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.
>
> (3) If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:
>
> (a) The governmental agency was an appropriate governmental agency.
>
> (b) The sewage disposal system had a defect.

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

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

(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. [MCL 691.1417.]

"To successfully bring an action, a plaintiff cannot merely satisfy subsection 2 but must, instead, establish all the requirements of subsection 3." *Bosanic v Motz Dev, Inc*, 277 Mich App 277, 282; 745 NW2d 513 (2007). Under the statute:

> "Sewage disposal system" means all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency. [MCL 691.1416(j).]

Additionally:

> "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:
>
> (*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. [MCL 691.1416(k).]

" 'Appropriate governmental agency' means a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury." MCL 691.1416(b). " 'Defect' means a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). " 'Substantial proximate cause' means a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury." MCL 691.1416(*l*).

We agree with the trial court's decision to allow the amendment of the complaint. Questions of fact exist, including but not limited to, whether the sewage disposal system had a

RECEIVED by MCOA 3/28/2025 2:09:36 PM

defect[3] and whether the event in issue constitutes an obstruction. Further, while 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 demarcated any pipelines with green spray paint, flags, or not at all. On this issue, too, we affirm the trial court and remand to allow for amendment of the complaint.

V. NOTICE

Independence Township argues Zezula failed to comply with the pre-suit notice requirements of MCL 691.1419. We decline to address this issue.

Independence Township's motion for summary disposition argued Zezula failed to comply with pre-suit notice requirements of MCL 691.1419. This issue was not significantly addressed during the hearing on Independence Township's motion. The trial court's order denying summary disposition stated:

> The Court has addressed statutory immunity but questions whether [Zezula] gave the notice required by MCL 691.1419. Independence Township argued in its motion that [Zezula] had not given the requisite notice. [Zezula] 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 then appealed as of right the trial court's denial of summary disposition in favor of Independence Township. See MCR 7.202(6)(a)(v). Lower court proceedings were stayed during this appeal. The parties never filed supplemental briefs on the issue of notice and the trial court never ruled on the issue of notice. Independence Township's notice claim is still being held in abeyance. Because the trial court did not render an opinion on the issue of notice, there is nothing for this Court to review.

VI. CONCLUSION

We affirm the trial court's decision that Independence Township is not entitled to governmental immunity for alleged violations of the MISS DIG Act. We also affirm the trial court's decision to allow Zezula to amend his complaint to include allegations under MCL 691.1417.

/s/ Adrienne N. Young
/s/ Kirsten Frank Kelly

[3] As the trial court identified, caselaw exists that identifies the MISS DIG notification requirements as a government function and constitutes "operation and maintenance." *State Farm Fire & Cas Co v Corby Energy Services Inc*, 271 Mich App 480, 481 n2; 722 NW2d 906 (2006).

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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

STATE OF MICHIGAN

COURT OF APPEALS

BRIAN ZEZULA,

Plaintiff-Appellee,

v

NINA BROWN and DTE ENERGY COMPANY,

Defendants,

and

KALTZ EXCAVATING COMPANY INC.,

Defendant-Appellee,

and

INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,

Defendant-Appellant.

FOR PUBLICATION
March 11, 2025
12:02 PM

No. 368261
Oakland Circuit Court
LC No. 22-197937-NZ

Before: BOONSTRA, P.J., and K. F. KELLY and YOUNG, JJ.

BOONSTRA, P.J. (*dissenting*).

I respectfully dissent. It is the role of the Legislature, and not of this Court, to enact exceptions to governmental immunity. See *State Farm Fire & Cas Co v. Corby Energy Services, Inc*, 271 Mich App 480, 485; 711 NW2d 906 (2006). The majority errs, in my view, by misinterpreting the scope of our Legislature's actions, by failing to interpret those actions narrowly as is required, by instead reading into the law what it describes as a "broad exception to governmental immunity for alleged violations of the [MISS DIG underground facility damage prevention and safety act, MCL 460.721 *et seq*. (MISS DIG act)]," and, by doing so, failing to properly defer to the Legislature on matters within its purview. And, in my judgment, the majority also errs by finding potentially viable a proffered claim under the sewage-disposal-system-event exception to governmental immunity.

RECEIVED by MCOA 3/28/2025 2:09:36 PM

As the majority recognizes, "governmental agencies, with a few exceptions, are generally statutorily immune from tort liability." *Rowland v Washtenaw County Rd Comm'n*, 477 Mich 197, 203; 731 NW2d 41 (2007). "[T]he immunity provided by the [governmental tort liability act, MCL 691.1401 *et seq*. (GTLA)] is broad and its exceptions are to be narrowly construed . . . ." *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 485; 722 NW2d 906 (2006). The established "statutory exceptions to the governmental immunity provided to the state and its agencies are 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)." *Odom v Wayne County*, 482 Mich 459, 478 n 62; 760 NW2d 217 (2008) (citation omitted).

I. MISS DIG ACT LIMITED EXCEPTION TO GOVERNMENTAL IMMUNITY

In 2006, this Court held in *State Farm* that "[b]ecause the immunity provided by the GTLA is broad and its exceptions are to be narrowly construed . . . the MISS-DIG act does not waive or abrogate the immunity provided by the GTLA, either expressly or by necessary inference from the statute." *State Farm*, 271 Mich App at 491. Eight years later, in 2014, the Legislature amended the GTLA to provide 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), as amended 2013 PA 173. Additionally, the Legislature amended the MISS DIG act in certain respects, as I will describe.

The principal question in this case is whether or to what extent the Legislature has enacted an exception to governmental immunity for violations of the MISS DIG act. The majority concludes that the Legislature enacted a "broad exception," contending that it "need look no further" than the simple fact that the Legislature used the word "liability" in MCL 691.1407(7) of the GTLA. I conclude that the Legislature did not enact the "broad exception" the majority endorses. It instead enacted a much more limited exception that allows only for complaints against governmental agencies to be filed with the Michigan Public Service Commission (MPSC), and that authorizes the MPSC to impose fines and damage awards.

As noted, MCL 691.1407(7) provides:

> The immunity provided by this act does not apply to liability of a governmental agency under the MISS DIG underground facility damage prevention and safety act." [MCL 691.1407(7).]

Of course, the Legislature did not simply use the word "liability" in this provision, but used the phrase "liability . . . *under the MISS Dig [act]*." *Id*. (emphasis added). Simply put, that means that we must look to the MISS DIG act itself to see what liability arises under that act. More on that later.

First, I note that the majority relies on *In re Bradley Estate*, 494 Mich 385; 835 NW2d 545 (2013), to define the term "liability." Our Supreme Court in *Bradley Estate* broadly defined the term "tort liability," as used in MCL 691.1407(1), to encompass "all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages." *Bradley Estate*, 494 Mich at 385. Thus, the majority concludes, the term

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

"liability" means "all legal responsibility." Fair enough, I suppose. But it bears noting that the decision in *Bradley Estate* was *expansive* of governmental immunity, inasmuch as the Court in that case employed its definition of "tort liability" to *preclude* a claim for indemnification damages. The majority, by contrast, employs its definition to *restrict* governmental immunity by creating a *broad exception* to governmental immunity even though, as noted, "the immunity provided by the GTLA is broad and its exceptions are to be narrowly construed . . . ." *State Farm*, 271 Mich App at 485.

According to the majority, "[i]t follows [from the use of the word 'liability' in MCL 691.1407(7)] that the GTLA precludes any governmental immunity for 'all legal responsibility under MISS DIG.' " But the majority ignores the word "under" when it simply concludes: "Our statutory interpretation need go no further—the GTLA has a broad exception to immunity for violations of MISS DIG." The majority, despite making this pronouncement, does go on to delve a bit further into the statutory scheme, but in my judgment its analysis still falls short. The majority correctly notes that the MISS DIG act provides that:

> Except as provided in this section, this act does not affect the liability of a governmental agency for damages for tort or the application of [the GTLA]. [MCL 460.732(1).]

I agree entirely with the majority that "this means that, except as that section may elsewhere provide, the law of tort and the application of governmental immunity are unaffected by the MISS DIG act and apply as they otherwise would." In other words, a governmental agency continues to enjoy immunity from tort liability unless MCL 460.732 provides otherwise or one of the established exceptions to governmental immunity applies. But instead of examining this, the majority just circularly reaches back to its broad definition of "liability" to simplistically conclude, without any real analysis, that the GTLA "expressly precludes coverage for liability under MISS DIG."

As noted, the Legislature did not simply use the word "liability" in MCL 691.1407(7), but used the phrase "liability . . . *under the MISS DIG [act]*." MCL 691.1407(7) (emphasis added). A proper analysis of this issue therefore requires us to consider what the GTLA means by the phrase in its entirety.

The GTLA does not define the term "under," so it is appropriate to turn to a dictionary definition of the term. See *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). The most salient definitions of the preposition "under" as used in the phrase "under the MISS DIG [act]" are "subject to the authority or influence of" and "in accordance with." See *Random House Webster's College Dictionary* (2d ed), p 1422. Regarding the latter definition, *Random House Webster's College Dictionary* provides the example phrase "under the provisions of the law." *Id.*

Our caselaw is replete with examples of courts assessing whether and when parties are liable "under the provisions of" a law or a contract through analysis of the relevant statute or contractual provision. See, e.g., *Auto Owners Ins Co v Seils*, 310 Mich App 132; 871 NW2d 530 (2015) (liability under the dramshop act); *Johnson v Pastoriza*, 491 Mich 417; 818 NW2d 279 (2012) (liability under the fetal wrongful-death statute); *Elezovic v*

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

Ford Motor Co, 472 Mich 408; 697 NW2d 851 (2005) (liability under the Elliot-Larsen civil rights act); *Flanders Indus, Inc v Mich*, 203 Mich App 15; 512 NW2d 328 (1993) (liability under the Michigan Environmental Response Act, now recodified into the Natural Resources and Environmental Protection Act); *Chrysler Corp v Skyline Indus Servs Inc*, 448 Mich 113, 125; 528 NW2d 698 (1995) (rights and liabilities under a contract). It follows then that, in assessing the phrase "liability . . . *under the MISS DIG [act]*," MCL 691.1407(7), we must look to the MISS DIG act itself to ascertain whether, or to what extent, it provides for liability of a governmental agency for alleged violations of the MISS DIG act. And, as the majority correctly notes, the MISS DIG act expressly says that it does not affect the existing status of liabilities or immunities "except as provided in [MCL 460.732]." MCL 460.732(1).

MCL 460.732 provides, in pertinent part:

> (2) A facility owner[1] or a facility operator may file a complaint with the commission[2] 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).]

MCL 460.732(2) thus provides for the filing of a complaint with the MPSC seeking a civil fine and damages. It provides for no other liability of a governmental agency. It provides for no other exceptions to governmental immunity. It provides no mechanism for pursuing liability in a court of law, but only provides for a right of appeal (to the Ingham circuit court) from a commission order. MCL 460.732(4).

The majority acknowledges that the MPSC can receive complaints, adjudicate a government agency's liability under the MISS DIG act, and impose fines under MCL 460.732(2).[3] But the majority concludes that "it is likewise clear that these commission-based remedies are not the exclusive pathway to relief." For that proposition, the majority cites only to MCL 460.731(3), which provides that "[a] complaint filed under subsection (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." *Id*.

---

[1] The MISS DIG act defines a "[f]acility owner" as "a person that owns a facility." MCL 460.723(q). It further defines a "[f]acility" or "underground 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 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." MCL 460.723(o).

[2] The MISS DIG act defines the "commission" as the MPSC. MCL 460.723(g).

[3] The majority appears to ignore that the MPSC can also hold a governmental agency liable for monetary damages under MCL 460.732(2).

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

Of course, the reference to "subsection (2)" in MCL 460.731(3) is not to the pertinent statutory section concerning governmental agencies, i.e., MCL 460.732(2), but is rather to MCL 460.731(2). And MCL 460.731(2) has nothing whatsoever to do with the liability of a governmental agency under the MISS DIG act. To the contrary, MCL 460.731(2) expressly makes clear that it relates *only* to complaints filed with the MPSC against a person "*other than a governmental agency*":

> Upon complaint filed with the commission or upon the commission's own motion, following notice and hearing, a person, *other than a governmental agency*, who violates any of the provisions of this act may be ordered to pay a civil fine of not more than $5,000.00 for each violation. . . . [MCL 460.731(2).]

Consequently, MCL 460.731(3) merely provides that the right of a party to file a complaint with the MPSC against a person *other than a governmental agency* does not limit the party's otherwise-available right to sue that (non-governmental) person for damages. Hence, in this case, plaintiff had a right to bring suit against defendant Kaltz Excavating Company, Inc., regardless of whether plaintiff filed a complaint with the MPSC. MCL 460.731(3).

By contrast, MCL 460.732(2) exclusively addresses the liability of a *governmental agency* under the MISS DIG act. As earlier noted, MCL 460.732(1) expressly provides that it does not affect liability or immunity "[e]xcept as provided in this section [i.e., MCL 460.732]," and MCL 460.732 provides *only* for potential fines and damages pursuant to an order of the *MPSC*. MCL 460.732(2), (3). Consequently, as applied to this case, plaintiff, as a "facility owner," may file a complaint with the MPSC seeking fines and damages from defendant Independence Township, but Independence Township, as a governmental agency, otherwise remains immune from liability under the GTLA.

There is one other section of the MISS DIG act that bears mentioning, although neither the parties nor the majority refers to it. MCL 460.728 states, in pertinent part:

> This act does not limit the right of an excavator, facility owner, or facility operator to seek legal relief and recovery of actual damages incurred and equitable relief in a civil action arising out of a violation of the requirements of this act, or to enforce the provisions of this act, nor shall this act determine the level of damages or injunctive relief in any such civil action. This section does not affect or limit the availability of any contractual or legal remedy that may be available to an excavator, facility owner, or facility operator under any contract to which they may be a party. [MCL 460.728][4]

[4] I note that "tort liability for purposes of the GTLA encompasses claims of noncontractual civil wrongs seeking compensatory damages, not those seeking declaratory or injunctive relief." *Eplee v City of Lansing*, 327 Mich App 635, 648; 935 NW2d 104 (2019). Consequently, neither the GTLA nor MCL 460.728 would affect or limit contractual claims or claims for declaratory, injunctive, or equitable relief. *Id.*

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

But MCL 460.728 does not operate to *authorize* the filing of civil actions for tort damages; it merely "does not limit," *id.*, any pre-existing right to file one. Consequently, *if* a right to file a civil action for tort damages arises elsewhere, then the MISS DIG act does not limit it. But again, MCL 460.732(1) expressly provides that it does not affect liability or immunity with respect to a governmental agency "[e]xcept as provided in this section [i.e., MCL 460.732]," and MCL 460.732 provides *only* for potential fines and damages pursuant to an order of the *MPSC*. MCL 460.732(2), (3).

The majority errs, in my judgment, by ignoring the limited nature of the governmental immunity exception created by MCL 460.732(2) (allowing for a complaint to be filed in the MPSC and for the MPSC to impose "a civil fine and, if applicable, damages," *id.*), by failing to interpret it narrowly, *State Farm*, 271 Mich App at 485, and by instead engrafting onto the law a broad and all-encompassing exception that our Legislature has not seen fit to adopt.[5] Accordingly, I respectfully dissent and would instead reverse the trial court's order denying defendant's motion for summary disposition with respect to plaintiff's negligence claim premised on alleged violations of the MISS DIG act.

II. SEWAGE DISPOSAL SYSTEM EVENT EXCEPTION

I further respectfully dissent from the majority's affirmance of the trial court's order allowing plaintiff to amend his complaint for a third time to assert a claim under MCL 691.1417(3), the sewage-disposal-system-event exception to governmental immunity.

For a claim to fall within the sewage-disposal-system-event exception to governmental immunity, the GTLA requires, among other things, that "[t]he sewage disposal system had a defect." [MCL 691.1417(b).] A "defect" under the statute "means a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). And

> "Sewage disposal system" means all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency. [MCL 691.1416(j).]

I note that although the majority concludes that there is a question of fact as to whether the sewage disposal system in this case had a defect, the trial court has already held, even before amendment of plaintiff's complaint to assert such a claim, that "[t]he Court finds that the sewage disposal system had a defect pursuant to MCL 691.1417(3)(b)." That, to me, is troubling in and of itself. But I also conclude that the proffered claim is not viable under the sewage-system-disposal-event exception to governmental immunity.

[5] If the Legislature wishes to create a broad exception to governmental immunity in relation to the MISS DIG act, it should say so with clarity.

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

As the majority notes, the trial court cited *State Farm* for the proposition that "the prevention of accidental damage to the City's water system through notification is within the scope of the water department's operations." *State Farm*, 271 Mich App at 484 n 2. The trial court concluded therefrom that "[b]ecause the failure to mark is an operation of Independence Township, the failure to mark is a defect." However, the Court in *State Farm* was not addressing whether there was a "defect" in a sewage disposal system, but was merely assessing whether the alleged conduct of the defendant city qualified as a "governmental function" under the GTLA. It is a stretch indeed to conclude from a brief statement in a footnote in *State Farm* that an alleged failure to mark is a "defect" of the sewage disposal system; yet it seems the trial court has already done so, and the majority now affirms that conclusion. I conclude that, under any reasonable interpretation, the failure to properly mark facilities as required by the MISS DIG act does not constitute a "defect" in the sewage disposal system and that the proffered amendment of plaintiff's complaint to assert a claim under MCL 691.1417(3) should have been denied.

For these reasons, I respectfully dissent and would instead reverse and remand for entry of an order granting summary disposition in favor of Independence Township.

/s/ Mark T. Boonstra

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

RECEIVED by MCOA 3/28/2025 2:09:36 PM

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

Court of Appeals, State of Michigan

ORDER

BRIAN ZEZULA V NINA BROWN

Docket No. 368261

LC No. 2022-197937-NZ

Mark T. Boonstra
Presiding Judge

Kirsten Frank Kelly

Adrienne N. Young
Judges

The motion for reconsideration is DENIED.

Presiding Judge

Boonstra, P.J., would grant the motion for reconsideration.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

April 16, 2025
Date

Chief Clerk

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

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

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

BRIAN ZEZULA

Plaintiff,

v

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.

/

LIONEL E. BASHORE (P58599)
DANIEL A. GROVES (P74026)
Bashore Green Law Group
Attorneys for Plaintiff
17 South Saginaw Street, 2nd Floor
Pontiac, Michigan 48342
PH (586) 803-0500 / FX (586) 803-0501
e-Mail: daniel@bglawpc.com

NICOLE E. WILINSKI (P61904)
BRIAN A. CATRINAR (P76320)
Collins Einhorn Farrell PC
Attorneys for Defendant Nina Brown
4000 Town Center, Ste 909
Southfield, Michigan 48075
PH (248) 355-4141/ FX (248) 355-2277
E-mail: nicole.wilinski@ceflawyers.com
brian.catrinar@ceflawyers.com

MICHAEL F. SCHMIDT (P25213)
Harvey Kruse, PC
Attorney for Defendant Kaltz
1050 Wilshire Dr. Suite 320
Troy, MI 48084
e-Mail: mschmidt@harveykruse.com

FRANK A. MISURACA (P55643)
Kaufman Payton & Chapa, P.C.
Attorney for Defendant DTE
30833 Northwestern Highway, Suite 200
Farmington Hills, Michigan 48334
PH (248) 626-5000 / FX (248) 626-2843
e-Mail: famisuraca@kaufmanlaw.com

MORGAN A. MCATAMNEY (P80047)
The Kelly Firm, PC
Attorney for Independence Township
2825 University Drive
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)

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

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.

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

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.

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

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.

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

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.

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

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.

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

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

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

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.

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

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,

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

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

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

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ZEZULA,BRIAN,,
Plaintiff,
V

BROWN,NINA,,
Defendant.

NO. 2022-197937-NZ

HON. CHERYL A. MATTHEWS

ORDER REGARDING MOTION

Motion Title: PLAINTIFF BRIAN ZEZULA'S MOTION TO ADD A NECESSARY PARTY

The above-named motion is: **Granted**

In addition: The Court considered the above titled motion, and the response, and dispenses with oral argument pursuant to MCR 2.119(E)(3). The hearing scheduled for June 7, 2023, was cancelled.

The amended complaint shall be filed by June 14, 2023.

IT IS SO ORDERED.

Dated: 6/7/2023

/s/ Cheryl Matthews
June 7, 2023
HON. CHERYL A. MATTHEWS
CIRCUIT COURT JUDGE rf

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

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.
1050 Wilshire Drive, Suite 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

Nicole E. Wilinski (P61904)
Brian A. Catrinar (P76320)
COLLINS EINHORN FARRELL P.C.
Attorneys for Defendant Nina Brown
4000 Town Ctr, Ste. 909
Southfield, MI 48075-1408
(248) 351-6022
Nicole.wilinski@ceflawyers.com
Brian.catrinar@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 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:

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

Document Submitted for Filing to MI Oakland County 6th Circuit Court.

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

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

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

Document Submitted for Filing to MI Oakland County 6th Circuit Court.

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

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

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

Document Submitted for Filing to MI Oakland County 6th Circuit Court.

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

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

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

Document Submitted for Filing to MI Oakland County 6th Circuit Court.

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

FILED Received for Filing Oakland County Clerk 8/16/2023 4:08 PM

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
Lionel E. Bashore (P58599)
Daniel A. Groves (P74026)
Attorneys for Plaintiff
17 South Saginaw St., 2nd Floor
Pontiac, MI 48342
(586) 803-0500
daniel@bglawpc.com

COLLINS EINHORN FARRELL PC
Nicole E. Wilinski (P61904)
Brian A. Catrinar (P76320)
Attorneys for Defendant Brown
4000 Town Center, Ste. 909
Southfield, MI 48075
(248) 455-4141
nicole.wilinski@ceflawyers.com
brian.catrinar@ceflawyers.com

HARVEY KRUSE, PC
Michael F. Schmidt (P25213)
Attorney for Defendant Kaltz
1050 Wilshire Dr., Ste. 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

KAUFMAN PAYTON & CHAPA, PC
Frank A. Misuraca (P55643)
Attorney for Defendant DTE
30833 Northwestern Hwy., Ste. 200
Farmington Hills, MI 48334
(248) 626-5000
famisuraca@kaufmanlaw.com

THE KELLY FIRM, PC
Morgan A. McAtamney (P80047)
Attorney for Independence Twp
2825 University Dr.
Auburn Hills, MI 48326-2544
(248) 655-7025
morgan@kellyfirmoc.com

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

/

DEFENDANT INDEPENDENCE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITSION

FEE

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

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

DATED: August 16, 2023

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

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

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

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

Defendants.

_____ /

BASHORE GREEN LAW GROUP
Lionel E. Bashore (P58599)
Daniel A. Groves (P74026)
Attorneys for Plaintiff
17 South Saginaw St., 2nd Floor
Pontiac, MI 48342
(586) 803-0500
daniel@bglawpc.com

COLLINS EINHORN FARRELL PC
Nicole E. Wilinski (P61904)
Brian A. Catrinar (P76320)
Attorneys for Defendant Brown
4000 Town Center, Ste. 909
Southfield, MI 48075
(248) 455-4141
nicole.wilinski@ceflawyers.com
brian.catrinar@ceflawyers.com

HARVEY KRUSE, PC
Michael F. Schmidt (P25213)
Attorney for Defendant Kaltz
1050 Wilshire Dr., Ste. 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

KAUFMAN PAYTON & CHAPA, PC
Frank A. Misuraca (P55643)
Attorney for Defendant DTE
30833 Northwestern Hwy., Ste. 200
Farmington Hills, MI 48334
(248) 626-5000
famisuraca@kaufmanlaw.com

THE KELLY FIRM, PC
Morgan A. McAtamney (P80047)
Attorney for Independence Twp
2825 University Dr.
Auburn Hills, MI 48326-2544
(248) 655-7025
morgan@kellyfirmoc.com

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

_____ /

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

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

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

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

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

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

> 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).

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

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

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

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*

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

> *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).

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

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

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

> 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.

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

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,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

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

DATED: August 16, 2023

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

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

CA: 22-197937-NZ

HON: CHERYL A. MATTHEWS

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

Defendants.

_____ /

BASHORE GREEN LAW GROUP
Lionel E. Bashore (P58599)
Daniel A. Groves (P74026)
Attorneys for Plaintiff
17 South Saginaw St., 2nd Floor
Pontiac, MI 48342
(586) 803-0500
daniel@bglawpc.com

COLLINS EINHORN FARRELL PC
Nicole E. Wilinski (P61904)
Brian A. Catrinar (P76320)
Attorneys for Defendant Brown
4000 Town Center, Ste. 909
Southfield, MI 48075
(248) 455-4141
nicole.wilinski@ceflawyers.com
brian.catrinar@ceflawyers.com

HARVEY KRUSE, PC
Michael F. Schmidt (P25213)
Attorney for Defendant Kaltz
1050 Wilshire Dr., Ste. 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

KAUFMAN PAYTON & CHAPA, PC
Frank A. Misuraca (P55643)
Attorney for Defendant DTE
30833 Northwestern Hwy., Ste. 200
Farmington Hills, MI 48334
(248) 626-5000
famisuraca@kaufmanlaw.com

THE KELLY FIRM, PC
Morgan A. McAtamney (P80047)
Attorney for Independence Twp
2825 University Dr.
Auburn Hills, MI 48326-2544
(248) 655-7025
morgan@kellyfirmoc.com

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

_____ /

NOTICE OF HEARING

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

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,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

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

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

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

INDEX OF EXHIBITS

1 Second Amended Complaint

2 Notice of Non-Party

3 Selected Ordinance Provisions

4 Case: *Walby v City of Caro*

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

EXHIBIT 1

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

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

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

BRIAN ZEZULA

Plaintiff,

v

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.

/

LIONEL E. BASHORE (P58599)
DANIEL A. GROVES (P74026)
Bashore Green Law Group
Attorneys for Plaintiff
17 South Saginaw Street, 2nd Floor
Pontiac, Michigan 48342
PH (586) 803-0500 / FX (586) 803-0501
e-Mail: daniel@bglawpc.com

NICOLE E. WILINSKI (P61904)
BRIAN A. CATRINAR (P76320)
Collins Einhorn Farrell PC
Attorneys for Defendant Nina Brown
4000 Town Center, Ste 909
Southfield, Michigan 48075
PH (248) 355-4141/ FX (248) 355-2277
E-mail: nicole.wilinski@ceflawyers.com
brian.catrinar@ceflawyers.com

MICHAEL F. SCHMIDT (P25213)
Harvey Kruse, PC
Attorney for Defendant Kaltz
1050 Wilshire Dr. Suite 320
Troy, MI 48084
e-Mail: mschmidt@harveykruse.com

FRANK A. MISURACA (P55643)
Kaufman Payton & Chapa, P.C.
Attorney for Defendant DTE
30833 Northwestern Highway, Suite 200
Farmington Hills, Michigan 48334
PH (248) 626-5000 / FX (248) 626-2843
e-Mail: famisuraca@kaufmanlaw.com

MORGAN A. MCATAMNEY (P80047)
The Kelly Firm, PC
Attorney for Independence Township
2825 University Drive
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)

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

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.

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

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.

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

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.

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

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.

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

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.

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

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

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

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.

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

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,

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

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

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

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ZEZULA,BRIAN,,
Plaintiff,
V

BROWN,NINA,,
Defendant.

NO. 2022-197937-NZ

HON. CHERYL A. MATTHEWS

ORDER REGARDING MOTION

Motion Title: PLAINTIFF BRIAN ZEZULA'S MOTION TO ADD A NECESSARY PARTY

The above-named motion is: **Granted**

In addition: The Court considered the above titled motion, and the response, and dispenses with oral argument pursuant to MCR 2.119(E)(3). The hearing scheduled for June 7, 2023, was cancelled.

The amended complaint shall be filed by June 14, 2023.

IT IS SO ORDERED.

/s/ Cheryl Matthews
June 7, 2023

Dated: 6/7/2023

HON. CHERYL A. MATTHEWS
CIRCUIT COURT JUDGE rf

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

EXHIBIT 2

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

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.
1050 Wilshire Drive, Suite 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

Nicole E. Wilinski (P61904)
Brian A. Catrinar (P76320)
COLLINS EINHORN FARRELL P.C.
Attorneys for Defendant Nina Brown
4000 Town Ctr, Ste. 909
Southfield, MI 48075-1408
(248) 351-6022
Nicole.wilinski@ceflawyers.com
Brian.catrinar@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 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:

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

Document Submitted for Filing to MI Oakland County 6th Circuit Court.

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

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

Document Submitted for Filing to MI Oakland County 6th Circuit Court.

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

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

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

Document Submitted for Filing to MI Oakland County 6th Circuit Court.

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

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

Document Submitted for Filing to MI Oakland County 6th Circuit Court.

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

EXHIBIT 3

Sec. 48-53. - Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Act or *the act* means the Federal Water Pollution Control Act, also known as the Clean Water Act, as amended, being 33 USC 1251, et seq.

As-built plans means engineering drawings prepared after installations of wastewater facilities which shall show a statement by a registered engineer or surveyor certifying this to be as-built plans and shall include, but not be limited to, length of sewer, invert elevation, locations with respect to property lines, wye and riser locations and depths, sewer material and joints used, and mechanical, electrical, and structural details for pump stations, wastewater treatment facilities, and other appurtenances.

Authorized representative of industrial user means:

(1) Responsible corporate officer, where the industrial user submitting the reports required by this article is a corporation, who is either:

   a. The president, vice-president, secretary, or treasurer of a corporation in charge of a principal business function, or any other person who performs similar policy or decision making functions for the corporation; or

   b. The manager of one or more manufacturing, production, or operation facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25,000,000.00 in second-quarter 1980 dollars, when authority to execute documents has been assigned or delegated to said manager in accordance with corporate procedures; or

(2) A general partner or proprietor where the industrial user submitting the reports required by this chapter is a partnership or sole proprietorship respectively.

Available cyanide means the quantity of cyanide that consists of cyanide ion (CN) hydrogen cyanide in water (HCNaq), and the cyano-complexes of zinc, copper, cadmium, mercury nickel and silver, determined by EPA method OIA-1677, or other method designated as a standard method or approved under 40 CFR 136.

Best management practices (BMP) means programs, practices, procedures or other directed efforts initiated and implemented by the user which can or do lead to the reduction, conservation or minimization of pollutants being introduced into the ecosystem, including, but are not limited to, the Detroit sewer system. BMPs include, but are not limited to, equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, or inventory control and may include technical and economic considerations.

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

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

Biochemical oxygen demand (BOD) means the quality of dissolved oxygen utilized in the biochemical oxidation of organic matter under standard laboratory procedure five days at 20 degrees Celsius expressed in terms of mass and concentration (milligrams per liter (mg/l)) as measured by standard methods.

Board means the Board of Water Commissioners of the City of Detroit.

Building drain means that part of the lowest horizontal piping of a drainage system that receives discharge from soil, waste, and other drainage pipes inside the walls of the building and conveys it to the building's sewer (house sewer). The latter begins five feet outside the inner face of the building wall.

Bypass means the intentional diversion of a waste stream from any portion of an industrial user's treatment facility. See 40 CFR 403.17.

Centralized waste treatment (CWT) facility means any facility that treats any hazardous or nonhazardous industrial waste received from off site by tanker truck, trailer/roll-off bins, drums, barges, or any other forms of shipment including:

(1) A facility that treats industrial waste received exclusively from off site; and

(2) A facility that treats industrial waste generated on site as well as industrial waste received from off site.

Compatible industrial wastewater means wastewater that is produced by an industrial user which has a pollutant strength or characteristics similar to those found in domestic wastewater, and which can be efficiently and effectively transported and treated with domestic wastewater.

Compatible pollutant means pollutants that can be effectively removed by the POTW treatment system to within the acceptable levels for the POTW residuals and the receiving stream.

Composite sample means a collection of individual samples that are obtained at regular intervals and collected on a time-proportional or flow-proportional basis over a specified period and which provides a representative sample of the average stream during the sampling period. A minimum of four aliquot per 24 hours shall be used where the sample is manually collected. See 40 CFR 403, appendix E.

Confidential information means the information that would divulge information, processes or methods of production entitled to protection as trade secrets of the industrial user.

Consent judgment means the judgment issued by Federal District Court on September 14, 1977, *U.S. EPA v. City of Detroit,* et al., C.A. No. 77-1100, as amended.

Control authority means the Detroit Water and Sewerage Department which has been officially designated as such by the state under the provisions of 40 CFR 403.12. See 40 CFR 403.12(a).

Cooling water means the noncontact water discharged from any use such as air conditioning, cooling or refrigeration, and whose only function is the exchange of heat.

County means the County of Oakland, State of Michigan or the Oakland County Drain Commissioner.

County agency means the Oakland County Drain Commissioner. References to the Oakland County Department of Public Works shall also mean Oakland County Drain Commissioner.

Days mean consecutive calendar days for the purpose of computing a period of time prescribed or allowed by this article.

Debt service charge means charges levied to customers of the wastewater system that are used to pay principal, interest and administrative costs of retiring the debt incurred for construction of the wastewater system. The debt service charge is separate and distinct and may be in addition to the user charge specified below.

Department means the City of Detroit Water and Sewerage Department, and authorized employees of the department.

Direct discharge means the discharge of treated or untreated wastewater directly to the waters of the state.

Director means the Director of the Detroit Department of Water and Sewerage, or the director's designee.

Discharger means a person who, directly or indirectly, contributes, causes, or permits wastewater to be discharged into the POTW.

Domestic sewage means waste and wastewater from humans or household operations that is discharged to, or otherwise enters, a treatment works.

Environmental Protection Agency or *EPA administrator* or *administrator* means the United States Environmental Protection Agency or, where appropriate, the authorized representatives or employees of the EPA.

Facility means a location that contributes, causes or permits wastewater to be discharged into the POTW including, but not limited to, a place of business, endeavor, arts, trade or commerce, whether public or private, commercial or charitable.

Fats, oils or *grease (FOG)* means any hydrocarbons, fatty acids, soaps, fats, waxes, oils, and any other nonvolatile material of animal, vegetable or mineral origin that is extractable by solvent in accordance with standard methods.

Flow proportional sample means a composite sample taken with regard to the flow rate of the waste stream.

Footing drain means a pipe or conduit that is placed around the perimeter of a building foundation and which intentionally admits groundwater.

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

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

Grab sample means an individual sample collected over a period of time not exceeding 15 minutes, which reasonably reflects the characteristics of the stream at the time of sampling.

Groundwater means subsurface water occupying the saturation zone, from which wells and springs are fed.

Holding tank waste means any waste from holding tanks such as vessels, chemical toilets, campers, trailers, septic tanks, and vacuum-pump tank trucks.

Indirect discharge or *discharge* means the discharge or the introduction of pollutants into the POTW from any nondomestic source regulated under 33 USC 1317(b), (c) or (d).

Industrial user means a person who contributes, causes or permits wastewater to be discharged into the POTW, including, but not limited to, a place of business, endeavor, arts, trade or commerce, whether public or private, commercial or charitable but excludes single-family and multifamily residential dwellings with discharges consistent with domestic waste characteristics.

Industrial waste means any liquid, solid or gaseous waste or form of energy, or combination thereof, resulting from any processes of industry, manufacturing, business, trade or research, including the development, recovery or processing of natural resources.

Infiltration means any waters entering the system from the ground, through such means as, but not limited to, defective pipes, pipe joints, connections or manhole walls. The term "infiltration" does not include and is distinguished from inflow.

Infiltration/inflow means the total quantity of water from both infiltration and inflow.

Inflow means any waters entering the system through such sources as, but not limited to, building downspouts, footing or yard drains, cooling water discharges, seepage lines from springs and swampy areas, and storm drain cross connections.

Interference means a discharge which, alone or in conjunction with a discharge or discharges from other sources, both:

(1) Inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal; and

(2) Therefore is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation) or of the prevention of sewage sludge use or disposal in compliance with the following statutory provisions and regulations or permits issued thereunder (or more stringent state or local regulations): section 405 of the Clean Water Act, as amended, being 33 USC 1345, the Solid Waste Disposal Act (SWDA), as amended, (including the Resource Conservation and Recovery Act (RCRA), and state

regulations contained in any state sludge management plan prepared pursuant to subtitle D of the SWDA), the Clean Air Act, the Toxic Substances Control Act, and the Marine Protection, Research and Sanctuaries Act.

Local means a prefix denoting jurisdiction by the Charter Township of Independence.

May means permissive.

Municipality means the Charter Township of Independence.

National categorical pretreatment standard means any regulation containing pollutant discharge limits promulgated by the EPA in accordance with 33 USC 1317(b) and (c) which applies to a specific class or category of industrial users.

National Pollutant Discharge Elimination System (NPDES) permit means a permit issued pursuant to 33 USC 1342.

Natural outlet means any outlet into a watercourse, pond, ditch, lake, or other body of surface or groundwater.

New source means:

(1) Any building, structure, facility or installation from which there is or may be a discharge of pollutants, the construction of which commenced after the publication of proposed pretreatment standards under 33 USC 1317(c) which will be applicable to such source if such standards are thereafter promulgated in accordance with that section; provided, that:

a. The building, structure, facility or installation is constructed at a site where no other source is located;

b. The building, structure, facility or installation totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or

c. The production or wastewater generating processes of the building, structure, facility or installation are substantially independent of an existing source at the same site. In determining whether these are substantially independent, factors such as the extent to which the new facility is integrated with the existing plant, and the extent to which the new facility is engaged in the same general type of activity as the existing source should be considered;

(2) Construction on a site where an existing source is located resulting in a modification rather than a new source if the construction does not create a new building, structure, facility or installation meeting the criteria of subsection (1)b or (1)c of this definition but otherwise alters, replaces, or adds to existing process or production equipment;

(3) Construction of a new source has commenced where the owner or operator has:

a. Begun, or caused to begin as part of a continuous on site construction program:

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

1. Any placement, assembly, or installation of facilities or equipment; or
2. Significant site preparation work including clearing, excavation, or removal of existing buildings, structures, or facilities that are necessary for the placement, assembly, or installation of new source facilities or equipment; or

b. Entered into a binding contractual obligation for the purchase of facilities or equipment, which are intended to be used in its operation within a reasonable time.

Options to purchase or contracts which can be terminated or modified without substantial loss, and contracts for feasibility, engineering, and design studies do not constitute a contractual obligation under this section.

Operation-maintenance (O&M) means all work, materials, equipment, utilities and other effort required to operate and maintain the wastewater transportation and treatment system consistent with insuring adequate treatment of wastewater to produce an effluent in compliance with the NPDES permit and other applicable state and federal regulations, and includes the cost of replacement.

Owner means the owners of record of the freehold of the premises or lesser estate therein, a mortgagor or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, or other person, firm or corporation in control of a building.

Pass through means discharge which exits the POTW into waters of the United States in quantities or concentrations, which alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the POTWs NPDES permit including an increase in the magnitude or duration of a violation.

Person means any individual, partnership, copartnership, firm, company, corporation, association, joint stock company, trust, estate, unit of government, school district, or any other legal entity, or their legal representative, agent or assigns.

pH means the intensity of the acid or base condition of a solution, calculated by taking the negative base-ten logarithm of the hydrogen ion activity. Activity is deemed to be equal to concentration in moles per liter.

Pollutant means any dredged spoil, solid waste, incinerator residue, sewage garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, or industrial, municipal and agricultural waste which is discharged into water.

Pollution means the introduction of any pollutant that, alone or in combination with any other substance, can or does result in the degradation or impairment of the chemical, physical, biological or radiological integrity of water.

POTW treatment plant means that portion of the POTW designed to provide treatment to wastewater, including recycling and reclamation of wastewater.

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

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

Pretreatment means the reduction of the amount of pollutants, the removal of pollutants, or the alteration of the nature of pollutant properties in wastewater to a less harmful state prior to or in lieu of discharging or otherwise introducing such pollutants into the POTW. The reduction, removal or alteration may be attained by physical, chemical or biological processes, or process changes by other means, except as prohibited by federal, state or local laws, rules and regulations.

Pretreatment requirements means any substantive or procedural requirements related to pretreatment, other than a national pretreatment standard imposed on an industrial user. See 40 CFR 403.3(r).

Pretreatment standards means all national categorical pretreatment standards, the general prohibitions specified in 40 CFR 403.5(a), the specific prohibitions delineated in 40 CFR 403.5(b), and the local or specific limits developed pursuant to 40 CFR 403.5(c), including the discharge prohibitions specified in section 48-135.

Private means a prefix denoting jurisdiction by a nongovernmental entity.

Public means a prefix denoting jurisdiction by any governmental subdivision or agency.

Publicly owned treatment works (POTW) means a treatment works as defined by 33 USC 1292(2)(A) which is owned by a state or municipality, as defined in 33 USC 1362, including:

(1) Any devices and systems used in the storage, treatment, recycling, or reclamation of municipal sewage or industrial waste of a liquid nature;

(2) Sewers, pipes and other conveyances only if they convey wastewater to a POTW treatment plant; or

(3) The municipality, as defined in 33 USC 1362, which has jurisdiction over the indirect discharges to and the discharges from such a treatment works.

Public sewer means a sewer of any type controlled by a governmental entity.

Quantification level means the measurement of the concentration of a contaminant obtained by using a specified laboratory procedure calculated at a specified concentration above the detection level. The quantification level is considered the lowest concentration at which a particular contaminant can be quantitatively measured using a specified laboratory procedure for monitoring of the contaminant.

Replacement means the replacement in whole or in part of any equipment, appurtenances and accessories in the wastewater transportation or treatment systems to ensure continuous treatment of wastewater in accordance with the NPDES permit and other applicable state and federal regulations.

Representative sample means any sample of wastewater, which accurately and precisely represents the actual quality, character, and condition of one or more pollutants in the waste stream being sampled. Representative samples shall be collected and analyzed in accordance with 40 CFR 136.

Sanitary wastewater means the portion of wastewater that is not attributable to industrial activities and is similar to discharges from domestic sources including, but not limited to, discharges from sanitary facilities and discharges incident to the preparation of food for on-site noncommercial consumption.

Service area means any area whose wastewater is received by the township or the county for the transmission for treatment by the City of Detroit DWSD.

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 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.

Sewer service charge means the sum of the applicable user charge, surcharges and debt service charges.

Significant industrial users means any user of the POTW who:

(1) Has an average discharge flow of 25,000 gallons per day or more of process wastewater excluding sanitary, boiler blowdown, and noncontact cooling water;

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

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

(2) Has discharges subject to the national categorical pretreatment standards;

(3) Requires pretreatment to comply with the specific pollutant limitations of this article;

(4) Has in its discharge toxic pollutants as defined pursuant to 33 USC 1317, or other applicable federal and state laws or regulations, that are in concentrations and volumes which are subject to regulation under this chapter as determined by the department;

(5) Is required to obtain a permit for the treatment, storage or disposal of hazardous waste pursuant to regulations adopted by this state or adopted under the Federal Solid Waste Disposal Act, as amended by the Federal Resource Conservation and Recovery Act, as amended, and may or does contribute or allow waste or wastewater into the POTW including, but not limited to, leachate or runoff; or

(6) Is found by the City of Detroit or the township to have a reasonable potential for adverse effect, either singly or in combination with other contributing industries, on the POTW operation, the quality of sludge, the POTW's effluent quality, or air emissions generated by the POTW.

Significant noncompliance means any violation that meets one or more of the following criteria:

(1) Chronic violations of wastewater discharge limits, defined as those in which 66 percent or more of all of the measurements taken during a six-month period exceed by any magnitude the daily maximum limit or the average limit for the same parameter;

(2) Technical review criteria (TRC) violations, defined as those in which 33 percent or more of all of the measurements for each pollutant parameter taken during a six-month period equal or exceed the product of the daily maximum limit or the average limit multiplied by the applicable TRC (TRC = 1.4 for BOD, TSS, fats, oil and grease, and 1.2 for all other pollutants except pH);

(3) Any other violation of a pretreatment effluent limit (daily maximum or longer term average) that the department determines has caused, alone or in combination with other discharges, interference or pass through including endangering the health of POTW personnel or the general public;

(4) Any discharge of a pollutant that has caused imminent endangerment to human health or welfare, or to the environment, or has resulted in the POTW's exercise of its emergency authority;

(5) Failure to meet a compliance schedule milestone contained in a local control mechanism, or enforcement order for starting construction, completing construction, or attaining final compliance within 90 days after the scheduled date;

(6) Failure to provide required reports such as baseline monitoring reports, 90-day compliance reports, periodic self-monitoring reports, and reports on compliance with compliance

schedules within 30 days after the due date;

(7) Failure to accurately report noncompliance; or

(8) Any other violation or group of violations that the department determines will adversely affect the operation or implementation of the local pretreatment program.

Slug means any discharge of a nonroutine episodic nature including, but not limited to, an accidental spill or a noncustomary batch discharge.

Standard industrial classification (SIC) means a classification pursuant to the Standard Industrial Classification Manual issued by the Executive Office of the President, Office of Management and Budget, 1987, as amended.

Standard methods mean methods set forth in 40 CFR 136, Guidelines for Establishing Test Procedures for Analysis of Pollutants or the laboratory procedures set forth in the latest edition, at the time of analysis, of Standard Methods for the Examination of Water and Wastewater prepared and published jointly by the American Public Health Association, the American Water Works Association, and the Water Pollution Control Federation, or methods set forth in 40 CFR 136, Guidelines for Establishing Test Procedures for Analysis of Pollutants. Where these two references are in disagreement regarding procedures for the analysis of a specific pollutant, the methods given in 40 CFR 136 shall be followed.

Stormwater means any flow occurring during or following any form of natural precipitation and resulting therefrom.

Superintendent means the director of the township department of public works or his duly authorized representative.

Surface water means:

(1) All water on the surface as distinguished from groundwater or subterranean water; and

(2) Water appearing on the surface in a diffused state, with no permanent source of supply or regular course for any considerable time, as distinguished from water appearing in watercourses, lakes, or ponds.

Suspended solids (total) mean the total suspended matter that floats on the surface of, or is suspended in, water, wastewater or other liquids, and is removable by laboratory filtration or as measured by standard methods.

Total equivalent master metered water consumption means the equivalent to the total amount of potable water used by a municipality as recorded by a master water meter for sewered premises, and shall include, but not be limited to, fire protection water, gardening and lawn water.

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

Total PCB means the sum of the individual analytical results for each of the PCB aroclors 1016, 1221, 1232, 1242, 1248, 1254, and 1260 during any single sampling event with any aroclor result less than the quantification level being treated as zero.

Total phenolic compounds means the sum of the individual analytical results for each of the phenolic compounds of 2-chlorophenol, 4-chlorophenol, 4-chloro-3-methylphenol, 2,4-dichlorophenol, 2,4-dinitrophenol, 4-methylphenol, 4-nitrophenol, and phenol during any single sampling event expressed in mg/l.

Toxic pollutant means any pollutant or combination of pollutants designated as toxic in regulations promulgated by the administrator of the U.S. Environmental Protection Agency under the provisions of the Clean Water Act, being 33 USC 1317, or included in the critical materials register promulgated by the Michigan Department of Environmental Quality, or by other federal or state laws, rules or regulations.

Trade secret means the whole, or any portion or phase, of any proprietary manufacturing process or method, not patented, which is secret, is useful in compounding an article of trade having a commercial value, and whose secrecy the owner has taken reasonable measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes but excludes any information regarding the quantum or character of waste products or their constituents discharged or sought to be discharged into the Detroit Wastewater Treatment Plant, or into the wastewater system tributary thereto.

Upset means an exceptional incident in which there is unintentional and temporary noncompliance with limits imposed under this chapter or with national categorical pretreatment standards due to factors beyond the reasonable control of the industrial user but excludes noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.

User means any person who, directly or indirectly, contributes, causes or permits the discharge of wastewater into the POTW as defined herein.

User charge means a charge levied on users of a treatment works for the cost of operation and maintenance of sewerage works pursuant to section 204(b) of P.L. 92-500 and includes the cost of replacement.

Wastewater or *waste stream* means the liquid and water-carried industrial or domestic wastes of dwellings, commercial buildings, industrial facilities, and institutions, whether treated or untreated, which are contributed to or permitted to enter the POTW including infiltration and inflow waters, stormwater, and cooling water.

Wastewater discharge permits means permits issued by the department in accordance with section 48-137.

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

Waters of the state mean groundwater, lakes, rivers, streams, all other watercourses and waters within the confines of this state as well as bordering this state in the form of the Great Lakes.

(Code 1982, § 16.5-3; Ord. of 10-3-1989, § 3; Ord. of 12-4-2001, § 1; Ord. No. 07-01, § 1, 1-2-2007; Ord. No. 2012-01, § 17, 1-25-2012)

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

Sec. 48-84. - Ownership, operations and maintenance responsibility.

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.

(Code 1982, § 16.5-28; Ord. of 10-3-1989, § 5(H))

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

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

EXHIBIT 4

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

2021 WL 1941635
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Jeffrey WALBY, Plaintiff-Appellee,
v.
CITY OF CARO, Defendant-Appellant.

No. 354155
|
May 13, 2021

Tuscola Circuit Court, LC No. 20-031064-CZ

Before: K. F. Kelly, P.J., and Servitto and Letica, JJ.

Opinion

Per Curiam.

*1 Defendant appeals as of right the trial court's order denying defendant's motion for summary disposition under MCR 2.116(C)(7) (immunity granted by law) and (8) (failure to state a claim). On appeal, defendant argues that the trial court erred by denying summary disposition because governmental immunity barred plaintiff's claims. We reverse and remand for further proceedings consistent with this opinion.

The underlying facts of this case are not in dispute. Plaintiff owned a building in Caro, Michigan, and contacted defendant to shut off the water supply to the building. On February 1, 2018, defendant purportedly shut off the water. On March 13, 2019, defendant became aware that the basement of the building had flooded with 315,000 gallons of water.

Thereafter, plaintiff filed a complaint alleging that defendant was grossly negligent for failing to turn the water supply off to the building, failing to maintain the shutoff valves, failing to appropriately train its employees to shut off the valves, and failing to take backup measures to shut off the city-owned water meter inside plaintiff's building.

Defendant answered and soon filed a motion for summary disposition under MCR 2.116(C)(7) and (8), arguing that it was entitled to governmental immunity under Michigan's Governmental Tort Liability Act ("GTLA"), MCL 691.1407, because operating the water supply was a governmental function and none of the statutory exceptions applied.

In response, plaintiff filed a motion to amend the complaint to add claims of breach of contract and individual liability against four employees of defendant. Plaintiff also filed a response brief to defendant's motion, arguing that defendant was not entitled to governmental immunity because it was liable for the gross negligence of its employees under MCL 691.1407(2)(c) and the theory of vicarious liability. Finally, plaintiff argued that the additional claims in the amended complaint were not subject to governmental immunity.

At the hearing on defendant's motion for summary disposition, the trial court determined that "at this point|—|prediscovery|—|the Court's unwilling to grant the motion for summary disposition. I think that the pleadings on their face state a sufficient claim for relief." The court reasoned that it was not "willing to rule at this point as a matter of law that there is no way by which the plaintiff could seek his relief here." Therefore, the trial court denied defendant's motion for summary disposition. The trial court also granted plaintiff's motion to amend the complaint. This appeal followed.

Defendant argues that the trial court erred by denying its motion for summary disposition because governmental immunity barred plaintiff's suit and it cannot be vicariously liable for the alleged gross negligence of its employees. We agree.

"We review de novo both a trial court's decision to grant or deny a motion for summary disposition and questions of statutory interpretation." *PNC Nat'l Bank Ass'n v. Dep't of Treasury*, 285 Mich. App. 504, 505; 778 N.W.2d 282 (2009). Whether governmental immunity applies is a question of law that is also reviewed de novo on appeal. *Co. Rd. Ass'n of Mich. v. Governor*, 287 Mich. App. 95, 117-118; 782 N.W.2d 784 (2010).

*2 "MCR 2.116(C)(7) permits summary disposition because of release, payment, prior judgment, |or| immunity granted by law." *Clay v. Doe*, 311 Mich. App. 359, 362; 876 N.W.2d 248 (2015) (quotation marks and citation omitted; alteration in original). "When it grants a motion under MCR 2.116(C)(7), a trial court should

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

examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party." *McLain v. Lansing Fire Dep't*, 309 Mich. App. 335, 340; 869 N.W.2d 645 (2015).

"MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v. Mich. Dep't of Transp.*, 456 Mich. 331, 337; 572 N.W.2d 201 (1998). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v. Rozwood*, 461 Mich. 109, 119; 597 N.W.2d 817 (1999). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotation marks and citation omitted).

Under MCL 691.1407(1), "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." Governmental immunity is to be liberally construed: "The immunity from tort liability provided by the [GTLA] is expressed in the broadest possible language; it extends to all governmental agencies and applies to all tort liability when governmental agencies are engaged in the exercise or discharge of governmental functions." *McLean v. McElhaney*, 289 Mich. App. 592, 598; 798 N.W.2d 29 (2010). However, the grant of immunity under the GTLA is subject to six statutory exceptions, *Wesche v. Mecosta Co. Road Comm.*, 480 Mich. 75, 84; 746 N.W.2d 847 (2008), that must be narrowly construed. *McLean*, 289 Mich. App. at 598.

"A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception." *Ross v. Consumers Power Co.*, 420 Mich. 567, 625; 363 N.W.2d 641 (1984), superseded by statute on other grounds as stated in *Peters v. Bay Fresh Start, Inc.*, 161 Mich. App. 491, 498 (1987). "[A] governmental function is 'an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.' " *Dextrom v. Wexford Co.*, 287 Mich. App. 406, 416; 789 N.W.2d 211 (2010), quoting MCL 691.1401(f). "Governmental immunity is not an affirmative defense proffered by governmental defendants, but rather is a characteristic of government; therefore a party suing a unit of government must plead in avoidance of governmental immunity." *Kendricks v. Rehfield*, 270 Mich. App. 679, 681; 716 N.W.2d 623 (2006) (quotation marks and citation omitted). "To be effective, such pleading must state a claim that fits within a statutory exception to immunity or include facts that indicate the action at issue was outside the exercise of a governmental function." *Id.*

The resolution of this case involves the proper interpretation and application of the GTLA. Defendant contends that the GTLA provides immunity for all actions that involve a governmental function that do not fall within one of the statutory exceptions. Plaintiff generally agrees with defendant's contention, but argues that gross negligence is an exception provided for within the text of the GTLA. Because plaintiff concedes that defendant was engaged in a governmental function, we need only address whether the allegation of gross negligence is sufficient to avoid the application of governmental immunity and allow the suit to proceed.[1]

***3** "MCL 691.1407(1) ... broadly provides that 'a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.' " *In re Bradley Estate*, 494 Mich. 367, 378; 835 N.W.2d 545 (2013) (emphasis omitted), quoting MCL 691.1407(1). "To overcome governmental immunity for tort liability, then, plaintiffs ... must either (1) plead a tort that falls within one of the GTLA's stated exceptions, or (2) demonstrate that the alleged tort occurred outside the exercise or discharge of a governmental function." *Genesee Co. Drain Comm'r v. Genesee Co.*, 309 Mich. App. 317, 327; 869 N.W.2d 635 (2015) (footnotes omitted). "The statutory exceptions contained in the GTLA are: (1) the highway exception, MCL 691.1402, (2) the motor vehicle exception, MCL 691.1405, (3) the public building exception, MCL 691.1406, (4) the governmental hospital exception, MCL 691.1407(4), (5) the proprietary function exception, MCL 691.1413, and (6) the sewage system event exception, MCL 691.1417." *In re Bradley*, 494 Mich. at 378 n. 21.

Noticeably absent from the list of statutory exceptions is gross negligence. Instead, gross negligence is referenced in MCL 691.1407(2), which provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, *each officer and employee*

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

> *of a governmental agency, each volunteer* acting on behalf of a governmental agency, and *each member* of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) *The officer's, employee's, member's, or volunteer's conduct* does not amount to gross negligence that is the proximate cause of the injury or damage. [Emphasis added.]

Although plaintiff argues that "MCL 691.1407(2)(c) permits liability for a governmental entity's gross negligence, it is clear that the statute only imposes liability on the individual actor, not the governmental entity. See *Yoches v. Dearborn*, 320 Mich. App. 461, 476; 904 N.W.2d 887 (2017) ("MCL 691.1407(1) provides immunity to a governmental agency without regard to an employee's gross negligence," while "MCL 691.1407(2) provides immunity for governmental employees ... [except] when the employee's conduct constitutes gross negligence."). Accordingly, plaintiff's argument that the allegations of gross negligence in the complaint permitted the lawsuit to proceed is without merit.

The parties next disagree about whether vicarious liability could allow plaintiff's claim of gross negligence to survive summary disposition, and both cite *Ross* to support their respective position. The *Ross* Court considered various aspects of governmental immunity and the GTLA, including whether a governmental entity can be vicariously liable for the tort of its employee. *Ross*, 420 Mich. at 621-625. The Court acknowledged that the GTLA is silent with respect to whether vicarious liability may be imposed upon a governmental entity, but noted that prior decisions had impliedly acknowledged that vicarious liability may be imposed on the basis of respondeat superior. *Id.* at 623. However, the Court cautioned that "courts must be careful not to destroy an agency's immunity by indiscriminately imposing vicarious liability whenever individual officers, employees, and agents are held personally liable for their torts." *Id.*

***4** In the context of governmental immunity, a governmental entity can be vicariously liable for the tort of its employee "only where the individual tortfeasor acted during the course of his or her employment and within the scope of his or her authority." *Id.* at 624. But that is not the end of the inquiry:

> Even when the tort is committed during the employee's course of employment and is within the scope of the employee's authority, the governmental agency is not automatically liable. Where the individual tortfeasor is acting on behalf of an employer, the focus should be on the activity which the individual was engaged in at the time the tort was committed. *A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception.* The agency is vicariously liable in these situations because it is in effect furthering its own interests or performing activities for which liability has been statutorily imposed. However, if the activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function (i.e., the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune pursuant to § 7 of the governmental immunity act. [*Id.* at 624-625 (citations omitted; emphasis added).]

Thus, plaintiff's argument that the alleged gross negligence of defendant's employees can support vicarious liability is without merit; plaintiff conceded that

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

operating the water supply is a governmental function and, as noted, none of the statutory exceptions apply. See *Yoches*, 320 Mich. App. at 476-477 ("Consequently, if an exception to governmental immunity does not apply 'as otherwise provided in this act,' ... the [governmental entity] would not be vicariously liable for [the entity's employee's] negligence, regardless of whether it rises to the level of gross negligence.").

Plaintiff notes that the trial court denied defendant's motion for summary disposition in part because no discovery had been conducted. Even though the lack of discovery was attributable to the pandemic, it does not change the fact that plaintiff failed to plead in avoidance of governmental immunity. Governmental "immunity protects the state not only from liability, but also from the great public expense of having to contest a trial." *Odom v. Wayne Co.*, 482 Mich. 459, 478; 760 N.W.2d 217 (2008). Therefore, "[a] plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity." *Id.* at 478-479. "Placing this burden of the plaintiff relieves the government of the expense of discovery and trial in many cases." *Id.* at 479. For the reasons already discussed, plaintiff failed to plead in avoidance of governmental immunity as to defendant, and, therefore, the trial court erred in denying its motion for summary disposition.

Finally, defendant asserts plaintiff's breach-of-contract claim in the amended complaint was legally insufficient on its face and was merely an attempt to relabel his tort claim.[2] Although a breach-of-contract claim is not barred by governmental immunity merely because the underlying facts could support a tort claim, *Ross*, 420 Mich. at 647-648, the claim must be examined to determine whether it is an attempt to disguise a tort claim as a contract claim. *Penner v. Seaway Hosp.*, 169 Mich. App. 502, 509-510; 427 N.W.2d 584 (1988). "In determining whether a claim is based in contract or tort, courts are not bound by the label assigned to the claim by the plaintiff." *Broz v. Plante & Moran, PLLC*, 326 Mich. App. 528, 548; 928 N.W.2d 292 (2018), vacated in part on other grounds 504 Mich. 892 (2019). "Rather, a court is required to consider the gravamen of the suit based on the complaint as a whole." *Id.* "[W]hen a party breaches a duty stemming from a legal obligation, other than a contractual one, the claim sounds in tort." *In re Bradley*, 494 Mich. at 384.

***5** It is unnecessary to determine whether a contract between the parties existed. Instead, this issue can be quickly disposed of on the basis of how the alleged breach arose. Plaintiff alleges that defendant breached the contract to turn off the water supply to the building by failing to turn off the water. But the alleged breach does not arise from a contractual obligation to turn off the water. Instead, defendant's office of water department has a legal obligation covering "the maintenance and operation of the water supply, plumbing equipment, distribution system, fire hydrants, meters and all other appurtenances of the water supply system of the city." Caro Ordinances, § 38-96. Because the alleged breach arises of out defendant's legal obligation to operate and maintain the water supply, plaintiff breach-of-contract claim sounds in tort, rather than contract. Accordingly, the defendant is entitled to governmental immunity as to plaintiff's breach-of-contract claim.

Reversed and remanded for entry of an order granting defendant's motion for summary disposition consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in N.W. Rptr., 2021 WL 1941635

Footnotes

1 Even if plaintiff did not concede that defendant was engaged in a governmental function, we would conclude that defendant's operation of the water supply is indeed a governmental function. See *NL Ventures VI Farmington, LLC v. Livonia*, 314 Mich. App. 222, 244; 886 N.W.2d 772 (2015).

2 To the extent that defendant argues that the trial court abused its discretion by granting plaintiff's motion to amend his complaint, we do not address that question. We note that defendant's initial brief on appeal does not contain a statement of the question involved that challenges the trial court's ruling on that motion. *Caldwell v. Chapman*, 240 Mich. App. 124, 132; 610 N.W.2d 264 (2000) (declining to consider an issue that was not set forth in the statement

of questions presented). And, although an appellant in an appeal as of right from a final order may raise issues relating to prior orders, *Green v. Ziegelman*, 282 Mich. App. 292, 301 n. 6; 767 N.W.2d 660 (2009), the order granting plaintiff's motion to amend the complaint was entered after the order denying summary disposition. Moreover, defendant objected to the entry of the order granting plaintiff's motion to amend the complaint on procedural grounds and the trial court stayed proceedings before the procedural issues could be resolved. Regardless, the parties agree that the trial court addressed defendant's motion for summary disposition by reviewing the allegations in plaintiff's amended complaint, and, if the "contract" claim is actually a tort claim, as defendant contends, then the issue is a question of law. See *Co. Rd. Ass'n of Mich.*, 287 Mich. App. at 117-118 (stating that whether governmental immunity applies is a question of law).

End of Document

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

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

rf

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

FILED Received for Filing Oakland County Clerk 9/27/2023 4:46 PM

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

BRIAN ZEZULA,

Plaintiff,

v.

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

Defendants,

and

DTE ENERGY COMPANY,

Cross-Plaintiff,

v.

KALTZ EXCAVATING COMPANY, INC.,

Cross-Defendant.

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

LIONEL E. BASHORE (P-58599)
DANIEL A. GROVES (P-74026)
Bashore Green Law Group
Attorneys for Plaintiffs
17 South Saginaw Street, 2nd Floor
Pontiac, Michigan 48342
(248) 209-6009 Ph. (248) 209-6010 Fax
e-Mail: [redacted]
juliya@bglawpc.com

NICOLE E. WILINSKI (P61904)
BRIAN A. CATRINAR (P76320)
Collins Einhorn Farrell, P.C.
Attorneys for Defendant Brown
4000 Town Ctr., Ste. 909

FRANK A. MISURACA (P55643)
Kaufman, Payton, & Chapa
Attorneys for Defendant/Cross-Plf DTE
30833 Northwestern Hwy., Suite 200
Farmington Hills, MI 48334
(248) 626-5000 Ph. (248) 626-2843 Fax
e-Mail: famisuraca@kaufmanlaw.com

MICHAEL F. SCHMIDT (P25213)
Harvey Kruse, P.C.
Attorney for Defendant Kaltz Excavating
1050 Wilshire Dr., Ste. 320
Troy, MI. 48084-1526
(248) 649-7800 Ph. (248) 649-2316 Fax
mschmidt@harveykruse.com

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

Southfield, MI. 48075-1408
(248) 351-6022 Ph. (248) 351-6021 Fax
Patrick.crandell@ccflawyers.com
Nicole.wilinski@ccflawyers.com

MARGARET T. DEBLER (P43905)
Rosati Schultz Joppich & Amtsbuechler PC
Attorney for Independence Twp
27555 Executive Drive, Suite 250
Farmington Hills, Michigan 48331-3550
PH (248) 489-4100/ FX (248) 489-1726
e-Mail: mdebler@rsjalaw.com

/

PLAINTIFF'S RESPONSE TO DEFENDANT INDEPENDENCE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION

NOW COMES Plaintiff, Brian Zezula, by and through his legal counsel at Bashore Green Law Group, and for his Response to Defendant Independence Township's Motion for Summary Disposition, states as follows:

Plaintiff has had the opportunity to review Defendant Independence Township's Motion for Summary Disposition (MSD) as well as Plaintiff has had the opportunity to review Defendant Kaltz Excavating Company, Inc. (Kaltz) Response to Independence Township's MSD. Plaintiff is further aware that this Honorable Court's MSD Scheduling Order allows for Independence Township to file a Reply brief to Katltz's Response no later than October 4, 2023, even though Plaintiff's Response to Independence Township's MSD is due today.

As such, Plaintiff is very interested in seeing Independence Township's Reply Brief regarding responsive arguments to Kaltz's arguments made in its MSD Response. Barring that information, Plaintiff respectfully believes at this point in time, the heart of the two arguments may boil down to how each defendant is using and applying terms of art found within MISS DIG and Public Act 174 as well as whether sources of authority that Kaltz refers to in its Response are statutory authorities (or otherwise industrial standard practice guidelines / authorities), i.e., the Michigan Damage Prevention Board's "Best Practices."

Plaintiff believes there may be confusion (at least for Plaintiff) when any given defendant

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

uses terms of art from MISS DIG – Public Act 174 and statutory law that conflicts and contradicts another defendant's understanding and use of the same term. Plaintiff understands that our Michigan courts are given broad discretion over interpretation of statutory language and how to apply specific language and terms to any given law and case based on the facts of each. But, in a situation where terms of art such as interdictor lines, sewer leads, lateral lines, facilities, utilities, stubs, appurtenances, and so on are used, Plaintiff has found on several occasions when speaking to the different parties (or through discovery) that the same terms were being intermixed or generally applied in far too broad of a manner for Plaintiff to have precise clarity. Should it be the case that Kaltz is understanding and defining the terms appurtenances, utilities, facilities and sewer leads differently that what Independence Township is, there is a problem. Independence Township has made it known that a sewer lead is (in this case) a private sewer lead. Plaintiff understands that Kaltz doesn't believe the definition of "private" to be accurate. Thus, Plaintiff looks forward to a possible filing by Independence Township regarding a Reply Brief to Kaltz's MSD Response for further clarity. It won't be until oral arguments that these arguments can be better argued by Plaintiff.

WHEREFORE and for all the reasons above, Plaintiff respectfully leaves it to the discretion of this Honorable Court regarding Independence Township's Motion for Summary Disposition. Plaintiff further notes that discovery is not closed in this matter until October 20, 2023. Additional discovery time will clear up any confusion or misunderstandings (at least on Plaintiff's part) and that an extension of the discovery cut-off date is certainly needed.

Respectfully submitted,
Bashore Green Law Group

/s/ Daniel A. Groves
DANIEL A. GROVES
17 S. Saginaw St., 2nd Floor

September 27, 2023

Pontiac, MI. 48342
(248) 209-6009 Ph. (248) 209-6010 Fax
daniel@bglawpc.com
juliya@bglawpc.com

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

PROOF OF SERVICE

Faith Vue states under oath that on Monday, September 27, 2023, she served copies of the following documents: *(1) Plaintiff's Response to Defendant Independence Township's Motion for Summary Dispostion , and (2) a copy of this Proof of Service,* **upon all attorneys of record.**

I declare that the statements above are true to the best of my information, knowledge and belief.

/s/ Faith Vue

FILED Received for Filing Oakland County Clerk 9/26/2023 4:30 PM

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

rf

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.

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.
1050 Wilshire Drive, Suite 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

Nicole E. Wilinski (P61904)
Brian A. Catrinar (P76320)
COLLINS EINHORN FARRELL P.C.
Attorneys for Defendant Nina Brown
4000 Town Ctr, Ste. 909
Southfield, MI 48075-1408
(248) 351-6022
Nicole.wilinski@ceflawyers.com
Brian.catrinar@ceflawyers.com

Frank A. Misuraca (P55643)
KAUFMAN, PAYTON & CHAPA, PC
Attorney for Defendant DTE
30833 Northwestern Hwy., Ste. 200
Farmington Hills, MI 48334
(248) 626-5000/fax: (248) 626-2843
famisuraca@kaufmanlaw.com

Margaret T. Debler (P43905)
Andrea M. Pike (P74755)
ROSATI SCHULTZ JOPPICH & AMTSBUECHLER P.C.
Attorney for Independence Twp.
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
mdebler@rsjalaw.com

Morgan A. McAtamney (P80047)
THE KELLY FIRM, P.C.
Attorneys for Independence Twp.
2825 University Dr.
Auburn Hills, MI 48326-2544
(248) 655-7025
morgan@kellyfirmoc.com

ANSWER BY DEFENDANT KALTZ EXCAVATING COMPANY, INC. TO MOTION FOR SUMMARY DISPOSITION BY DEFENDANT INDEPENDENCE TOWNSHIP ORAL ARGUMENT SET FOR OCTOBER 11, 2023 AT 8:30 A.M.

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

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

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

STATEMENT OF FACTS

The plaintiff, Brian Zezula, filed suit against the defendants Nina Brown, DTE Energy Company and Kaltz Excavating Company on 12/23/2022 alleging damage to his home from alleged sanitary sewage backups of 12/02/2020 and 12/29/2020.

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.

Plaintiff's allegations against Kaltz are that Kaltz struck the plaintiff's sanitary sewer lead while doing a bore job for the defendant DTE Energy Company, running an underground electrical service to the premises of the defendant Brown who lives across the street from the plaintiff Zezula.

In accord with the Miss Dig Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq*, before beginning the underground work, Kaltz submitted a request to Miss Dig to mark all of the facilities in the area of the bore job. (Copy attached as Exhibit A). Per the Miss Dig Act, this was sent to multiple companies potentially having underground facilities in the area and also various governmental entities who had facilities in the area including Independence Township and the Oakland County Drain Commission. (Copy attached as Exhibit A).

Pursuant to the statute, Miss Dig then issued to Kaltz the responses by the various entities and Independence Township responded regarding Independence Township's sanitary and water with "NO CONFLICT." (Copy of Miss Dig response attached as Exhibit B).

Kaltz employees then went to the scene and did not note any marks showing any conflict with the bore job for underground sewers which would require green paint, stakes or flags per MCL 460.727(2) and in addition Kaltz had been provided the response by Independence Township of "NO CONFLICT." (See Exhibit B).

According to plaintiff's complaint, the plaintiff claims the plaintiff had sewage backups on

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

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

December 2, 2020 and December 29, 2020. (Plaintiff's second amended complaint, ¶ 15).

To determine if there actually was a conflict between the bore job and any facilities in the area, on 03/01/2023 Kaltz served a notice of record deposition by subpoena on Independence Township (before Independence Township has been added as a defendant) to produce requested documents regarding Independence Township facilities in the area, 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. (Copy attached as Exhibit C). There were five requests.

Independence Township responded with unresponsive documents producing only a document regarding the Miss Dig call, a permit for the water/sewer connection for one of the six 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 claimed it had no liability. ***None of the requested documents were provided.*** (See copy of Independence Township's response to subpoena attached as Exhibit D). This failure to respond was in violation of MCR 2.305.

The plaintiff then filed plaintiff's second amended complaint on 06/13/2023 naming Independence Township as a defendant. Independence Township did not file its response pleadings until 07/31/2023. Kaltz then filed a request to produce to Independence Township on 08/01/2023, one day after Independence Township filed its response pleadings. The request to produce was identical to the request previously made by Kaltz by subpoena and notice of record deposition, in response to which Independence Township had failed to produce any of the requested documents. (Kaltz 08/01/2023 requests to produce to Independence Township attached as Exhibit E).

Independence Township then waited 28 days and filed what it called "Objections and Response to Defendant Kaltz Excavating Company's Request to Produce." (Copy attached as Exhibit F). There was no response to any of the requests. ***Nothing was produced.*** All that was provided was the same

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

objection to every request, claiming that Independence Township has governmental immunity and has no liability and does not have to produce anything.

At the time Kaltz made the request there were only 10 weeks left in discovery and at the time Independence Township filed its non-response there were only six weeks left in discovery. There had been no delay whatsoever by Kaltz, it had filed the request to produce the day after Independence Township appeared in the case and filed its answer.

Independence Township then filed a motion for protective order on September 1, 2023, arguing that all discovery involving Independence Township should be terminated pending argument of Independence Township's pending motion for summary disposition which has been set by the court for oral argument on October 11, 2023.

The Court has set October 18, 2023 (only two days before the October 20, 2023 discovery cutoff date) for argument on the Independence Township motion for protective order. On September 8, 2023, Kaltz filed its answer to Independence Township's motion for protective order.

Kaltz filed a motion to compel responses by Independence Township to Kaltz' discovery requests on September 14, 2023, which is set for hearing for October 18, 2023.

Kaltz has argued in its answer to Independence Township's motion for protective order and Kaltz' motion to compel Independence Township to respond to its discovery requests that Independence Township, in violation of the court rules, has refused to participate in discovery in this case to date to attempt to avoid liability by filing a meritless motion for summary disposition claiming that it is entitled to governmental immunity.

Independence Township filed its motion for summary disposition arguing that it is entitled to governmental immunity on August 16, 2023.

The motion is based on a blatant misrepresentation of the existing law regarding governmental immunity.

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

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

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

ARGUMENT

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

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***. Effective 04/01/2014 the Legislature amended the governmental immunity statute to add 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 of the provisions of the governmental immunity statute 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 Corby 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

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

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

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 of its argument *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.

In response to the Miss Dig marking request (Exhibit A) made by Kaltz 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 B).

Independence Township continues its misrepresentation of the law regarding what it calls the "sewage-disposal-system-event exception to governmental immunity, 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

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

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

> 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.

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)

Thus, failing to mark facilities is considered a "defect" which is also not entitled to governmental immunity per MCL 691.1417, providing another exception to governmental immunity, which

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

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

Independence Township misrepresents.

Thus, Independence Township's motion for summary disposition is based on a misrepresentation of the law. The amendment to the Governmental Immunity Act in 2014 was made in response to the exact conduct engaged by Independence Township in this case by governmental entities failing and refusing to mark facilities resulting in property damage and injuries.

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 three lots on Forrest View Drive, including the plaintiff's lot and Forrest View Drive itself. (Copy attached as Exhibit A).

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

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 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 its 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***

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

customary methods using the uniform color code of the American national standards institute as follows:

. . . .

(h) ***Green — sewers and drain lines***. (emphasis added).

Use of the word "shall" indicates a mandatory and imperative directive. *Burton v Reed City Hosp Corp,* 471 Mich 745, 752; 691 NW2d 424 (2005) (". . . The Legislature's use of the word 'shall' indicates a mandatory and imperative directive . . . ").

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 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 G) 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

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

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

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

> 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 G)

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, and did ***not*** 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 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.)

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

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

III. SINCE THE PLAINTIFF ZEZULA'S DAMAGE OCCURRED, INDEPENDENCE TOWNSHIP HAS BEEN ENGAGED IN A COVER-UP AND A REFUSAL TO COMPLY WITH A SUBPOENA OR ANSWER DISCOVERY REQUESTS AND HAS FILED A MOTION TO STAY PROCEEDINGS CLAIMING IT IS ENTITLED TO SUMMARY DISPOSITION.

From the time of the damage to the plaintiff's property, Independence Township has engaged in a campaign to deny all liability, place the blame on Kalz, DTE and Zezula's neighbor, Brown, and avoid complying with any subpoena requests or discovery requests in this case.

Independence Township refused to produce any of the requested documents in response to the subpoena served on Independence Township with the notice of records deposition on March 1, 2023. (Exhibits C and D). Independence Township then filed what it called "Objections and Response to Defendant Kaltz Excavating Company's Requests to Produce" on August 29, 2023 which stated objections that it did not have to respond to discovery because it was entitled to summary disposition and produced nothing in response to any of the requests. (Exhibit F).

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.

Now, Independence Township has filed a motion for protective order to terminate all discovery involving Independence Township.

Independence Township's motion for summary disposition should be denied and sanctions should be imposed including attorney fees pursuant to MCR 1.109 for filing a motion directly contrary to the applicable law and misciting the law.

In addition, Independence Township's motion to stay proceedings should be denied and Kaltz's motion to compel should be granted and costs and sanctions should be imposed on Independence Township for filing the motion to stay and for failing to participate in discovery pursuant to MCR

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

1.109(E)(5)(6)(7) and MCR 2.313. In addition, it is requested that discovery be extended by an additional 90 days to allow the parties to obtain discovery which Independence Township has refused to provide.

RELIEF REQUESTED

It is respectfully requested that this Honorable Court deny Independence Township's motion for summary disposition and impose sanctions including attorney fees pursuant to MCR 1.109(E)(5)(6)(7) for filing the motion which misstates the applicable law. In addition, it is respectfully requested that his Honorable Court deny Independence Township's motion to stay and award costs and sanctions for filing this motion and for failing to participate in discovery including costs and attorney fees per MCR 1.109(E)(5)(6)(7) and MCR 2.313.

It is further respectfully requested that the Court grant Kaltz' motion to compel and require Independence Township to file responsive answers to defendant Kaltz' request to produce of August 1, 2023 within seven days in accordance with the Michigan Court Rules and that discovery be extended 90 days to allow the parties to complete discovery.

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 26, 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 26, 2023

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

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

INDEX OF EXHIBITS

A. Miss Dig Request

B. Miss Dig Response

C. Subpoena and Notice of Records Dep

D. Response by Independence to Subpoena

E. Requests to Produce to Independence Township by Kaltz

F. Objection and Response by Independence Township to Kaltz Requests to Produce

G. Michigan Damage Prevention Board Best Practice

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

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

EXHIBIT A

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

Ticket: [illegible] 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: WSTE INWSE, 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 : 248-333-1717 Ext: 224 Fax: Text: 810-795-4563
Email : kevin.oneal@kaltzexcavating.com

Work Type : REPLC UG ELEC SERV - LTD SERV
Done for : D T E
Field Contact: KEVIN ONEAL (CELL) Number: 810-795-4563

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 DE8010 INDSANI INDWTR OAKCDRSWR

Member	Name	Act	Shw	Div	Cty	Plc	Grd	Shp	Opr	Sty	Ctr
ATTD	ATT	Y	Y	Y			A				
CECD	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				
CPCD12	CONSUMERS ENERGY T&S	N	N	N			A				
DE8010	DETROIT EDISON	Y	Y	Y			A				
DSGATTS	ATT	Y	N	N			A			R	
DSGCES	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			
[illegible]	[illegible]	Y	Y	Y			A				
INDTWP	INDEPENDENCE TOWNSHIP	Y	N	Y					A		
INDTWPEN	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				

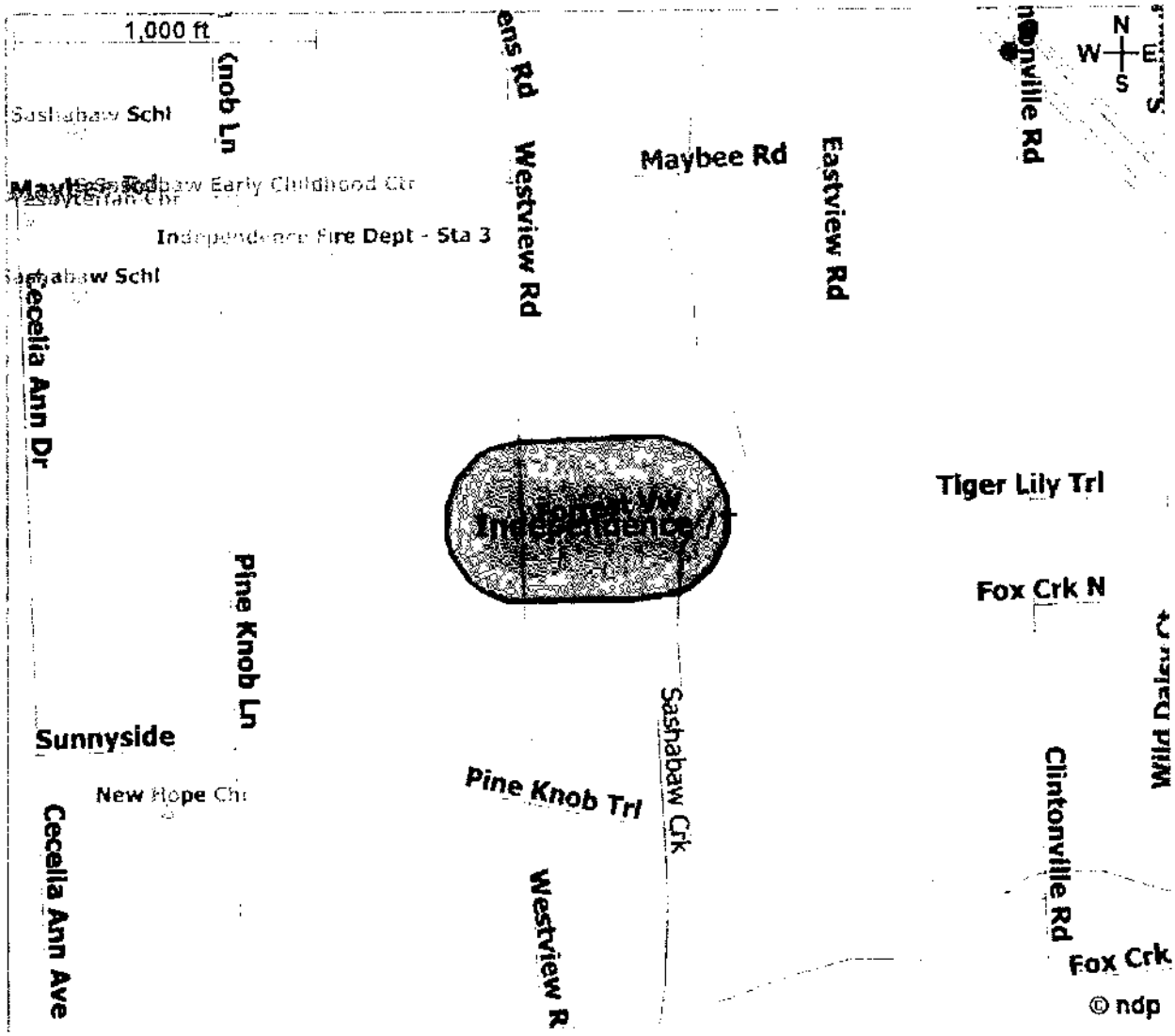
1/3

SMSCFM	SMS CONFIRMATION SYSTEM M	Y	N	Y				A		
TESTBGNG	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
INDSANT	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

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



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

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

EXHIBIT B

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

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		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

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

									11AM 12/1/20 WRONG ADDRESSES NEEDED LOTS 5128 5122 & 5116
CEGDIS	CONSUMERS ENERGY GAS DISTRIBUTION	NEW	00B	005		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		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
- 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.

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

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

EXHIBIT C

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

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

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.
1050 Wilshire Drive, Suite 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

Patrick D. Crandell (P76249)
COLLINS EINHORN FARRELL P.C.
Attorneys for Defendant Nina Brown
4000 Town Ctr, Ste. 909
Southfield, MI 48075-1408
(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.

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

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

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

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 5/7/2025 12:11:43 PM

Approved SCAO

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

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

v

Defendant(s)/Respondent(s)

Nina Brown et al.

✓ Civil | Criminal

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.

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 2.506

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

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

Service fee	Miles traveled Fee	
$	$	
Incorrect address fee	Miles traveled Fee	TOTAL FEE
$	$	$

_____
Signature

_____
Name (type or print)

_____
Title

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

My commission expires: _____ (Date) Signature: _____ (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 _____ (Date) in _____ County, Michigan.

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

Notary public, State of Michigan, County of _____

MCR 2.105

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

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.

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

EXHIBIT D

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

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

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

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

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

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

Miss Dig

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

Importance: High

```
INDTWP 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 INDSANI
Members : INDWTR OAKCDRSWR
```

Flora

PERMIT NO 00-0154

JAMES R. WENGER
PAID
0 3 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

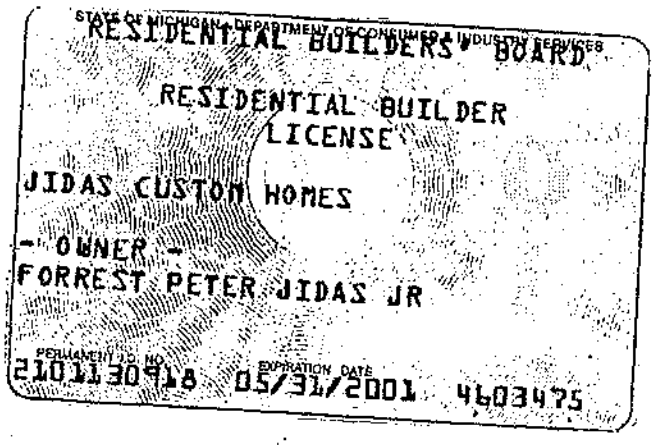
CURB BOX LOCATION

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

TOTAL P.01

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


STATE OF MICHIGAN DEPARTMENT OF CONSUMER & INDUSTRY SERVICES
RESIDENTIAL BUILDERS' BOARD
RESIDENTIAL BUILDER
LICENSE
JIDAS CUSTOM HOMES
- OWNER -
FORREST PETER JIDAS JR
PERMANENT I.D. NO
21011309 18
EXPIRATION DATE
05/31/2001
4603475

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

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

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



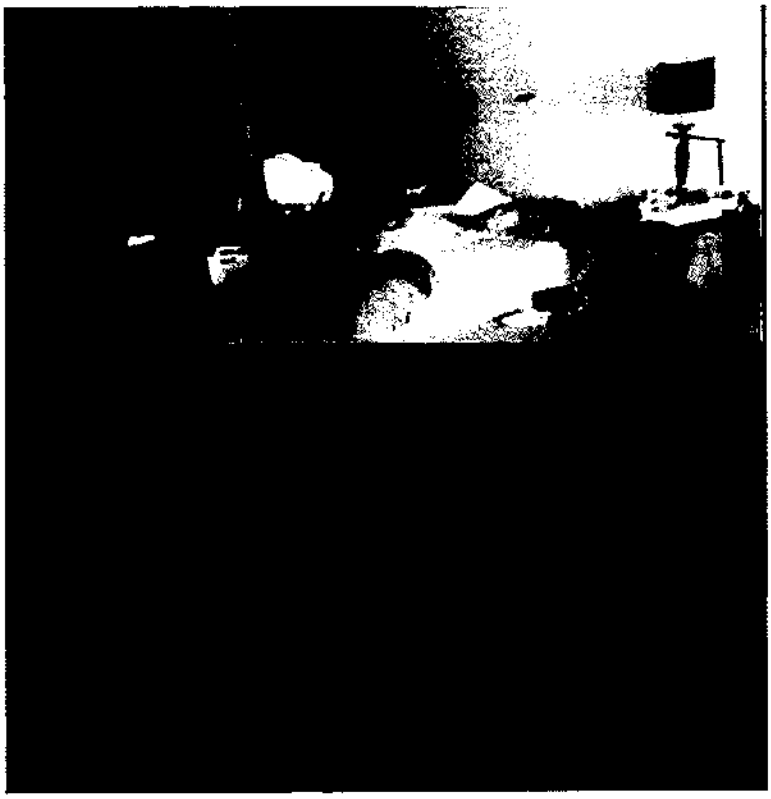
IMG_1053.JPG

IMG_1066.JPG



IMG_1066.JPG

IMG_1063.JPG



IMG_1063.JPG

IMG_1058.JPG

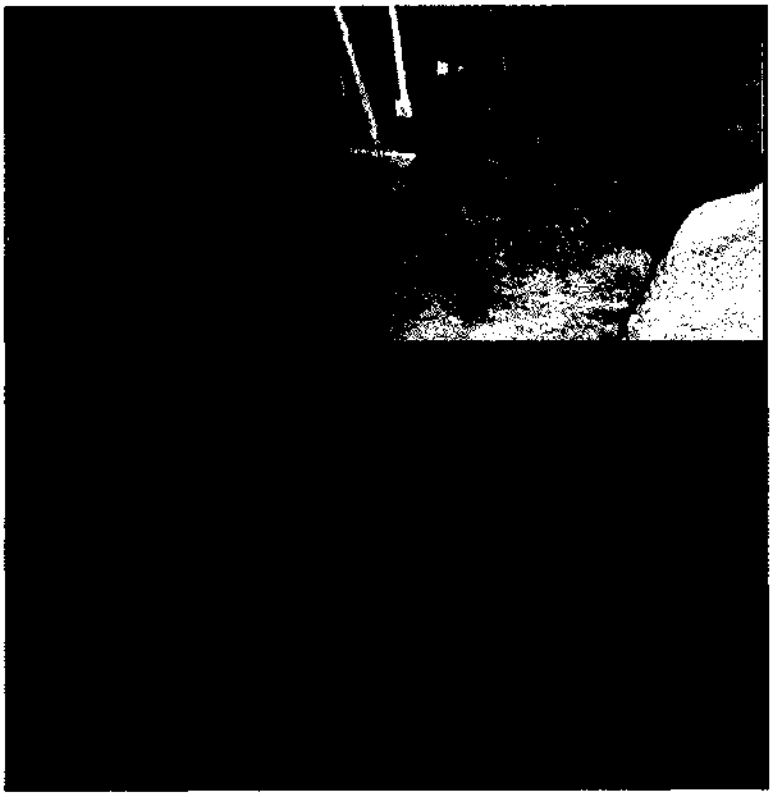


RECEIVED by MSC 5/7/2025 12:11:43 PM



IMG_1058.JPG

IMG_1064.JPG

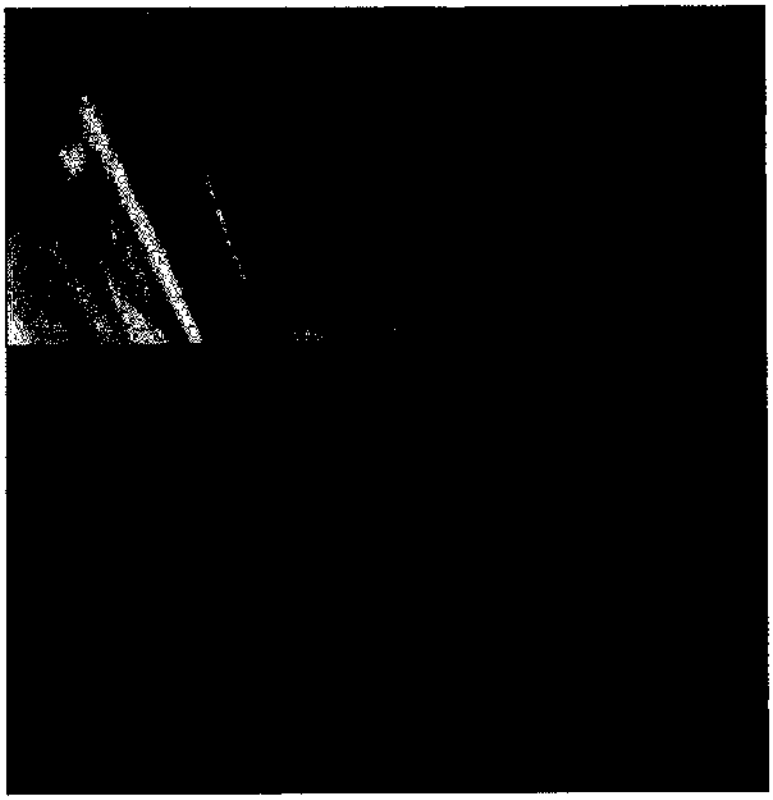


IMG_1064.JPG

IMG_1073.JPG

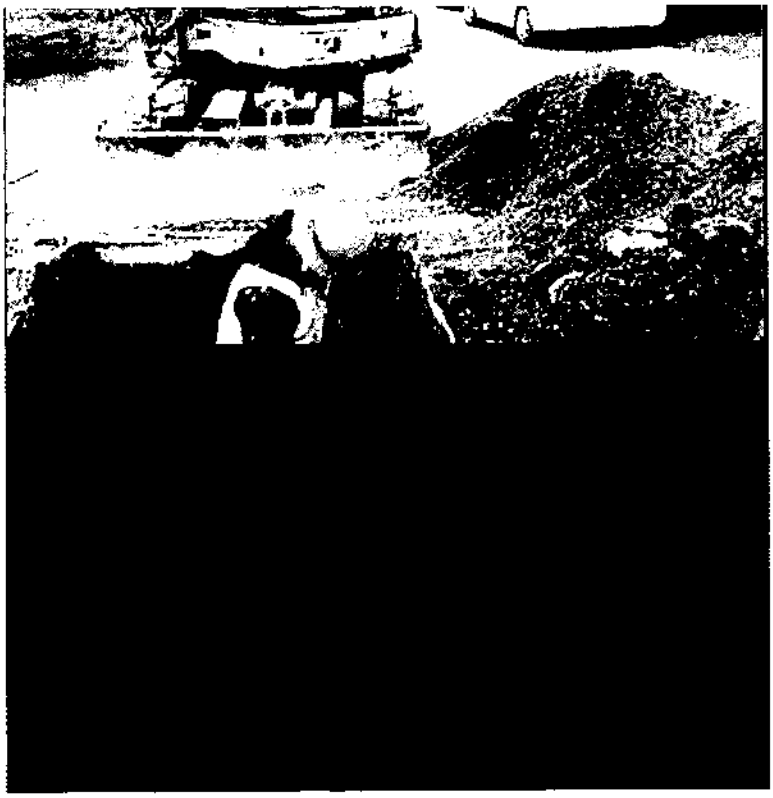
RECEIVED by MSC 5/7/2025 12:11:43 PM

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



IMG_1073.JPG

IMG_1081.JPG



IMG_1081.JPG

IMG_1084.JPG



IMG_1084.JPG

IMG_1097.JPG

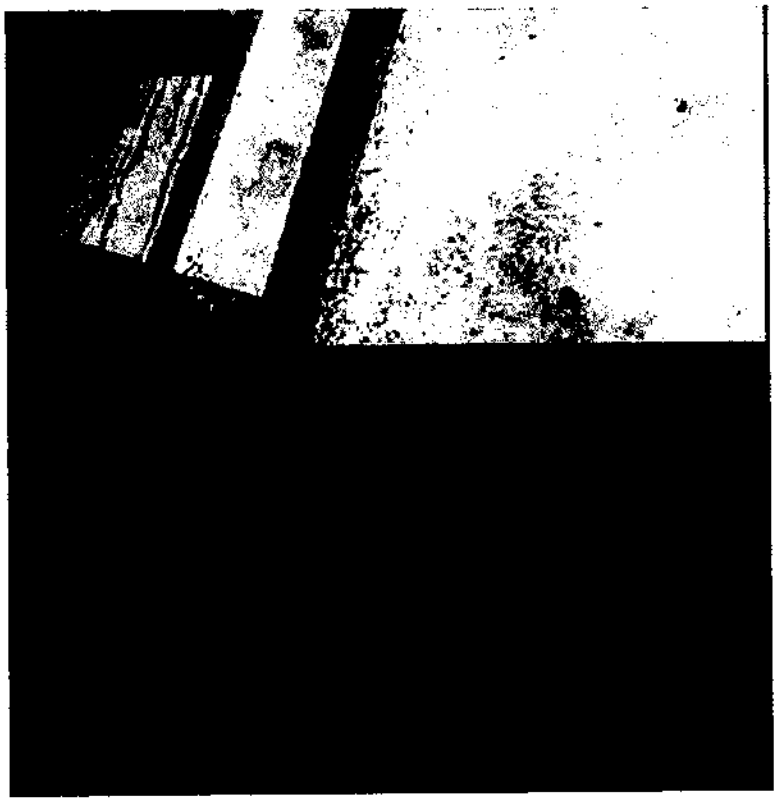


RECEIVED by MSC 5/7/2025 12:11:43 PM



IMG_1097.JPG

IMG_1100.JPG



IMG_1100.JPG

IMG_1065.JPG

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

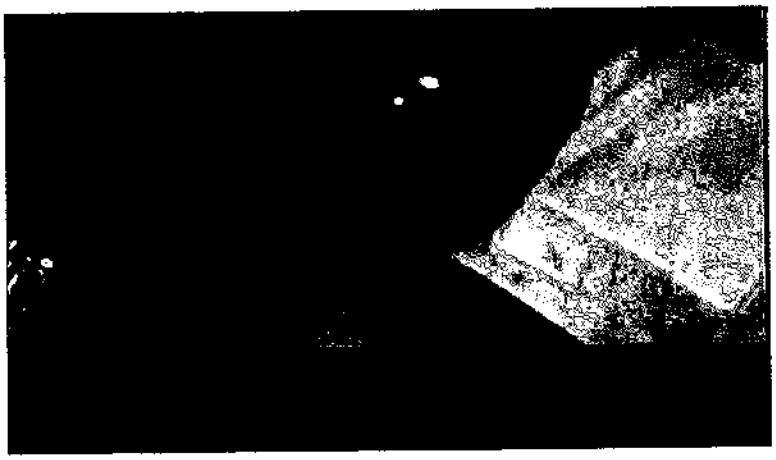
RECEIVED by MSC 5/7/2025 12:11:43 PM



IMG_1065.JPG

And the top pic of them all:

IMG_1091.JPG





IMG_1091.JPG

Thanks,

Brian

Brian Zezula Cell 248.894.1963

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

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

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 5/7/2025 12:11:43 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

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

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

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

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

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

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

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)

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

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

Report a Claim | Connect on LinkedIn

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

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

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

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

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

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

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

"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

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

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

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

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
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

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

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

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

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

EXHIBIT E

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

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.
1050 Wilshire Drive, Suite 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

Nicole E. Wilinski (P61904)
Brian A. Catrinar (P76320)
COLLINS EINHORN FARRELL P.C.
Attorneys for Defendant Nina Brown
4000 Town Ctr, Ste. 909
Southfield, MI 48075-1408
(248) 351-6022
Nicole.wilinski@ceflawyers.com
Brian.catrinar@ceflawyers.com

Frank A. Misuraca (P55643)
KAUFMAN, PAYTON & CHAPA, PC
Attorney for Defendant DTE
30833 Northwestern Hwy., Ste. 200
Farmington Hills, MI 48334
(248) 626-5000/fax: (248) 626-2843
famisuraca@kaufmanlaw.com

Margaret T. Debler (P43905)
ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER P.C.
Attorney for Independence Twp.
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
mdebler@rsjalaw.com

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

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

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

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

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.

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

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
1050 Wilshire Drive, Suite 320
Troy, Michigan 48084-1526
(248) 649-7800
mschmidt@harveykruse.com

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

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

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

EXHIBIT F

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

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

CA: 22-197937-NZ

HON: CHERYL A. MATTHEWS

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

Defendants.
_____ /

BASHORE GREEN LAW GROUP
Lionel E. Bashore (P58599)
Daniel A. Groves (P74026)
Attorneys for Plaintiff
17 South Saginaw St., 2nd Floor
Pontiac, MI 48342
(586) 803-0500
daniel@bglawpc.com

COLLINS EINHORN FARRELL PC
Nicole E. Wilinski (P61904)
Brian A. Catrinar (P76320)
Attorneys for Defendant Brown
4000 Town Center, Ste. 909
Southfield, MI 48075
(248) 455-4141
nicole.wilinski@ceflawyers.com
brian.catrinar@ceflawyers.com

HARVEY KRUSE, PC
Michael F. Schmidt (P25213)
Attorney for Defendant Kaltz
1050 Wilshire Dr., Ste. 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

KAUFMAN PAYTON & CHAPA, PC
Frank A. Misuraca (P55643)
Attorney for Defendant DTE
30833 Northwestern Hwy., Ste. 200
Farmington Hills, MI 48334
(248) 626-5000
famisuraca@kaufmanlaw.com

THE KELLY FIRM, PC
Morgan A. McAtamney (P80047)
Attorney for Independence Twp
2825 University Dr.
Auburn Hills, MI 48326-2544
(248) 655-7025
morgan@kellyfirmoc.com

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

_____ /

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

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

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

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

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.

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

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.

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

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),

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

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

/s/ Margaret T. Debler (P43905)
Attorneys for Attorney for Independence Twp.
34405 W. 12 Mile Rd., Ste. 200
Farmington Hills, MI 48331-5627
(248) 489-4100
mdebler@rsjalaw.com

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
☐ Hand Delivered ☐ Overnight courier
☐ Federal Express ***X Other: EService via MiFile***

/s/ Paula M. Rosenthal

EXHIBIT G

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

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

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.

FILED Received for Filing Oakland County Clerk 10/4/2023 3:17 PM

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

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
Lionel E. Bashore (P58599)
Daniel A. Groves (P74026)
Attorneys for Plaintiff
17 South Saginaw St., 2nd Floor
Pontiac, MI 48342
(586) 803-0500
daniel@bglawpc.com

COLLINS EINHORN FARRELL PC
Nicole E. Wilinski (P61904)
Brian A. Catrinar (P76320)
Attorneys for Defendant Brown
4000 Town Center, Ste. 909
Southfield, MI 48075
(248) 455-4141
nicole.wilinski@ceflawyers.com
brian.catrinar@ceflawyers.com

HARVEY KRUSE, PC
Michael F. Schmidt (P25213)
Attorney for Defendant Kaltz
1050 Wilshire Dr., Ste. 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

KAUFMAN PAYTON & CHAPA, PC
Frank A. Misuraca (P55643)
Attorney for Defendant DTE
30833 Northwestern Hwy., Ste. 200
Farmington Hills, MI 48334
(248) 626-5000
famisuraca@kaufmanlaw.com

THE KELLY FIRM, PC
Morgan A. McAtamney (P80047)
Attorney for Independence Twp
2825 University Dr.
Auburn Hills, MI 48326-2544
(248) 655-7025
morgan@kellyfirmoc.com

ROSATI SCHULTZ JOPPICH & AMTSBUECHLER PC
Margaret T. Debler (P43905)
Andrea M. Pike (P74755)
Attorneys for Independence Twp.
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
mdebler@rsjalaw.com
apike@rsjalaw.com

DEFENDANT INDEPENDENCE TOWNSHIP'S REPLY TO KALTZ EXCAVATING COMPANY, INC.'S ANSWER TO DEFENDANT INDEPENDENCE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION

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

The Township filed a motion for summary disposition of the one-count negligence claim alleged against it in Plaintiff's Second Amended Complaint ("Complaint") pursuant to MCR 2.116(C)(7) for governmental immunity and MCR 2.116(C)(8) for failure to state a valid claim. Co-Defendant Kaltz filed an Answer opposing the Motion, arguing that the Township violated its Ordinance and the Miss Dig Act and contends, unsuccessfully, that immunity exceptions apply.

NEITHER PLAINTIFF NOR KALTZ ESTABLISHED AN EXCEPTION TO THE TOWNSHIP'S GOVERNMENTAL IMMUNITY AS TO PLAINTIFF'S NEGLIGENCE CLAIM, REQUIRING SUMMARY DISPOSITION BE GRANTED TO THE TOWNSHIP

The Township is immune from Plaintiff's negligence claim, pursuant to the Michigan Governmental Tort Liability Act, MCL 691.1401, *et seq* (the "GTLA"). The Township is immune from tort liability if the government agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407. Kaltz admits, quoting *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 484 n2 (2006), that operating the Township's sewage system is a governmental function. Kaltz Answer, p. 7. See also *Baker v Waste Mgmt of Michigan, Inc*, 208 Mich App 602, 607-608 (1995). Plaintiff and Kaltz both failed to establish that Plaintiff's negligence claim against the Township falls within one of the recognized exceptions to governmental immunity so the claim is barred. MCL 691.1407; *Mack v City of Detroit*, 467 Mich 186, 201 (2002); *Lash v Traverse City*, 479 Mich 180, 199 (2007). It is important to decide immunity at the earliest possible stage. *Hunter v. Bryant*, 502 US 224 (1991).

A. A Violation of the Miss Dig Act Is Not an Immunity Exception

Plaintiff's Complaint alleges one count (Count IV) against the Township for "general negligence" and "common law negligence." Complaint, ¶¶ 42-44. Plaintiff alleges that the Township was negligent because it violated the MISS DIG underground facility damage prevention and safety act, MCL 460.721, *et seq* ("Miss Dig Act" or "Miss Dig"), and violated its Ordinance. *Id.* Plaintiff further alleges that "governmental immunity does not apply when the

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

governmental entity is operating or failing to operate outside the descriptions and duties of the prescribed governmental duties." Complaint, ¶ 44. Plaintiff did not plead an exception to governmental immunity; he pleaded only negligence. Kaltz's Answer attempts to amend Plaintiff's pleadings to shift liability away from it. Kaltz claims that the Township responded, "no conflict" and failed to mark its facilities so it violated Miss Dig, preventing immunity. Kaltz Answer, p. 6.

But Kaltz misinterprets the GTLA, misconstrues the Miss Dig Act, misrepresents case law, and misunderstands the rules of statutory construction when it alleges that a violation of the Miss Dig Act creates a seventh exception to governmental immunity. Kaltz provides no legal support because there is none.[1] Both the GTLA and Miss Dig contain clear and unambiguous language. *In re Bradley Estate, supra.* The GTLA says, "[t]he immunity provided by this act does not apply to liability of a governmental agency *under the MISS DIG* underground facility damage prevention and safety *act*." MCL 691.1407(7). But Plaintiff misinterprets Section 7 of the GTLA. Although a governmental agency may be liable under the Miss Dig Act, liability under the Miss Dig Act is confined to that liability that this statute spells out within it. *Id.* The provision is not an exception to tort immunity; it recognizes that Miss Dig contains express remedies set forth within it.

As recently as June 15, 2023, after the Miss Dig language was added to the GTLA, the Michigan Court of Appeals held that there are only six exceptions to governmental immunity under the GTLA. Liability under Miss Dig does not create a seventh exception to immunity as Kaltz alleges. *Gathright v Mission Hills Memorial Gardens, Inc,* 2023 WL 4043795, at *7 (Mich Ct App

[1] Kaltz's Answer includes seven exhibits that cannot be considered in the Township's MCR 2.116(C)(8) Motion. Although documentary evidence can be considered in response to a MCR 2.116(C)(7) motion, governmental immunity is a question of law. *Kendricks v Rehfield*, 270 Mich App 679, 682 (2006). Plaintiff did not plead an immunity exception and there is no immunity exception applicable here. Further, Kaltz's argument about statutory interpretation of the GTLA and the Miss Dig Act is also a question of law so Kaltz's documentary evidence is irrelevant. *In re Bradley Est,* 494 Mich 367, 377 (2013)(when construing a statute, the Court considers the statute's plain language and enforces the clear and unambiguous language as written).

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

June 15, 2023), attached as **Exhibit 5**. See also *Goodhue v Dept of Transportation*, 319 Mich App 526, 531 n1 (2017)(six exceptions to the broad grant of governmental immunity); *Schornak v Martinrea Hot Stampings, Inc*, 2020 WL 1968684, at *2 (Mich Ct App Apr 23, 2020), attached as **Exhibit 6**. Michigan Courts have ruled that in accordance with MCL 691.1407, no variety of negligence claims avoid governmental immunity. *Walby v City of Caro*, 2021 WL 1941635, at *3-4 (Mich Ct App May 13, 2021), Exhibit 4 to Motion.

Section 12(1) of **the Miss Dig Act 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 [the GTLA].** (emphasis added)." MCL 460.732(1). The Miss Dig Act permits a facility owner or operator to file a complaint with the Public Service Commission to seek a civil fine and, if applicable, damages from a governmental agency, but the Act does not reference a private cause of action against a municipality. MCL 460.732(2). The provisions of law concerning townships "shall be liberally construed *in their favor*." Mich Const 1963, Article 7, § 34; see also, *Altman v Meridian Twp*, 439 Mich 623 (1992). A complaint to the Commission that the Township violated the Miss Dig Act is the *exclusive* remedy against the Township for an alleged violation of the Miss Dig Act. Furthermore, a complainant must file the complaint form with the Commission within 270 days of the damage or 90 days of determining there was a violation, which has passed. Mich Admin Code R 460.11; MCL 460.732(2).

The express language in the GTLA and the Miss Dig Act are clear that (A) an alleged violation of the Miss Dig is not an exception to governmental immunity for torts like negligence under that Act, and (B) governmental immunity does not preclude a complaint to the Commission, but (C) it does not provide authority for a cause of action against a Township in Circuit Court for actual damages. Therefore, the Township is entitled to governmental immunity.

Plaintiff's Complaint never alleges *how* the Township allegedly violated the Miss Dig Act

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

or what it did or did not do. Complaint, ¶¶ 1-6, 42-44. Kaltz argues that the Township should have marked its facilities and it should not have put "no conflict" in response to the Miss Dig ticket request. However, as Kaltz points out, the Miss Dig Act only requires the facility owner or operator to **mark "its facilities in the area of the proposed excavation** or blasting…(emphasis added)." MCL 460.727(1). Plaintiff alleges that his private sewer lead/drain was damaged by Kaltz, which Kaltz does not contest in its Answer. Notably, it was not the Township's facility on the other side of the private road that was damaged so the Miss Dig markings would not have changed the outcome and there is no separate cause of action, not barred by immunity. There is nothing in the Miss Dig Act that expands the Township's requirement to mark beyond its facilities "in the area of" the proposed excavation and no express language that would include a private building lead/drain or connection, as Kaltz alleges. Kaltz Answer, pp. 9-10.

The Township's Ordinance states that individual building sewers are *not maintained by the Township* and an individual building sewer includes a house connection sewer to the sewers in the streets or easements. Ordinance, §§ 48-52(a), 48-84 (Motion Exh. 3). 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 "appurtenance" and tries to argue the Township had to mark more than just its main, but Plaintiff's private lead/drain was not a Township pipe used by it to transmit sewage – it was a drain used by Plaintiff to transmit sewage out of his home. As admitted by Plaintiff, 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." Kaltz Answer, pp. 9-10; Kaltz Exh. G. Best practices are not a law, rule, or regulation but mere suggestions or practices. Even so, Kaltz says

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

the Best Practices consist of a main in a *public right-of-way*. Kaltz Answer, p. 10; Kaltz Exh. G. It is undisputed that Plaintiff's damaged lead was "a private sewer lead beneath a private road," not in a "public" right-of-way. Exhibit 1 to Motion, Complaint, ¶¶ 8-11, 20-22, 32-33, 39.

B. The Sewer Exception to Immunity Is Not Applicable

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." MCL 691.1417; *Willett v Charter Twp of Waterford,* 271 Mich App 38, 46-50 (2006). The GTLA defines "sewage disposal system event" as "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). If a connection to the sewage disposal system on the affected property, including a building drain, was a substantial proximate cause of the overflow or backup, it is *not* a "sewage disposal system event" so immunity applies. MCL 691.1416(k)(ii). Plaintiff's private sewer lead was a *private building drain* so there was no sewage disposal system event. Kaltz's analysis of "defect" misrepresents the exception. Kaltz Answer, pp. 6-7. The Court only considers whether there is a defect *to the municipal system* if there is a sewage disposal system "event" and there was not. The Complaint alleges that Kaltz damaged Plaintiff's private sewer lead/drain, not that a defect in the municipal main caused his damage, and nothing related to operation of the Township's main caused sewage to back up. *Id.* See also Complaint, ¶¶ 31-34.

WHEREFORE, Defendant Independence Township respectfully requests that this Honorable Court enter an order granting summary disposition in favor of the Township and award it reasonable costs and attorney fees pursuant to MCR 2.625(A)(2).

Respectfully submitted,

October 4, 2023

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC
/s/ Andrea M. Pike
Margaret T. Debler (P43905)
Andrea M. Pike (P74755)
Attorneys for Independence Township

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

EXHIBIT 5

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

2023 WL 4043795
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Margaret GATHRIGHT, Individually and as Personal Representative of the Estate of Nathaniel Gathright, Natalyn Newsom, Annetta Gathright, and Natonya Gathright, Plaintiffs-Appellees,
v.
MISSION HILLS MEMORIAL GARDENS, INC., Defendant,
and
Crystal Springs Cemetery, also known as Crystal Springs Cementary, Defendant/Cross-Defendant-Appellant,
and
City of Benton Harbor, Defendant/Cross-Plaintiff/Cross-Defendant-Appellant,
and
C Management, Inc., doing business as Crystal Springs Cemetery Management, Defendant/Cross-Plaintiff/Cross-Defendant.
Margaret Gathright, Individually and as Personal Representative of the Estate of Nathaniel Gathright, Natalyn Newsom, Annetta Gathright, and Natonya Gathright, Plaintiffs-Appellees,
v.
Mission Hills Memorial Gardens, Inc., Defendant,
and
Crystal Springs Cemetery, also known as Crystal Springs Cementary, Defendant/Cross-Defendant,
and
City of Benton Harbor, Defendant/Cross-Plaintiff/Cross-Defendant,
and
C Management, Inc., doing business as Crystal Springs Cemetery Management, Defendant/Cross-Plaintiff/Cross-Defendant-Appellant.

No. 362182, No. 362424
|
June 15, 2023

Berrien Circuit Court, LC No. 2021-000127-CZ

Before: Cameron, P.J., and Murray and Gadola, JJ.

Opinion

Per Curiam.

*1 In these consolidated appeals, [1] defendants-appellants Crystal Springs Cemetery (the Cemetery), the City of Benton Harbor (the City), and C Management, Inc., appeal by right the trial court's order denying their motions for summary disposition, in part, pursuant to MCR 2.116(C)(7) [2] on governmental immunity grounds. In Docket No. 362182, the Cemetery and the City (referred to collectively as "City defendants") argue that the trial court erred by denying their motion for summary disposition because plaintiffs' claim under the Prepaid Funeral and Cemetery Sales Act (PFCSA) MCL 328.211 *et seq.*, was barred by

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

governmental immunity under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.* In Docket No. 362424, defendant C Management argues that the trial court erred by finding that it was not entitled to governmental immunity although it was acting as City defendants' "agent" when the alleged torts occurred. We affirm.

I. BACKGROUND

This case arises from a prepaid contract entered between plaintiff Margaret Gathright and the Cemetery on June 7, 2013, when Margaret purchased a burial plot, identified as number 19, for herself at the Cemetery. Margaret purchased the burial plot located directly beside her late husband, Nathaniel Gathright, who was buried in plot 18 the year prior.

In the latter part of 2013, City defendants entered into a cemetery management and operation agreement with C Management, Inc., for C Management to manage and operate the Cemetery. The agreement defined C Management as an independent contractor to the City. According to the agreement, the term was set to end on September 30, 2033, but included an option to terminate. Although several years later, C Management exercised its option to terminate the agreement with City defendants, effective March 15, 2020. C Management continued to manage and operate the Cemetery under the oversight of the City and at the direction of the Chairperson of the Cemetery board.

The dispute arose in December of 2020 when Margaret was visiting her husband's grave and discovered that a woman named Cleavy Bradley had been buried in the plot that Margaret purchased for herself in 2013. The record shows that Mrs. Bradley's son, Joe Bradley Jr., purchased plot number 20 for his mother, but that Mrs. Bradley was mistakenly buried in plot number 19.

II. PROCEDURAL HISTORY

Margaret and her three daughters, Natalyn Newsom, Annetta Gathright, and Natonya Gathright filed suit against defendants, asserting the following 12 counts in their second amended complaint: the violation of the PFCSA (Count I) and the Michigan Consumer Protection Act (MCPA) (Count II), wrongful interference with the right of burial (Count III), breach of fiduciary duty (Count IV), negligence (Count V), gross negligence (Count VI), negligent infliction of emotional distress (NIED) (Count VII), fraudulent misrepresentation (Count VIII), negligent/innocent misrepresentation (Count IX), breach of contract (Count X), conversion (Count XI), and specific performance (Count XII). Plaintiffs sought damages in excess of $25,000 for compensatory and punitive damages, treble damages, and costs and attorney fees.

*2 Each count asserted in plaintiffs' complaint rested in some way on allegations that defendants had a duty to reserve Margaret's pre-purchased burial plot, that they breached their duty by burying another person in her plot, and that plaintiffs were harmed as a result. The subject of these appeals are plaintiffs' claims under the PFCSA against City defendants and C Management and plaintiffs' claims for negligence and gross negligence against C Management. In their complaint, plaintiffs alleged that defendants violated the PFCSA by failing to keep "accurate accounts, books, and records of all transactions and accounts regulated by [the PFCSA]," MCL 328.218(1), and sought enforcement and damages under MCL 328.234. Plaintiffs further alleged that C Management was negligent in its management and operation of the Cemetery and breached its duty owed to plaintiffs to secure Margaret's burial plot beside her late husband by negligently burying another person in that plot, resulting in harm to plaintiffs. Plaintiffs alleged that C Management's conduct amounted to gross negligence, demonstrating a substantial lack of concern for whether injury would result by infringing on Margaret's use of her plot. The City subsequently filed a crossclaim against C Management and C Management filed a separate crossclaim against City defendants, both asserting indemnity and breach of contract against each other. [3]

City defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), arguing that plaintiffs' tort claims were barred by governmental immunity. City defendants argued that they were immune from liability under the GTLA, MCL 691.1407(1), as the alleged tortious conduct occurred during the exercise or discharge of a governmental function and

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

plaintiffs had otherwise failed to state a claim that fit within any of the statutorily enumerated exceptions under the GTLA. According to the City, it's operation of a cemetery was a governmental function, as defined by MCL 691.1401(c), because the Michigan Constitution, Const. 1963 art. 7 § 23, and Home Rule Cities Act, MCL 117.1 and MCL 117.4e, explicitly authorized a municipality to own and operate a cemetery, as did the city charter and ordinances, Benton Harbor Ordinances, § 12-20. Moreover, the City argued, the Cemetery was not a separate legal entity from the City and, therefore, not subject to suit. MCR 2.201(C). City defendants further argued that plaintiffs failed to state a claim under the PFCSA because the Act did not apply to the sale or resale of the cemetery burial plot at issue. Rather, their argument goes, the PFCSA regulated funeral and cemetery merchandise and services, and the use of funds received by sellers and providers of those goods and services. City defendants argued that the PFCSA did not contemplate the sale of land, including the sale of cemetery plots, citing MCL 328.214(2), MCL 328.213(g), and MCL 328.214(e).

C Management also moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), seeking dismissal on all counts of plaintiffs' complaint. C Management first argued that it was immune from plaintiffs' tort claims pursuant to MCL 691.1407(2) because "agents" of government entities are cloaked with governmental immunity under the GTLA when acting within the scope of their employment. C Management alleged that it was an agent of the Cemetery under common law agency principles because the Cemetery's board controlled the actions of C Management. C Management alleged that it acted within its authority when selling the burial plot to the Bradley family and that its operation of a public cemetery was an exercise of the Cemetery's governmental function, as delineated under the city ordinances. C Management argued that it did not engage in grossly negligent conduct, considering that it reviewed the available records and inspected the burial plot prior to selling it to the Bradley family. C Management also argued that the sale to the Bradley family occurred *after* it had already terminated the cemetery management agreement with City defendants and relinquished all control over the cemetery operations to the Cemetery's board members.

C Management also sought dismissal of plaintiffs' complaint on other grounds, asserting, in relevant part, that it was entitled to judgment as a matter of law on plaintiffs' claims related to the PFCSA, negligence, and gross negligence. C Management argued that it was not managing the Cemetery when Margaret purchased the subject burial plot in 2013 because that event pre-dates the effective date of the cemetery management agreement between defendants. C Management also argued that after contracting to provide management services for the Cemetery, it acted reasonably under the circumstances despite City defendants' poor recordkeeping, pointing fault at City defendants for their purported failure to record Margaret's purchase of burial plot 19.

***3** Plaintiffs filed one brief in response to both C Management and City defendants' motions for summary disposition and voluntarily dismissed several claims against defendants.[4] Remaining were plaintiffs' claims related to the PFCSA, gross negligence, breach of contract, and their request for specific performance against all defendants and plaintiffs' claims for negligence, wrongful interference with the right of burial, and conversion against only C Management. Plaintiffs conceded that City defendants were entitled to immunity from tort liability under the GTLA. However, plaintiffs argued that C Management was not governmentally immune from liability because only governmental agencies and their employees could enjoy the GTLA's grant of immunity, MCL 691.1407. Plaintiffs argued that private entities, such as C Management, are not government agencies nor employees, even when the private entity contracts with, or acts on behalf of, a governmental agency. Aside from the management agreement, C Management retained its separate identity as a for-profit corporation, which was governed by its own board of directors, and unlike a governmental agency, C Management's creation was not mandated by law. Therefore, immunity under the GTLA was inapplicable to C Management.

Plaintiffs further argued in their response that defendants violated MCL 328.218(1) of the PFCSA by failing to keep accurate accounts, books, and records of all transactions and accounts, including the record evidencing Margaret's purchase of plot 19. According to plaintiffs, defendants admitted in their crossclaims against each other that the other failed to properly maintain the cemetery records. Plaintiffs alleged that the Bradley family was permitted to purchase and bury Ms. Bradley in the plot owned by Margaret solely because defendants failed to maintain accurate records of their transactions. Had defendants complied with the statute, Margaret's burial plot would not have been resold to the Bradley family and the lawsuit would have never occurred. Plaintiffs acknowledged that C Management was not involved in the original sale of plot 19 to Margaret, but asserted that C

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

Management facilitated the resale of the plot to the Bradley family and the subsequent burial of Mrs. Bradley in the plot owned by Margaret. Plaintiffs argued that governmental immunity did not apply and that a city ordinance could not preempt state law such as the PFCSA. Nor could defendants contract or indemnify themselves around the mandates of the PFCSA explicitly authorizing the court to award damages and other relief to plaintiffs under MCL 328.234.

In reply, City defendants argued that plaintiffs' claim for monetary damages under the PFCSA was barred by governmental immunity and that plaintiffs failed to plead in avoidance of governmental immunity. City defendants argued that although the PFCSA may permit a private enforcement action under MCL 328.234, the statute does not otherwise create a private cause of action for the negligent maintenance of cemetery records. Nor does the statute contain an express legislative authorization in avoidance of governmental immunity. City defendants argued that the PFCSA does not apply to the sale of funeral plots under MCL 328.216(1) and that cemeteries owned and operated by municipalities were exempt from the requirements of the Cemetery Regulation Act under MCL 456.530(1). Moreover, City defendants alleged that while MCL 328.218(1) imposed a statutory duty on registrants to maintain accurate records, they were not "registrants" as defined by the Act, considering that they did not register with the Department of Labor and Economic Growth under MCL 328.215(g).

City defendants further argued that plaintiffs' claim for breach of contract and request for specific performance was limited by Benton Harbor Ordinances, § 12-20, which provided that the supervisor of cemeteries could correct any errors made in the interment of remains by refunding money or removing and reinterring remains in a plot of equal value and similar location. According to City defendants, the Cemetery supervisor attempted to remedy the errors by offering to refund Margaret for the price of her burial plot or to locate two unused plots for both Margaret and Nathaniel. City defendants argued that plaintiffs were contractually limited to the supervisor's remedies and were not otherwise entitled to further relief.

III. TRIAL COURT DECISION

*4 Following oral argument on City defendants and C Management's motions for summary disposition, the trial court entered its written order, granting in part and denying in part defendants' motions for summary disposition. Regarding the four remaining claims against City defendants, the court granted summary disposition on plaintiffs' gross negligence claim, but denied summary disposition regarding plaintiffs' claims related to the PFCSA, breach of contract, and specific performance. As to the seven counts remaining against C Management, the trial court granted summary disposition to C Management regarding plaintiffs' wrongful interference with the right of burial and conversion claims, but denied summary disposition on plaintiffs' remaining claims under the PFCSA and for negligence, gross negligence, breach of contract, and specific performance.

The trial court found that City defendants were immune from tort liability under the GTLA. The court found that City defendants, as political subdivisions under MCL 691.1401(c), were governmental agencies for the purposes of the GTLA, MCL 691.1407(1). The court further found that cemetery responsibilities constituted governmental functions, MCL 691.1401(b), and the city ordinance governed cemeteries, Benton Harbor Ordinances, § 12-1. The court found that plaintiffs had not met their burden of pleading in avoidance of governmental immunity under any exception, and held that based on the facts before it, the proprietary-function exception to governmental immunity, MCL 691.1413, did not apply. Having found that governmental immunity applied to City defendants, the court dismissed plaintiffs' claim that City defendants engaged in grossly negligent conduct when the alleged torts occurred, as MCL 691.1407(2)(c) only permits liability against the individual actor and not the governmental entity.

On the other hand, the court found that C Management was not immune from tort liability under the GTLA, MCL 691.1407(2). The court found that C Management was an agent of City defendants, acting under a contract, whose actions were ministerial and therefore not shielded by governmental immunity under the GTLA. The court found that C Management was responsible for the Cemetery and its accompanying duties during the term of the agreement, between September of 2013 and March of 2020. After C Management exercised its option to terminate the agreement, it continued its obligations by acting on the Cemetery board's behalf and at the direction of the Cemetery board chairperson, receiving compensation for its services. The court held that while

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

C Management presented sufficient evidence establishing its agency relationship with City defendants, it was unprotected by governmental immunity because its actions while serving as an agent were ministerial.

The trial court further found that dismissal was not warranted under MCR 2.116(C)(7) as to plaintiffs' claims related to the PFCSA, breach of contract, and specific performance on governmental immunity grounds, as the GTLA's grant of immunity from tort liability did not extend to claims sounding in contract law. Concerning plaintiffs' claim under the PFCSA, the court found that "[g]overnmental immunity does not encompass a breach of contract claim, for which a remedy may be obtained in the form of compensatory damages." The court also declined to dismiss that claim under MCR 2.116(C)(10), finding that there remained genuine issues of material fact on the PFCSA's applicability to the contract for the sale of the burial plots and services. The court considered the statutory definitions of burial rights, cemetery services, funeral services, interment, and prepaid contract, and found that reasonable minds could differ as to whether the PFCSA's meaning of those words could encompass the issues in the case at bar. MCL 328.214(e), 213(a) and (g), and 214(e) and (i), and 215(d).

*5 The trial court further found genuine issues of material fact regarding plaintiffs' breach of contract claim, precluding summary disposition as to all defendants under MCR 2.116(C)(10). The court found that plaintiffs adequately presented evidence demonstrating the elements for a breach of contract, as Margaret purchased the burial plot for adequate consideration, with the expectations of being buried therein, and that Margaret, because of defendants' alleged breach of contract, could no longer be buried in that plot without a significant change of circumstances. The court additionally found that specific performance was an available remedy because burial plots constitute real property.

As to plaintiffs' remaining tort claims against C Management, the trial court granted summary disposition in favor of C Management for the wrongful interference with the right of burial and conversion claims, but denied summary disposition regarding plaintiffs' gross negligence and negligence claims. The court found no interference by C Management with plaintiffs' right to bury Nathaniel nor Margaret, and that an action for conversion could not lie with respect to realty such as burial plots. The court further found genuine issues of material fact regarding C Management's gross negligence and negligence. The court found that while C Management provided in its affidavit that it took reasonable steps to verify the correct burial plot, by reviewing records available to it and awaiting approval from the Cemetery board, plaintiffs countered by a showing of their receipts, exhibits, and allegations of other facts to the contrary, precluding summary disposition in favor of C Management.

In Docket No. 362424, C Management argues on appeal that the trial court erred by finding that it was not immune from tort liability under the GTLA, MCL 691.1407(2). C Management argues that the trial court properly found that it had established an agency relationship with City defendants and that its agency relationship with City defendants met the standard of an "employee" under MCL 691.1407(2). C Management argues that it is immune from tort liability under the GTLA because the alleged torts occurred while serving in its capacity as City defendants' agent and during the exercise or discharge of a governmental function, and no exception to governmental immunity applied. Moreover, C Management did not engage in grossly negligent conduct when the alleged torts occurred. On this basis, C Management argues that it is entitled to governmental immunity under MCL 691.1407(2), but that the trial court erred by ultimately denying governmental immunity to C Management based on its erroneous findings that C Management's actions while serving as an agent to City defendants were ministerial in nature. And, its entitlement to governmental immunity necessarily bars plaintiffs' claim under the PFCSA and for gross negligence and ordinary negligence.

In Docket No. 362182, City defendants argue that the trial court erred by treating the Cemetery as a separate legal entity from the City. Additionally, City defendants argue that any liability under the PFCSA is tort liability against which governmental immunity under the GTLA applies.

IV. STANDARD OF REVIEW

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

Summary disposition under MCR 2.116(C)(7) is appropriate based on immunity granted by law. MCR 2.116(C)(7). Whether governmental immunity applies under the GTLA is a question of law that is reviewed de novo on appeal. *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006). When reviewing a summary disposition motion under MCR 2.116(C)(7), "the court considers all documentary evidence submitted by the parties in the light most favorable to the nonmoving party." *Citizens Ins Co of America v Univ Physician Group*, 319 Mich App 642, 648; 902 NW2d 896 (2017). "If no material facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Mays v Snyder*, 323 Mich App 1, 25; 916 NW2d 227 (2018) (quotation marks and citation omitted), aff'd sub nom *Mays v Governor*, 506 Mich 157; 954 NW2d 139 (2020). However, if a question of fact does exist, dismissal is inappropriate. *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010). Whether this Court has jurisdiction is a question of law that is also reviewed de novo. *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009). Similarly, we review de novo issues of statutory interpretation. *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013).

V. JURISDICTION

***6** Preliminarily, we address plaintiffs' argument that this Court does not have jurisdiction as to City defendants' appeal because "all of the claims | | |to which] governmental immunity applied, were dismissed, either voluntarily or by the trial |c|ourt." Plaintiffs also argue that this Court lacks jurisdiction over C Management's appeal because C Management is a private, for-profit corporation with no standing to claim governmental immunity protection. [5]

This Court's jurisdiction is governed by statute and court rule. *Chen*, 284 Mich App at 191. A defendant may appeal as of right an order denying summary disposition under MCR 2.116(C)(7) if the order denied governmental immunity to a governmental party. MCR 7.202(6)(a)(v) (stating that a "final order" includes "an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity"); MCR 7.203(A)(1) (provides an appeal of right from a final judgment or order as defined in MCR 7.202(6)). In an appeal by right from an order denying a claim of governmental immunity, "this Court does not have the authority to consider issues beyond the portion of the trial court's order denying the defendant's claim of governmental immunity." *Pierce v Lansing*, 265 Mich App 174, 182; 694 NW2d 65 (2005).

Here, the trial court denied, in part, City defendants' motion for summary disposition under MCR 2.116(C)(7) on plaintiffs' counts for the alleged violation of the PFCSA and breach of contract. Although the trial court found that City defendants were a governmental agency shielded by governmental immunity, the court ultimately held that governmental immunity does not encompass claims sounding in contract law. City defendants appealed by right the portion of the trial court's order denying their motion for summary disposition on governmental immunity grounds regarding the PFCSA claim, arguing that any liability under the PFCSA is a form of tort liability for which governmental immunity should apply.

The trial court also denied, in part, C Management's motion for summary disposition under MCR 2.116(C)(7), holding that C Management was not entitled to governmental immunity. While the court found that C Management demonstrated sufficient evidence of its agency relationship with City defendants, the court ultimately held that agents of a governmental agency are not cloaked with immunity under the GTLA when the agent's duties were ministerial in nature. C Management appealed by right that portion of the trial court's order denying its motion for summary disposition on the basis of governmental immunity, arguing that the trial court erred because agents are immune from tort liability under MCL 691.1407(2) of the GTLA, irrespective of whether the agents' duties were discretionary or ministerial. C Management also appealed plaintiffs' tort claims remaining against C Management, arguing that those claims are barred by governmental immunity.

***7** City defendants and C Management each appealed as of right the trial court's order denying them, in some fashion, governmental immunity under MCR 2.116(C)(7). See MCR 7.203(A)(1) and MCR 7.202(6)(a)(v). City defendants appeal the trial court's denial of governmental immunity under MCR 2.116(C)(7) on the PFCSA claim, while C Management appeals the

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

trial court's complete denial of its immunity as to any of plaintiffs' claims. In both matters, defendants' arguments were directly considered and denied by the trial court in the context of governmental immunity. The trial court's order fits squarely within the final order definition in MCR 7.202(6)(a)(v) (an order denying governmental immunity to a governmental party under MCR 2.116(C)(7)). This Court has jurisdiction over the claims of appeal. MCR 7.203(A); MCR 7.202(6)(a)(v).

VI. DOCKET NO. 362182—CITY DEFENDANTS

City defendants argue that the trial court erred when it determined that plaintiffs' claim under the PFCSA was a breach of contract claim not barred by the GTLA. Specifically, City defendants argue any liability under the PFCSA is a form of tort liability against which governmental immunity applies and that plaintiffs failed to plead in avoidance of that immunity.

Under the GTLA, MCL 691.1407, government agencies are immune from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The GTLA "speaks only to immunity from tort liability and does not grant immunity from contract claims." *Rocco v Mich Dep't of Mental Health*, 114 Mich App 792, 799; 319 NW2d 674 (1982), aff'd sub nom *Ross v Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984). The GTLA defines "governmental function" to mean "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). Under certain narrowly construed exceptions, "the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government." *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002). The GTLA provides several narrow exceptions to governmental immunity, including (1) the highway exception, MCL 691.1402, (2) the motor vehicle exception, MCL 691.1405, (3) the public building exception, MCL 691.1406, (4) the governmental hospital exception, MCL 691.1407(4), (5) the proprietary function exception, MCL 691.1413, and (6) the sewage system event exception, MCL 691.1417.

A party pleads in avoidance of governmental immunity by stating a claim that fits within one of the statutory exceptions or by pleading facts that demonstrate that the alleged tort occurred outside the exercise or discharge of a governmental function. *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 327; 869 NW2d 635 (2015). "A party filing suit against a governmental agency bears the burden of pleading his or her claim in avoidance of governmental immunity." *In re Bradley Estate*, 494 Mich at 377.

As discussed below, although the trial court erred in holding that plaintiffs' claim arising under the PFCSA sounded in contract, the trial court properly denied summary disposition to City defendants, albeit for the wrong reasons. *Southfield Ed Ass'n v Bd of Ed of Southfield Pub Sch*, 320 Mich App 353, 374; 909 NW2d 1 (2017) (holding that a trial court's ruling will be undisturbed on appeal where the right result was reached, but for the wrong reason).

A. TORT LIABILITY

The trial court erred by finding that plaintiffs' claim under the PFCSA sounded in contract, not tort, as the underlying claim was premised on City defendants' breach of a noncontractual duty imposed by law. The GTLA does not apply when a lawsuit against a governmental agency does not seek to impose "tort liability." *Eplee v Lansing*, 327 Mich App 635, 646; 935 NW2d 104 (2019). "Tort liability" as used in MCL 691.1407(1) of the GTLA, "means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *In re Bradley Estate*, 494 Mich at 385. In determining whether a claim imposes "tort liability," courts must "first focus on the nature of the duty that gives rise to the claim." *Id.* at 388-389.

> ***8** If the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable. However, if the wrong is not premised on a breach of a contractual duty, but

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

> rather is premised on some other civil wrong, i.e., some other breach of a legal duty, then the GTLA might apply to bar the claim. In that instance, the court must further consider the nature of the liability the claim seeks to impose. If the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable. |*Id.* at 389 (footnotes omitted).|

An action in tort will lie when the legal duty arises "separately and distinctly" from the contractual agreement. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 169; 809 NW2d 553 (2011). See also *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 52; 649 NW2d 783 (2002) ("[A]n action in tort may not be maintained where a contractual agreement exists, unless a duty, separate and distinct from the contractual obligation, is established.").

The precise nature of the duty that gave rise to plaintiffs' claim under the PFCSA was noncontractual, as plaintiffs' allegations concerned City defendants' violation of an obligation imposed by law under the PFCSA. *In re Bradley Estate*, 494 Mich at 384 ("when a party breaches a duty stemming from a legal obligation, other than a contractual one, the claim sounds in tort"). Plaintiffs alleged in their complaint that City defendants violated MCL 328.218(1) of the PFCSA by failing to keep "accurate accounts, books, and records" of its transactions, resulting in City defendants' mistaken burial of another person in the plot owned by Margaret. Plaintiffs sought enforcement and relief for City defendants' purported violation of the Act under MCL 328.234, which permits any person to bring an action, "whether or not that person has purchased a prepaid contract," to force compliance with the PFCSA.[6] Although the PFCSA governs prepaid contracts concerning funeral and cemetery merchandise and services, a cause of action alleging violations of the PFCSA may be premised on "a wrong independent of a contract," *In re Bradley Estate*, 494 Mich at 383 (quotation marks and citation omitted), as is the case here.

Plaintiffs' claim was premised on their allegation that City defendants breached their statutory duty to maintain their records under MCL 328.218(1). That duty was "separate and distinct" from their contractual obligations with plaintiffs. *Loweke*, 489 Mich at 169. In fact, plaintiffs separately asserted their claim for breach of contract in their complaint, alleging that City defendants breached the prepaid contract by failing to perform a specific contracted for promise, i.e., securing Margaret's plot, and sought specific performance. Plaintiffs' breach of contract claim concerned only those duties that were voluntarily assumed in the contract and arose out of the intentions of the parties themselves when entering into the agreement. *Hart v Ludwig*, 347 Mich 559, 565-566; 79 NW2d 895 (1956); *Fultz v Union-Commerce Ass'n*, 470 Mich 460, 469-470; 683 NW2d 587 (2004) ("|I|f defendant fails or refuses to perform a promise, the action is in contract."). In contrast, plaintiffs' claim under the PFCSA was predicated on their assertions that City defendants owed them a duty independent of the contract, that is, the statutory duty to maintain their records under MCL 328.218(1). See *Loweke*, 489 Mich at 169 (recognizing that a legal duty, including duties imposed by law, may support a cause of action in tort). And, MCL 328.234 provided plaintiffs with "a right to maintain an action without regard to whether there was a contractual relationship between the plaintiff and the defendant." *Ferrett v Gen Motors Corp*, 438 Mich 235, 245; 475 NW2d 243 (1991). See also MCL 328.234. Plaintiffs' cause of action for City defendants' breach of a legal duty imposed by law under the PFCSA sounded in tort.

***9** Because plaintiffs' cause of action for City defendants' alleged violation of MCL 328.218(1) was premised on a civil wrong independent of the underlying contract, the GTLA will bar plaintiffs' claim "|i|f the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong." *In re Bradley Estate*, 494 Mich at 389. See also *Nat'l Copper Co v Minnesota Min Co*, 57 Mich 83, 93; 23 NW 781 (1885) ("|D|amage alone does not give a right of action there must be a concurrence of wrong and damage."). We conclude that plaintiffs sought to impose tort liability under MCL 328.234 of the PFCSA, as the statute permits a private cause of action by any person to force compliance with the Act and authorizes a court to "award damages, issue equitable orders in accordance with the Michigan court rules to restrain conduct in violation of this act, and award reasonable attorney fees and costs to a prevailing party." MCL 328.234. Plaintiffs requested compensatory and punitive relief[7] for the damages they allegedly sustained as a result of City defendants' failure to comply with the statutory duty imposed by the Act under MCL 328.218(1). See *In re Bradley Estate*, 494 Mich at 388 (providing that tort damages generally take the form of compensatory damages). Given that the statutory language of MCL 328.234 permits

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

an award of damages to plaintiffs for a noncontractual civil wrong and plaintiffs sought that relief in their complaint, we hold that plaintiffs cause of action sought to impose "tort liability" for purposes of the GTLA. *Id.* at 385 (defining "tort liability" to mean "all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages"); *Eplee*, 327 Mich App at 648. We conclude that the trial court erred in concluding that plaintiffs' allegation that City defendants violated the duties imposed by the PFCSA was a claim for breach of contract because that claim sought to impose tort liability against City defendants. In light of our holding, plaintiffs' claim under the PFCSA is barred by statutory governmental immunity unless plaintiffs pleaded in avoidance of immunity.

B. AVOIDANCE OF GOVERNMENTAL IMMUNITY

Having concluded that plaintiffs' claim under the PFCSA imposed tort liability for the purposes of the GTLA, the dispositive issue concerns whether plaintiffs pleaded in avoidance of governmental immunity. *Genesee Co Drain Comm'r*, 309 Mich App at 327 (providing that a party pleads in avoidance of governmental immunity by pleading facts that demonstrate that the alleged tort occurred outside the exercise or discharge of a governmental function or by stating a claim that fits within one of the statutory exceptions enumerated under the GTLA).

The trial court found that the City is a governmental agency and that the City's operation of the Cemetery constitutes a governmental function. A governmental agency is defined under MCL 691.1401(a) as "this state or a political subdivision." Subsection (c) defines political subdivision to include "municipal corporation," which is defined in subsection (d) to include a city. MCL 691.1401(c) and (d). Thus, the City, as a municipal corporation, constitutes a governmental agency for purposes of the GTLA.[8] *Mack*, 467 Mich at 204. The trial court found that the City's operation of the Cemetery was a "governmental function" under MCL 691.1401(b) because those responsibilities were mandated or authorized by chapter 12 of the City's ordinances. See MCL 6911401(b) (" 'Governmental function' means an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."); Benton Harbor Ordinances, § 12-1. Because the parties do not dispute that City defendants were a governmental agency engaged in the exercise or discharge of a governmental function when the alleged torts occurred, City defendants are immune from tort liability unless plaintiffs stated a claim that fits within one of the enumerated statutory exceptions. *Genesee Co Drain Comm'r*, 309 Mich App at 327.

***10** Plaintiffs do not dispute that the enumerated statutory exceptions to governmental immunity do not apply, but instead argue that MCL 328.234 of the PFCSA establishes an exception to the general rule that government agencies are immune from tort liability when performing a governmental function. Although "the Legislature remains free to create additional exceptions, either within the GTLA or another statute[,]" governmental immunity under the Act "may not be held to have been waived or abrogated except that result has been accomplished by an express statutory enactment or by necessary inference from a statute." *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 485; 722 NW2d 906 (2006) (quotation marks and citations omitted). "Whether an express statutory enactment creates an exception to governmental immunity is resolved by reference to the language of the statute." *Id.* MCL 328.234 specifically provides that:

> The department or any other person, in order to force compliance with this act, may bring an action in a circuit court in any county in which the registrant or *any other person has solicited or sold prepaid contracts*, whether or not that person has purchased a prepaid contract or is personally aggrieved by a violation of this act. The court may award damages, issue equitable orders in accordance with the Michigan court rules to restrain conduct in violation of this act, and award reasonable attorney fees and costs to a prevailing party. [Emphasis added.]

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

The PFCSA defines the word "person" to include a "government agency." MCL 328.215(b). On this basis, plaintiffs allege that the Legislature created an exception to governmental immunity from tort liability in the PFCSA because it included governmental agencies among those "persons" subject to a cause of action for damages.

The plain language of the PFCSA demonstrates the Legislature's intent to waive governmental immunity under the GTLA and submit government agencies to the jurisdiction of the circuit court. The Legislature expressly applied the PFCSA to City defendants by including "governmental agency" in the definition of a "person" that can be sued. MCL 328.234; MCL 328.215(b). City defendants do not dispute that they are a "government agency" for the purposes of the PFCSA but argue that the Legislature did not provide specific and express authorization to sue a governmental entity under the PFCSA. Although the PFCSA does not specifically mention governmental immunity, the Act otherwise imposes duties on a "person," i.e., a government agency, and further permits a private cause of action against the "person" for breaches of the duties imposed by the Act, to which the court may award damages or equitable relief. MCL 328.234. The Legislature's imposition of liability on any "person," which explicitly includes a governmental agency, MCL 328.215(b), for their failure to abide by the provisions of the Act demonstrates an express waiver to governmental immunity provided by the GTLA. Compare: *Ballard v Ypsilanti Twp*, 457 Mich 564, 576; 577 NW2d 890 (1998) (holding that the recreational land use act did not create an express statutory enactment subjecting the state to liability because the Act mentions neither the state nor its political subdivisions), with *Anzaldua v Band*, 457 Mich 530, 551; 578 NW2d 306 (1998) (holding that the Legislature intended to create an exception to immunity in the Whistleblowers' Protection Act by including the state and its political subdivisions in the definition of "employer").

Additional support for this conclusion is found in the legislative history of the GTLA and the later enacted PFCSA. The Legislature enacted MCL 691.1407 of the GTLA in 1964 to provide immunity from tort liability to governmental agencies. 1964 PA 170. Decades later, in 1986, the Legislature enacted the PFCSA, formerly known as the Prepaid Funeral Contracting Funding Act, to govern the sale of funeral cemetery services, "to prescribe powers and duties of the departments of licensing and regulation ... and certain other state and local officers|,| ... and to provide certain penalties and remedies|.|" 1986 PA 255. In 2004, the Legislature amended the definition of "person" under MCL 328.215(b) of the PFCSA to include a "government agency" within its meaning, whereas the predecessor statute read, in part, only to include "agency." 2004 PA 21; 1986 PA 255. The Legislature's express inclusion of governmental agencies within the definition of "person" under MCL 328.215(b) was made notwithstanding its knowledge of governmental immunity under the GTLA. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993) ("It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws."). Following the 2004 amendment, any "person," i.e., governmental agency, in violation of the PFCSA was subject to suit in circuit court under MCL 328.234, and, in effect, the historical grant of immunity to governmental agencies under the GTLA was waived.

***11** Accordingly, the trial court did not err by denying City defendants' motion for summary disposition because, despite the PFCSA's imposition of tort liability, the PFCSA's direct inclusion of a "government agency" as a "person" that can be sued for damages indicates the Legislature's intent to waive the immunity conferred by MCL 691.1407(1) for governmental agencies. *Southfield Ed Ass'n*, 320 Mich App at 374.

VII. DOCKET NO. 362424—C MANAGEMENT

C Management argues that it is entitled to governmental immunity under MCL 691.1407(2) because it was acting as an "agent" of City defendants when the alleged torts occurred, and that the trial court erred by relying on an abrogated principle that considered whether C Management's duties were discretionary or ministerial.

The trial court found that although C Management was an agent acting under contract of City defendants, the GTLA's grant of immunity did not apply because its duties were ministerial. The GTLA shields the officers, employees, members, or volunteers

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

of a governmental agency from tort liability for injuries or damages they cause while in the course of employment or services, or while acting on behalf of the governmental agency if all of the following conditions are met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [MCL 691.1407(2)(a) through (c).]

C Management argues that it was entitled to governmental immunity under MCL 691.1407(2) because it was acting as an agent of City defendants when the alleged torts occurred and that agents constitute "employees" for purposes of the GTLA. [9] However, even if C Management was an agent of City defendants, "agents" do not fall under the categories of persons entitled to governmental immunity under MCL 691.1407(2), which lists the individuals entitled to the grant of immunity as officers, employees, members, or volunteers of governmental agencies. Because agents are not listed as an individual entitled to immunity under MCL 691.1407(2), C Management is not entitled to governmental immunity under that statutory provision.

The trial court erroneously relied on *Ross v Consumers Power Co*, 420 Mich at 592, superseded by statute on other grounds as stated in *Ray v Swager*, 501 Mich 52, 81; 903 NW2d 366 (2017), as the *Ross* Court did not construe the statute at issue here. In fact, the Legislature amended the GTLA in response to *Ross*, *Odom v Wayne Co*, 482 Mich 459, 468; 760 NW2d 217 (2006), and MCL 691.1407(2), as amended, applies only to those individual governmental actors listed in the statute. [10]

***12** We further reject C Management's contentions that "employee" under MCL 691.1407(2) includes private for-profit corporations serving as agents to a governmental agency. Two reasons support this conclusion. First, as already noted, the Legislature did not include the term "agent" when describing those who are entitled to immunity under MCL 691.1407(2). That term was included, however, within several other provisions of the GTLA, [11] and the inclusion of the term in those sections allows us to presume that the exclusion of the term from MCL 691.1407(2) was intentional. See *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW2d 217 (1931) ("Express mention in a statute of one thing implies the exclusion of other similar things, expressio unius est exclusio alterius.") (citation omitted); *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) ("The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another."); and *Coblentz v Novi*, 475 Mich 558, 572; 719 NW2d 73 (2006) (providing that "[t]he words chosen by the Legislature are presumed intentional[,] and this Court "will not speculate that it used one word when it meant another").

Second, because "employee" is not defined by the GTLA, it must be given its plain and ordinary meaning, and we may consult a dictionary for guidance. *Rakowski v Sarb*, 269 Mich App 619, 626; 713 NW2d 787 (2006). In *Rakowski*, this Court considered whether the defendant was an employee for purposes of MCL 691.1407(2), and determined that the "*Random House Webster's College Dictionary* (1992) defines 'employee' as 'a person who has been hired to work for another.' " *Id.* at 626. That an "employee" means an individual "person" is consistent with the Legislature's use of that word in subsection 2, which only immunizes certain individual actors, that is, officers, employees, members, or volunteers [12] of a governmental agency, from tort liability, and does not include private entities within the immunity in MCL 691.1407(2). The remaining subsections of MCL 691.1407 are also void of any language evidencing the Legislature's intent for the GTLA's grant of immunity to apply to nongovernmental business entities. C Management is a private for-profit organization that, notwithstanding its purported agency relationship with City defendants, retained its separate corporate identity as a nongovernmental actor or entity. C Management is not an "employee" considered by the Legislature as immune from tort liability under MCL 691.1407(2) of the GTLA. [13]

C Management has not cited any relevant authority showing that private for-profit entities such as C Management may be immune from tort liability under MCL 691.1407(2), which cloaks certain *individuals* with governmental immunity. On the other hand, Michigan courts have repeatedly declined to extend the protection of governmental immunity to private entities

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

in application of the related subsections in MCL 691.1407. *Vargo v Sauer*, 457 Mich 49, 68; 576 NW2d 656 (1998) ("[T]he definition of 'governmental agency' does not include, or remotely contemplate, joint ventures, partnerships, arrangements between governmental agencies and private entities, or any other combined state-private endeavors."), (quotation marks and citation omitted); *Jackson v New Ctr Community Mental Health Servs*, 158 Mich App 25, 34; 404 NW2d 688 (1987) ("A private entity's performance of a governmental function does not confer governmental agency status on that entity"); and *Roberts v Pontiac*, 176 Mich App 572, 578; 440 NW2d 55 (1989) (holding that there is "no reason to extend the protection of governmental immunity to a private entity merely because it contracts with the government"). Michigan courts have even held that the employees of a private entity doing business with a public agency also are not entitled to governmental immunity. See *Rambus v Wayne Co Gen Hosp*, 193 Mich App 268, 270-273; 483 NW2d 455 (1992); *Roberts*, 176 Mich App at 578; and *Vargo v Sauer*, 457 Mich at 71 ("[O]ur examination of the governmental tort immunity statute reveals that although the Legislature extended immunity to a large number of individuals for broad categories of conduct, there is no indication that the statute, when read in conjunction with its definitional sources, even remotely contemplates a grant of immunity for agents who are simultaneously serving a private entity.")

***13** We conclude that the trial court properly denied summary disposition to C Management on governmental immunity grounds, albeit for the wrong reasons. However, a trial court's ruling will be undisturbed on appeal where the right result was reached, but for the wrong reason. *Southfield Ed Ass'n*, 320 Mich App at 374 (citation omitted). Because C Management was not entitled to tort immunity under the GTLA, we need not discuss its remaining issues on appeal.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2023 WL 4043795

Footnotes

1 *Gathright v Mission Hills Memorial Gardens*, unpublished order of the Court of Appeals, entered August 9, 2022 (Docket Nos. 362182 and 362424).

2 The Cemetery and the City, together, moved for summary disposition under MCR 2.116(C)(7) and (C)(10). Defendant C Management moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). Defendants' arguments on appeal relate only to the trial court's denial of governmental immunity under MCR 2.116(C)(7) on their related claims.

3 Defendants do not raise any issues on appeal related to the trial court's rulings on their crossclaims.

4 Plaintiffs voluntarily dismissed against all defendants their claims under the MCPA and for breach of fiduciary duty, NIED, fraudulent misrepresentation, and negligent/innocent misrepresentation. Plaintiffs further agreed to dismiss three counts for wrongful interference with the right of burial, negligence, and conversion against only City defendants.

5 Plaintiffs assert that C Management and City defendants' appeals were improperly filed on the eve of trial in order to stop the trial court proceedings and give them more time to file an application for leave to appeal. However, plaintiffs' argument, speculating as to why defendants' claims of appeal were filed, is irrelevant to this Court's jurisdiction. Nevertheless, the record shows that defendants timely filed their claims of appeal, as City defendants filed a claim of appeal within two days and C Management filed its claim of appeal within 21 days after the trial court denied their motions for summary disposition on governmental immunity grounds. See MCR 7.204(A)(1)(a) (providing that an appeal by right must be taken within 21 days of the judgment or order appealed from).

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

6 MCL 328.234 provides that "[t]he department or any other person, in order to force compliance with this act, may bring an action in a circuit court in any county in which the registrant or any other person has solicited or sold prepaid contracts, whether or not that person has purchased a prepaid contract or is personally aggrieved by a violation of this act. The court may award damages, issue equitable orders in accordance with the Michigan court rules to restrain conduct in violation of this act, and award reasonable attorney fees and costs to a prevailing party."

7 In their complaint, plaintiffs provided a blanket request for the award of damages in excess of $25,000 for compensatory and punitive damages, costs, and attorney fees. Although plaintiffs also requested specific performance in their complaint, the request was premised on City defendants' purported breach of the underlying contract, without any mention or reasoning justifying that relief on the basis of City defendants' purported violation of the PFCSA. Specifically, in their request for specific performance, plaintiffs asserted that Margaret had a "contractual right to possession" of the burial plot and requested that the court order defendant to locate two unused plots for Margaret and Nathaniel. Plaintiffs reaffirmed this point in their response to City defendants and C Management's motions for summary disposition by further requesting that the court order specific performance by way of City defendants' fulfillment of "what was bargained for and an equitable remedy for what their mistake caused: plots where Nathaniel Gathright and Margaret Gathright can rest, in peace, together for eternity." Similarly, plaintiffs' request for treble damages in their complaint was unrelated to their claim under the PFCSA. Plaintiffs sought treble damages for City defendants' alleged conversion of the underlying burial plot under MCL 600.2919a, but plaintiffs voluntarily dismissed their conversion claims against City defendants.

8 Although plaintiffs' complaint named both the City and the Cemetery as defendants, the Cemetery is not a separate legal entity against which a tort action can be directed or from which plaintiffs can recover. *Omelenchuk v Warren*, 466 Mich 524, 526 n 3; 647 NW2d 493 (2002) ("It is agreed that the fire department is not a separate entity from which plaintiffs can recover. Any recovery would be from the city of Warren."); *Davis v Chrysler Corp*, 151 Mich App 463, 466 n 1; 391 NW2d 376 (1986) ("Although plaintiffs' complaint named the Detroit Public Lighting Department as a defendant, the Department is not a separate legal entity against which a tort action can be directed."); and *Michonski v Detroit*, 162 Mich App 485, 490; 413 NW2d 438 (1987).

9 C Management improperly relies on *Pomilee v Detroit*, 121 Mich App 121; 328 NW2d 595 (1982), for the proposition that "agents" are immune from liability under MCL 691.1407(2) by quoting the following language from *Pomilee*: "Officers, agents and employees of immune institutions are themselves cloaked with governmental immunity when acting within the scope of their employment." *Id.* at 125. However, the *Pomilee* Court indicated that the quoted language was a paraphrased statement drawn from *Everhart v Bd of Ed of Roseville Co Sch*, 108 Mich App 218, 222; 310 NW2d 338 (1981). Neither *Pomilee* nor *Everhart* considered what effect, if any, an agency relationship had on governmental immunity under MCL 691.1407(2). In fact, the words "agent" or "agency" do not appear anywhere in the *Everhart* decision.

10 The trial court ultimately held that governmental immunity under the GTLA did not apply to C Management because its actions while serving as agent were "ministerial" in nature. The court cited *Ross*, which conditioned immunity to government actors on whether they were: "a) acting during the course of their employment and are acting, or reasonably believe they are acting, within the scope of their authority; b) acting in good faith; and c) performing discretionary-decisional, as opposed to ministerial-operational, acts." *Ross*, 420 Mich at 592. As C Management argues, the court erred by relying on the abrogated principles outlined in *Ross*, which distinguished discretionary and ministerial acts. The Legislature amended the GTLA in 1986 in response to *Ross*, and the amended statute immunized individual governmental actors "without regard to the discretionary or ministerial nature of the conduct in question." MCL 691.1407(2); *Odom v Wayne Co*, 482 Mich at 468. Thus, except as to intentional torts brought against individuals, the ministerial act consideration is no longer relevant to determining whether an individual is entitled to governmental immunity. *Odom*, 482 Mich at 480. Even still, *Odom* only refers to those individuals designated under the statute —officers and employees—without any inclusion of "agents" being lower-ranking governmental actors under MCL 691.1407(2). *Id.* at 479-480.

11 The term "agent" is explicitly mentioned in the motor vehicle exception, MCL 691.1405, and the governmental hospital exception, MCL 691.1407(4), under the GTLA.

12 In fact, the GTLA defines "volunteer" to mean "an *individual* who is specifically designated as a volunteer and who is acting solely on behalf of a governmental agency." MCL 691.1401(i) (emphasis added).

13 C Management argues for the first time on appeal that under the economic-realities test, see *Rakowski*, 269 Mich App at 625, it qualified as an "employee" for purposes of MCL 691.1407(2). However, because C Management raised this argument for the first time on appeal, it is not properly preserved. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005) (holding that an issue is generally preserved for review if it was raised before, addressed, or decided by the trial court). In any event, our reading of MCL 691.1407(2) renders the argument moot.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

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

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

EXHIBIT 6

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

2020 WL 1968684
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Ray SCHORNAK, Plaintiff-Appellee,
v.
MARTINREA HOT STAMPINGS, INC., doing business as Martinrea Fabco Hot Stampings, Inc., and Wayne County Road Commission, Defendants,
v.
City of Detroit, Defendant-Appellant,
and
Downriver Lawn & Landscape, Inc., doing business as Blue Water Disposal, Defendant/Third-Party Plaintiff,
and
Greg Davis Landscape Services, Inc., Defendant/Third-Party Defendant.

No. 347191
|
April 23, 2020

Wayne Circuit Court, LC No. 17-008147-NO

Before: Riordan, P.J., and Fort Hood and Swartzle, JJ.

Opinion

Per Curiam.

*1 Defendant, the city of Detroit, appeals as of right from an order denying its renewed motion for partial summary disposition on the basis of governmental immunity.[1] We affirm.

I. FACTUAL BACKGROUND

This negligence action arises from a slip-and-fall, which occurred in March 2016 at a building owned by Martinrea Hot Stampings, Inc. (Martinrea), in Detroit, Michigan. Plaintiff is a security inspector, and was scheduled to inspect a fire security system at Martinrea with a coworker, Jonathan Burns (Burns). Plaintiff arrived at Martinrea and parked on the street outside of the building. The street and sidewalks were covered in snow. Plaintiff got out of his car to follow Burns into the building. Plaintiff attempted to step up onto a sidewalk, which was covered with approximately two to three inches of snow. The sidewalk outside of Martinrea's building had not been salted or shoveled, and plaintiff lost his footing when he stepped on a portion of the sidewalk that was missing a large piece of cement. Plaintiff explained his fall as follows:

> I stepped up with my left foot onto—over the curb onto the sidewalk, and when I stepped up with the next foot to get up onto the sidewalk ... there was nothing under my foot but snow, and there was supposed to be a curb there, I think, and my foot went down and backwards. I fell forward on an angle toward

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

> |Martinrea's| door, and there was |a| fire hydrant. I tried to brace myself with my left hand. My face hit the fire hydrant. My nose hit the collar around the fire hydrant. The top of my forehead hit on the rounded part of the fire hydrant.

Burns turned around, saw plaintiff lying on the ground, and helped him stand up. Burns told plaintiff that plaintiff's eye was bleeding and walked him into Martinrea's lobby. Plaintiff informed a secretary that he slipped and fell outside the building. A security officer attempted to help plaintiff stop the bleeding from his eye and called an ambulance. Plaintiff was taken to the hospital. Plaintiff later had reconstructive surgery to repair his nose, which was broken in the fall, and received a series of treatments for an infected wound on his knee.

Plaintiff filed a negligence complaint, and defendant filed a motion for summary disposition in lieu of filing an answer. Defendant's first motion for summary disposition was denied. Defendant later filed a renewed motion for summary disposition, which was also denied. This appeal followed.

II. STANDARD OF REVIEW

In general, this Court reviews the grant or denial of a motion for summary disposition de novo. *Value, Inc. v. Dep't of Treasury*, 320 Mich. App. 571, 576; 907 N.W.2d 872 (2017). Defendant moved for partial summary disposition under MCR 2.116(C)(7), premised on governmental immunity. MCR 2.116(C)(7) requires the moving party to "allege facts justifying the application of an exception to governmental immunity." *Beals v. Michigan*, 497 Mich. 363, 370; 871 N.W.2d 5 (2015). The reviewing court is required to "consider[ ] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Id.* If no factual dispute exists, and "reasonable minds could not differ concerning the legal effect of those facts, whether the claim is barred by immunity is a question for the court to decide as a matter of law." *Id.* "The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal." *Moraccini v. Sterling Hts.*, 296 Mich. App. 387, 391; 822 N.W.2d 799 (2012).

***2** "A motion under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Anzaldua v. Neogen Corp.*, 292 Mich. App. 626, 630; 808 N.W.2d 804 (2011). A genuine issue of material fact " 'exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.' " *Bennett v. Russell*, 322 Mich. App. 638, 642; 913 N.W.2d 364 (2018) (citation omitted). This Court also "reviews de novo questions of statutory interpretation." *Paris Meadows, LLC v. Kentwood*, 287 Mich. App. 136, 141; 783 N.W.2d 133 (2010).

III. GOVERNMENTAL IMMUNITY

Defendant argues that the trial court erred by denying its renewed motion for summary disposition because plaintiff's negligence claim is barred by the governmental tort liability act (GTLA), MCL 691.1401 *et seq.* We disagree.

The GTLA provides governmental agencies with immunity from tort liability. MCL 691.1407. The immunity granted by the GTLA is broad, and any statutory exceptions to the rule of governmental immunity "are to be *narrowly* construed." *Nawrocki v. Macomb Co. Rd. Comm.*, 463 Mich. 143, 158; 615 N.W.2d 702 (2000). Six statutory exceptions exist to the broad grant of immunity given to governmental agencies:

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

> [T]he 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 government-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3). [*Goodhue v. Dep't of Transp.*, 319 Mich. App. 526, 531 n. 1; 904 N.W.2d 203 (2017) (quotation marks and citation omitted).]

This action concerns the application of the highway exception to the GTLA, which covers actions that "include[ ] a bridge, sidewalk, trailway, crosswalk, or culvert on the highway." MCL 691.1401(c). The highway exception to governmental immunity, MCL 691.1402(1), states:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

Governmental agencies have a duty to keep sidewalks in reasonable repair. The duty to maintain sidewalks is specifically governed by MCL 691.1402a, which states, in relevant part:

> (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.
>
> (2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.

Defendant argues that the highway exception does not apply because plaintiff failed to provide evidence that defendant knew, or should have known, that the defect in the sidewalk existed at least 30 days before plaintiff's injury occurred, in accordance with MCL 691.1402a(2). Defendant relies on *Bernardoni v. Saginaw*, 499 Mich. 470, 471; 886 N.W.2d 109 (2016), in which our Supreme Court held that a series of photographs taken 30 days after an accident were insufficient "to establish a genuine issue of material fact regarding whether the defect existed at least 30 days *before* the accident." In *Bernardoni*, the plaintiff submitted photographs showing a raised portion of a sidewalk where the plaintiff fell and was injured. Our Supreme Court reasoned:

> ***3** The necessary inference that would connect the photographs to the sidewalk's condition 60 days earlier becomes tenable *only with additional evidence*. Absent such evidence, one can imagine any number of scenarios in which the defect formed within 60 days of when the photographs were taken. Yet plaintiff has offered no evidentiary support of any kind for her assumptions that the defect existed for the necessary amount of time. For example, she has offered no affidavits from neighbors who viewed the sidewalk 30 days before the accident, nor did she introduce expert testimony demonstrating that the sidewalk discontinuity was of a type that usually forms or enlarges over a long period of time. Such additional evidence might have narrowed or closed the inferential gap between the photographs and the

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

> conclusions plaintiff and the Court of Appeals drew from them .... [M]ore is needed to explain why the current condition is probative of the past condition. [*Id.* at 475-476 (emphasis added).]

This case is distinguishable from *Bernardoni* because plaintiff submitted photographs and additional evidence demonstrating that the defect existed at least 30 days before plaintiff was injured. In addition to the photographs, plaintiff presented an affidavit from Luigi Ferdinandi (Ferdinandi), who opined that the sidewalk and curb "existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before March 2, 2016." Ferdinandi's opinion was on the basis of his experience as a construction worker for a family business, which focused primarily on "commercial and residential cement work including sidewalks, driveways and roads." When paired with the photographs, Ferdinandi's affidavit suggests that the deteriorated condition of the sidewalk would have existed more than 30 days before plaintiff was injured. Thus, plaintiff presented sufficient evident to support his argument.

Nevertheless, defendant asserts that the trial court should not have considered Ferdinandi's affidavit because it constituted inadmissible expert testimony. Defendant directs this Court to MRE 702,[2] and argues that Ferdinandi's affidavit was inadmissible because it contained no facts, data, or information regarding the methods that Ferdinandi used to draw his conclusions regarding the condition of the sidewalk. However, under MCR 2.116(G)(5), the content of an affidavit need only be admissible in substance, not in form. *Dextrom v. Wexford Co.*, 287 Mich. App. 406, 428; 789 N.W.2d 211 (2010). An expert witness's qualifications and descriptions of his or her methodology do not need to be incorporated into an affidavit that is submitted in response to a motion for summary disposition. *Id.* Further, whether Ferdinandi "will ultimately meet the MRE 702 requirements to be sworn as a witness is a matter reserved for trial." *Id.* The trial court did not err by considering Ferdinandi's affidavit when ruling on defendant's renewed motion for summary disposition. Under these circumstances, plaintiff presented proof that defendant knew or should have known about the condition of the sidewalk at least 30 days before plaintiff's injury. Accordingly, defendant is not entitled to summary disposition on the basis of governmental immunity.

IV. STATUTORY NOTICE

Defendant argues that the trial court erred by denying its renewed motion for summary disposition because plaintiff's notice of injury and defect did not conform to MCL 691.1404(1). We disagree.

***4** Defendant first argues that plaintiff's notice did not conform to MCL 691.1404(1) because he did not provide a list of known witnesses. MCL 691.1404(1) states that the injured party must supply "the names of the witnesses known at the time by the claimant," in a notice to the appropriate governmental agency. The parties specifically disagree regarding whether plaintiff was required to include Burns on the list of potential witnesses, despite the fact that Burns did not actually witness plaintiff's fall. Plaintiff contends that he was not required to include Burns on a list of witnesses because Burns did not see plaintiff's fall. Conversely, defendant argues that Burns was required to be included on a list of witnesses regardless of whether he saw plaintiff's fall.

This Court has previously held that witnesses, under MCL 691.1404(1), "are those persons who witnessed the occurrence of the injury and the defect." *Milot v. Dep't of Transp.*, 318 Mich. App. 272, 278; 897 N.W.2d 248 (2016) (quotation marks omitted). This Court specified that " 'the names of the witnesses' are the names of those persons who witnessed the occurrence." *Id.* at 279-280, quoting MCL 691.1404(1). In this case, Burns attested that he did not actually see plaintiff fall:

> *Q.* Okay. What happened next?
>
> *A.* I heard a commotion behind me, so I turned around.
>
> *Q.* And [plaintiff] was on the ground.

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

* * *

Q. Okay. Now, you had indicated that you actually didn't observe [plaintiff] fall, correct?

A. Correct.

Since Burns did not actually witness plaintiff's accident, plaintiff was not required to identify him in his notice of injury and defect. *Milot*, 318 Mich. App. at 280. Accordingly, defendant cannot convincingly argue that plaintiff's notice failed to conform to MCL 691.1404(1) for failure to identify known witnesses.

Defendant next argues that the notice of injury and defect was defective because (1) plaintiff did not personally sign the notice and (2) plaintiff did not personally serve a copy of the notice on defendant. In support of this argument, defendant directs this Court to the language of MCL 691.1404(1), which states, "[a]s a condition to any recovery for injuries ... the injured person ... shall serve a notice on the governmental agency of the occurrence of the injury and the defect." Defendant argues that this means plaintiff was personally responsible for signing and serving the notice.

This issue is governed by *Russell v. City of Detroit*, 321 Mich. App. 628; 909 N.W.2d 507 (2017). In *Russell*, the plaintiff initiated a negligence action by filing a notice of injury and defect under MCL 691.1404(1). *Id.* at 630. The defendant argued that the plaintiff violated MCL 691.1404(1) by failing to sign and personally serve his notice of injury and defect on the defendant. *Id.* at 636-637. The defendant further contended that, "because MCL 691.1404(1) does not specifically allow for service through an attorney, an injured person over 18 must personally serve notice." *Id.* at 637. This Court disagreed, finding that the statute did not require an injured person to "personally send the notice by certified mail or to appear in person to personally serve the notice." *Id.* at 639. This Court observed that the defendant's argument ignored well-settled principles of agency, and observed that agents, including attorneys, "have the implied power to carry out all acts necessary in executing [the principal's] expressly conferred authority." *Id.* at 641. This Court opined that, to comply with MCL 691.1404(1), the notice of injury should specify that the notice is being given on behalf of the injured party. *Id.* at 641-642. Additionally, this Court addressed whether the injured party is required to sign the notice, and found that "all that is required by MCL 691.1404(1) is that the injured person *serves* the notice on the governmental agency," *id.* at 645 (emphasis added), suggesting that the injured party need not sign the notice.

**5 Applying this Court's analysis in *Russell* to the instant case, it is clear that defendant cannot show that the notice of injury and defect failed to conform to MCL 691.1404(1). The notice was signed by plaintiff's attorney and stated that plaintiff was the claimant. The content of the notice makes it apparent that plaintiff's attorney wrote the document and submitted it on plaintiff's behalf. Thus, the service of the notice satisfied the requirements of MCL 691.1404(1). Defendant is not entitled to summary disposition on the basis of deficiencies in the notice of injury and defect, and the trial court did not err by denying defendant's renewed motion for summary disposition.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2020 WL 1968684

Footnotes

1 "[T]his Court has jurisdiction to decide an appeal of right from an order denying governmental immunity under MCR 2.116(C)(7) ...." *Seldon v. Suburban Mobility Auth. for Regional Transp.*, 297 Mich. App. 427, 436; 824 N.W.2d 318 (2012).

2 MRE 702 states as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

End of Document © 2025 Thomson Reuters. No claim to original U.S. Government Works.

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

FILED Received for Filing Oakland County Clerk 10/4/2023 3:17 PM

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

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
Lionel E. Bashore (P58599)
Daniel A. Groves (P74026)
Attorneys for Plaintiff
17 South Saginaw St., 2nd Floor
Pontiac, MI 48342
(586) 803-0500
daniel@bglawpc.com

COLLINS EINHORN FARRELL PC
Nicole E. Wilinski (P61904)
Brian A. Catrinar (P76320)
Attorneys for Defendant Brown
4000 Town Center, Ste. 909
Southfield, MI 48075
(248) 455-4141
nicole.wilinski@ceflawyers.com
brian.catrinar@ceflawyers.com

HARVEY KRUSE, PC
Michael F. Schmidt (P25213)
Attorney for Defendant Kaltz
1050 Wilshire Dr., Ste. 320
Troy, MI 48084
(248) 649-7800
mschmidt@harveykruse.com

KAUFMAN PAYTON & CHAPA, PC
Frank A. Misuraca (P55643)
Attorney for Defendant DTE
30833 Northwestern Hwy., Ste. 200
Farmington Hills, MI 48334
(248) 626-5000
famisuraca@kaufmanlaw.com

THE KELLY FIRM, PC
Morgan A. McAtamney (P80047)
Attorney for Independence Twp
2825 University Dr.
Auburn Hills, MI 48326-2544
(248) 655-7025
morgan@kellyfirmoc.com

ROSATI SCHULTZ JOPPICH & AMTSBUECHLER PC
Margaret T. Debler (P43905)
Andrea M. Pike (P74755)
Attorneys for Independence Twp.
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
mdebler@rsjalaw.com
apike@rsjalaw.com

DEFENDANT INDEPENDENCE TOWNSHIP'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT INDEPENDENCE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION

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

Independence Township filed a motion for summary disposition of the one-count negligence claim against it in Plaintiff's Second Amended Complaint ("Complaint") pursuant to MCR 2.116(C)(7) for governmental immunity and MCR 2.116(C)(8) for failure to state a valid claim. Co-Defendant Kaltz filed an Answer and Plaintiff filed a two-page Response to the Motion.

Plaintiff's Response states that he wants to see the Township's Reply to the arguments in Kaltz's Answer to the Motion. Plaintiff claims that how the Township and Kaltz use terms of art from Miss Dig are at the crux of the argument, which is not the case. The legal issue before the Court on the Township's Motion is whether Plaintiff properly pleaded in avoidance of governmental immunity and set forth facts establishing an immunity exception applies. He pleaded a negligence claim against the Township, which fails to avoid immunity. Further, there is no other conceivable exception to governmental immunity applicable to the allegations in the Complaint.

PLAINTIFF FAILED TO PLEAD OR ESTABLISH AN EXCEPTION TO THE TOWNSHIP'S GOVERNMENTAL IMMUNITY AS TO PLAINTIFF'S NEGLIGENCE CLAIM, REQUIRING SUMMARY DISPOSITION IN FAVOR OF THE TOWNSHIP

The Township is immune from Plaintiff's negligence claim, pursuant to the Michigan Governmental Tort Liability Act, MCL 691.1401, *et seq* (the "GTLA"). Plaintiff alleges that upon information and belief, the Township was "operating or failing to operate outside the descriptions and duties of the prescribed governmental duties." Complaint, ¶ 44. However, the Township is immune from tort liability if it is engaged in the exercise or discharge of a governmental function and its operation of its sanitary disposal system is a governmental function. *Baker v Waste Mgmt of Michigan, Inc*, 208 Mich App 602, 607 (1995); *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 484 (2006). MCL 691.1407.

A. Plaintiff Failed to Plead an Exception to Governmental Immunity

Plaintiff's Complaint alleges one count (Count IV) against the Township for "general negligence" and "common law negligence." Complaint, ¶¶ 42-44. Plaintiff added Count IV,

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

containing allegations made "upon information and belief" and added the Township only after Co-Defendant Kaltz filed a Notice of Non-Party Fault to attempt to shift the blame away from Kaltz's actions. Plaintiff alleges the following in his Complaint that is relevant to the Motion:

- As a direct and proximate cause of Kaltz's actions in digging, excavating, drilling, and boring, Plaintiff suffered harm. Complaint, ¶¶ 31-34. Plaintiff never alleged that his harm was caused by the Township. *Id.*, ¶¶ 42-44.
- Plaintiff's damaged lead was "a private sewer lead beneath a private road." *Id.*, ¶¶ 8-11, 20-22, 32-33, 39.
- "Upon information and belief," the Township was negligent because it violated the Miss Dig Act, MCL 460.721, and violated its Ordinance, § 48-84. *Id.*, ¶¶ 42-43.
- "Upon information and belief that [sic] governmental immunity does not apply when the governmental entity is operating or failing to operate outside the descriptions and duties of the prescribed governmental duties." *Id.*, ¶ 44.

Plaintiff's Complaint contains no factual allegations about what the Township did or did not do to allegedly violate the Miss Dig Act or its Ordinance. Complaint, ¶¶ 1-6, 42-44. Plaintiff alleges the Township violated MCL 460.721 (the short title section of the Miss Dig Act) but is silent on what section of the Act it allegedly violated. His Complaint contains legal conclusions with no factual support, which is insufficient to survive summary disposition under MCR 2.116(C)(8). "[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *City of Detroit v Gen Motors Corp,* 233 Mich App 132, 139-140 (1998)(quoting *Libralter Plastics, Inc v Chubb Group of Ins Cos,* 199 Mich App 482, 486 (1993)).

Plaintiff failed to establish that his negligence claim against the Township falls within one of the six recognized exceptions to governmental immunity. MCL 691.1402, 1406, 1406, 1407,

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

1413, 1417; *Mack v City of Detroit*, 467 Mich 186, 201 (2002); *Lash v Traverse City*, 479 Mich 180, 199 (2007). It is important to resolve immunity questions at the earliest possible stage in litigation. *Hunter v Bryant,* 502 US 224 (1991); *Guider v Smith,* 431 Mich 559, 565 (1988). The central purpose of governmental immunity is to avoid the expense of having to contest on the merits any claim barred by governmental immunity. *Mack v Township of Detroit*, 467 Mich 186, 203 n18 (2002). Absent an immunity exception giving rise to a particular type of tort action against a governmental agency, general torts for damages, like negligence, are barred by immunity.

B. A Violation of the Miss Dig Act Is Not an Immunity Exception

Plaintiff did not plead an exception to governmental immunity; he pleaded only negligence against the Township. Kaltz attempts to amend Plaintiff's pleadings to shift liability away from itself for severing Plaintiff's private sewer lead/drain. Kaltz tries, unconvincingly, to argue that there are applicable exceptions to immunity but there are none. Both the GTLA and MISS DIG, MCL 460.721, *et seq* ("Miss Dig Act" or "Miss Dig"), contain clear and unambiguous language. *In re Bradley Est,* 494 Mich 367, 377 (2013). The GTLA says, "[t]he immunity provided by this act does not apply to liability of a governmental agency under the MISS DIG underground facility damage prevention and safety act." MCL 691.1407(7). Consequently, the only potential source of liability for MISS DIG violations is that set forth in the Miss Dig Act. **The Miss Dig Act 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** [the GTLA]. (emphasis added)." MCL 460.732(1). These Acts should be read harmoniously.

Section 12 of the Miss Dig Act permits *a facility owner or operator* to file a complaint with the Public Service Commission to seek a civil fine and, if applicable, damages from a governmental agency. MCL 460.732(2). The Act does not authorize a private cause of action against a municipality. The provisions of law concerning townships "shall be liberally construed

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

in their favor." Mich Const 1963, Article 7, § 34; see also, *Altman v Meridian Twp*, 439 Mich 623 (1992). A complaint made to the Commission, that the Township violated the Miss Dig Act, is the *exclusive* remedy against the Township for an alleged violation of that Act.

Although a governmental agency may be liable under the Miss Dig Act, liability under Miss Dig is confined to the liability Miss Dig spells out – a complaint to the Commission. *Id.* The provision is not an exception to tort immunity; it is an acknowledgment that Miss Dig provides an avenue for addressing violations. Miss Dig expressly states that the ability to file a complaint with the Commission does not affect the application of MCL 691.1407 (Section 7 of the GTLA), tort immunity. See MCL 460.732(1); MCL 691.1407. Michigan Courts have repeatedly held that there are only six exceptions to governmental immunity under the GTLA. The reference to Miss Dig in the GTLA does not create a seventh exception to immunity.[1] Michigan Courts have also ruled, in accordance with MCL 691.1407, that no variety of negligence claims avoid governmental immunity. *Walby v City of Caro,* 2021 WL 1941635, *3-4 (Mich Ct App May 13, 2021), Exh. 4.

There is nothing in the Miss Dig Act that expands the Township's requirement to mark beyond "its facilities in the area of the proposed excavation." MCL 460.727(1). Importantly, the express language in the GTLA and the Miss Dig Act are clear that (A) an alleged violation of the Miss Dig Act is not an exception to governmental immunity for torts like negligence under Miss Dig, and (B) governmental immunity does not preclude a complaint to the Commission, but (C) it does not provide authority for a tort cause of action against a Township in Circuit Court.

Plaintiff also alleged the Township was negligent for violating its Ordinance, Section 48-84, without any factual allegations. The Township's Ordinance states that individual building

[1] *Gathright v Mission Hills Memorial Gardens, Inc,* 2023 WL 4043795, at *7 (Mich Ct App June 15, 2023), attached as **Exhibit 5**. See also *Goodhue v Dept of Transportation,* 319 Mich App 526, 531 n1 (2017)(six exceptions to the broad grant of governmental immunity); *Schornak v Martinrea Hot Stampings, Inc,* 2020 WL 1968684, at *2 (Mich Ct App Apr 23, 2020), attached as **Exhibit 6**.

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

sewers are *not maintained by the Township* and an individual building sewer includes a house connection sewer to the sewers in the streets or easements. Ord., §§ 48-52(a), 48-84 (Exh. 3). The Township did not violate its Ordinance by failing to mark a private lead, but even if it had, it would not deprive the Township of immunity. *Reid by Ried v Allen,* 133 Mich App 448, 450 (1984).[2]

C. The Sewer Exception to Immunity Is Not Applicable

Plaintiff does not allege that the sewer exception in the GTLA applies. But even if he had, it does not apply. A governmental agency is immune from tort liability for a backup unless the backup was a "sewage disposal system event." A sewage disposal system is a sewer that is "under the jurisdiction and control of the governmental agency." MCL 691.1417; MCL 691.1416(j), (k); *Willett v Charter Twp of Waterford,* 271 Mich App 38, 46-50 (2006). Also, if a connection to the sewage disposal system, including a building drain, was a substantial proximate cause of the backup, it is *not* a "sewage disposal system event"; no exception applies. MCL 691.1416(k)(ii). It is undisputed that the cause of the backup was damage to Plaintiff's *private building lead/drain* so there was no "sewage disposal system event." The Complaint alleges that Kaltz damaged Plaintiff's private sewer lead/drain so there was no defect in the municipal main that caused sewage to back up into Plaintiff's basement. Complaint, ¶¶ 31-34 (Exh. 1).

WHEREFORE, the Township requests that this Honorable Court enter an order granting summary disposition in its favor and award its costs and attorney fees under MCR 2.625(A)(2).

Respectfully submitted,

October 4, 2023

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC
/s/ Andrea M. Pike
Margaret T. Debler (P43905)/Andrea M. Pike (P74755)
Attorneys for Independence Township

[2] Kaltz's argument about marking an "appurtenance," referenced in Plaintiff's Response, is not relevant to the Court's analysis of immunity. Further, the Township's Ordinance is clear that Plaintiff's house connection sewer or building lead/drain (under a private road) is not maintained by the Township. Therefore, it cannot be part of the Township's facilities under the Miss Dig Act.

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

EXHIBIT 5

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

2023 WL 4043795
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Margaret GATHRIGHT, Individually and as Personal Representative of the Estate of Nathaniel Gathright, Natalyn Newsom, Annetta Gathright, and Natonya Gathright, Plaintiffs-Appellees,
v.
MISSION HILLS MEMORIAL GARDENS, INC., Defendant,
and
Crystal Springs Cemetery, also known as Crystal Springs Cementary, Defendant/Cross-Defendant-Appellant,
and
City of Benton Harbor, Defendant/Cross-Plaintiff/Cross-Defendant-Appellant,
and
C Management, Inc., doing business as Crystal Springs Cemetery Management, Defendant/Cross-Plaintiff/Cross-Defendant.
Margaret Gathright, Individually and as Personal Representative of the Estate of Nathaniel Gathright, Natalyn Newsom, Annetta Gathright, and Natonya Gathright, Plaintiffs-Appellees,
v.
Mission Hills Memorial Gardens, Inc., Defendant,
and
Crystal Springs Cemetery, also known as Crystal Springs Cementary, Defendant/Cross-Defendant,
and
City of Benton Harbor, Defendant/Cross-Plaintiff/Cross-Defendant,
and
C Management, Inc., doing business as Crystal Springs Cemetery Management, Defendant/Cross-Plaintiff/Cross-Defendant-Appellant.

No. 362182, No. 362424
|
June 15, 2023

Berrien Circuit Court, LC No. 2021-000127-CZ

Before: Cameron, P.J., and Murray and Gadola, JJ.

Opinion

Per Curiam.

*1 In these consolidated appeals, [1] defendants-appellants Crystal Springs Cemetery (the Cemetery), the City of Benton Harbor (the City), and C Management, Inc., appeal by right the trial court's order denying their motions for summary disposition, in part, pursuant to MCR 2.116(C)(7) [2] on governmental immunity grounds. In Docket No. 362182, the Cemetery and the City (referred to collectively as "City defendants") argue that the trial court erred by denying their motion for summary disposition because plaintiffs' claim under the Prepaid Funeral and Cemetery Sales Act (PFCSA) MCL 328.211 *et seq.*, was barred by

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

governmental immunity under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.* In Docket No. 362424, defendant C Management argues that the trial court erred by finding that it was not entitled to governmental immunity although it was acting as City defendants' "agent" when the alleged torts occurred. We affirm.

I. BACKGROUND

This case arises from a prepaid contract entered between plaintiff Margaret Gathright and the Cemetery on June 7, 2013, when Margaret purchased a burial plot, identified as number 19, for herself at the Cemetery. Margaret purchased the burial plot located directly beside her late husband, Nathaniel Gathright, who was buried in plot 18 the year prior.

In the latter part of 2013, City defendants entered into a cemetery management and operation agreement with C Management, Inc., for C Management to manage and operate the Cemetery. The agreement defined C Management as an independent contractor to the City. According to the agreement, the term was set to end on September 30, 2033, but included an option to terminate. Although several years later, C Management exercised its option to terminate the agreement with City defendants, effective March 15, 2020. C Management continued to manage and operate the Cemetery under the oversight of the City and at the direction of the Chairperson of the Cemetery board.

The dispute arose in December of 2020 when Margaret was visiting her husband's grave and discovered that a woman named Cleavy Bradley had been buried in the plot that Margaret purchased for herself in 2013. The record shows that Mrs. Bradley's son, Joe Bradley Jr., purchased plot number 20 for his mother, but that Mrs. Bradley was mistakenly buried in plot number 19.

II. PROCEDURAL HISTORY

Margaret and her three daughters, Natalyn Newsom, Annetta Gathright, and Natonya Gathright filed suit against defendants, asserting the following 12 counts in their second amended complaint: the violation of the PFCSA (Count I) and the Michigan Consumer Protection Act (MCPA) (Count II), wrongful interference with the right of burial (Count III), breach of fiduciary duty (Count IV), negligence (Count V), gross negligence (Count VI), negligent infliction of emotional distress (NIED) (Count VII), fraudulent misrepresentation (Count VIII), negligent/innocent misrepresentation (Count IX), breach of contract (Count X), conversion (Count XI), and specific performance (Count XII). Plaintiffs sought damages in excess of $25,000 for compensatory and punitive damages, treble damages, and costs and attorney fees.

*2 Each count asserted in plaintiffs' complaint rested in some way on allegations that defendants had a duty to reserve Margaret's pre-purchased burial plot, that they breached their duty by burying another person in her plot, and that plaintiffs were harmed as a result. The subject of these appeals are plaintiffs' claims under the PFCSA against City defendants and C Management and plaintiffs' claims for negligence and gross negligence against C Management. In their complaint, plaintiffs alleged that defendants violated the PFCSA by failing to keep "accurate accounts, books, and records of all transactions and accounts regulated by [the PFCSA]," MCL 328.218(1), and sought enforcement and damages under MCL 328.234. Plaintiffs further alleged that C Management was negligent in its management and operation of the Cemetery and breached its duty owed to plaintiffs to secure Margaret's burial plot beside her late husband by negligently burying another person in that plot, resulting in harm to plaintiffs. Plaintiffs alleged that C Management's conduct amounted to gross negligence, demonstrating a substantial lack of concern for whether injury would result by infringing on Margaret's use of her plot. The City subsequently filed a crossclaim against C Management and C Management filed a separate crossclaim against City defendants, both asserting indemnity and breach of contract against each other. [3]

City defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), arguing that plaintiffs' tort claims were barred by governmental immunity. City defendants argued that they were immune from liability under the GTLA, MCL 691.1407(1), as the alleged tortious conduct occurred during the exercise or discharge of a governmental function and

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

plaintiffs had otherwise failed to state a claim that fit within any of the statutorily enumerated exceptions under the GTLA. According to the City, it's operation of a cemetery was a governmental function, as defined by MCL 691.1401(e), because the Michigan Constitution, Const. 1963 art. 7 § 23, and Home Rule Cities Act, MCL 117.1 and MCL 117.4e, explicitly authorized a municipality to own and operate a cemetery, as did the city charter and ordinances, Benton Harbor Ordinances, § 12-20. Moreover, the City argued, the Cemetery was not a separate legal entity from the City and, therefore, not subject to suit. MCR 2.201(C). City defendants further argued that plaintiffs failed to state a claim under the PFCSA because the Act did not apply to the sale or resale of the cemetery burial plot at issue. Rather, their argument goes, the PFCSA regulated funeral and cemetery merchandise and services, and the use of funds received by sellers and providers of those goods and services. City defendants argued that the PFCSA did not contemplate the sale of land, including the sale of cemetery plots, citing MCL 328.214(2), MCL 328.213(g), and MCL 328.214(e).

C Management also moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), seeking dismissal on all counts of plaintiffs' complaint. C Management first argued that it was immune from plaintiffs' tort claims pursuant to MCL 691.1407(2) because "agents" of government entities are cloaked with governmental immunity under the GTLA when acting within the scope of their employment. C Management alleged that it was an agent of the Cemetery under common law agency principles because the Cemetery's board controlled the actions of C Management. C Management alleged that it acted within its authority when selling the burial plot to the Bradley family and that its operation of a public cemetery was an exercise of the Cemetery's governmental function, as delineated under the city ordinances. C Management argued that it did not engage in grossly negligent conduct, considering that it reviewed the available records and inspected the burial plot prior to selling it to the Bradley family. C Management also argued that the sale to the Bradley family occurred *after* it had already terminated the cemetery management agreement with City defendants and relinquished all control over the cemetery operations to the Cemetery's board members.

C Management also sought dismissal of plaintiffs' complaint on other grounds, asserting, in relevant part, that it was entitled to judgment as a matter of law on plaintiffs' claims related to the PFCSA, negligence, and gross negligence. C Management argued that it was not managing the Cemetery when Margaret purchased the subject burial plot in 2013 because that event pre-dates the effective date of the cemetery management agreement between defendants. C Management also argued that after contracting to provide management services for the Cemetery, it acted reasonably under the circumstances despite City defendants' poor recordkeeping, pointing fault at City defendants for their purported failure to record Margaret's purchase of burial plot 19.

***3** Plaintiffs filed one brief in response to both C Management and City defendants' motions for summary disposition and voluntarily dismissed several claims against defendants.[4] Remaining were plaintiffs' claims related to the PFCSA, gross negligence, breach of contract, and their request for specific performance against all defendants and plaintiffs' claims for negligence, wrongful interference with the right of burial, and conversion against only C Management. Plaintiffs conceded that City defendants were entitled to immunity from tort liability under the GTLA. However, plaintiffs argued that C Management was not governmentally immune from liability because only governmental agencies and their employees could enjoy the GTLA's grant of immunity, MCL 691.1407. Plaintiffs argued that private entities, such as C Management, are not government agencies nor employees, even when the private entity contracts with, or acts on behalf of, a governmental agency. Aside from the management agreement, C Management retained its separate identity as a for-profit corporation, which was governed by its own board of directors, and unlike a governmental agency, C Management's creation was not mandated by law. Therefore, immunity under the GTLA was inapplicable to C Management.

Plaintiffs further argued in their response that defendants violated MCL 328.218(1) of the PFCSA by failing to keep accurate accounts, books, and records of all transactions and accounts, including the record evidencing Margaret's purchase of plot 19. According to plaintiffs, defendants admitted in their crossclaims against each other that the other failed to properly maintain the cemetery records. Plaintiffs alleged that the Bradley family was permitted to purchase and bury Ms. Bradley in the plot owned by Margaret solely because defendants failed to maintain accurate records of their transactions. Had defendants complied with the statute, Margaret's burial plot would not have been resold to the Bradley family and the lawsuit would have never occurred. Plaintiffs acknowledged that C Management was not involved in the original sale of plot 19 to Margaret, but asserted that C

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

Management facilitated the resale of the plot to the Bradley family and the subsequent burial of Mrs. Bradley in the plot owned by Margaret. Plaintiffs argued that governmental immunity did not apply and that a city ordinance could not preempt state law such as the PFCSA. Nor could defendants contract or indemnify themselves around the mandates of the PFCSA explicitly authorizing the court to award damages and other relief to plaintiffs under MCL 328.234.

In reply, City defendants argued that plaintiffs' claim for monetary damages under the PFCSA was barred by governmental immunity and that plaintiffs failed to plead in avoidance of governmental immunity. City defendants argued that although the PFCSA may permit a private enforcement action under MCL 328.234, the statute does not otherwise create a private cause of action for the negligent maintenance of cemetery records. Nor does the statute contain an express legislative authorization in avoidance of governmental immunity. City defendants argued that the PFCSA does not apply to the sale of funeral plots under MCL 328.216(1) and that cemeteries owned and operated by municipalities were exempt from the requirements of the Cemetery Regulation Act under MCL 456.530(1). Moreover, City defendants alleged that while MCL 328.218(1) imposed a statutory duty on registrants to maintain accurate records, they were not "registrants" as defined by the Act, considering that they did not register with the Department of Labor and Economic Growth under MCL 328.215(g).

City defendants further argued that plaintiffs' claim for breach of contract and request for specific performance was limited by Benton Harbor Ordinances, § 12-20, which provided that the supervisor of cemeteries could correct any errors made in the interment of remains by refunding money or removing and reinterring remains in a plot of equal value and similar location. According to City defendants, the Cemetery supervisor attempted to remedy the errors by offering to refund Margaret for the price of her burial plot or to locate two unused plots for both Margaret and Nathaniel. City defendants argued that plaintiffs were contractually limited to the supervisor's remedies and were not otherwise entitled to further relief.

III. TRIAL COURT DECISION

*4 Following oral argument on City defendants and C Management's motions for summary disposition, the trial court entered its written order, granting in part and denying in part defendants' motions for summary disposition. Regarding the four remaining claims against City defendants, the court granted summary disposition on plaintiffs' gross negligence claim, but denied summary disposition regarding plaintiffs' claims related to the PFCSA, breach of contract, and specific performance. As to the seven counts remaining against C Management, the trial court granted summary disposition to C Management regarding plaintiffs' wrongful interference with the right of burial and conversion claims, but denied summary disposition on plaintiffs' remaining claims under the PFCSA and for negligence, gross negligence, breach of contract, and specific performance.

The trial court found that City defendants were immune from tort liability under the GTLA. The court found that City defendants, as political subdivisions under MCL 691.1401(c), were governmental agencies for the purposes of the GTLA, MCL 691.1407(1). The court further found that cemetery responsibilities constituted governmental functions, MCL 691.1401(b), and the city ordinance governed cemeteries, Benton Harbor Ordinances, § 12-1. The court found that plaintiffs had not met their burden of pleading in avoidance of governmental immunity under any exception, and held that based on the facts before it, the proprietary-function exception to governmental immunity, MCL 691.1413, did not apply. Having found that governmental immunity applied to City defendants, the court dismissed plaintiffs' claim that City defendants engaged in grossly negligent conduct when the alleged torts occurred, as MCL 691.1407(2)(c) only permits liability against the individual actor and not the governmental entity.

On the other hand, the court found that C Management was not immune from tort liability under the GTLA, MCL 691.1407(2). The court found that C Management was an agent of City defendants, acting under a contract, whose actions were ministerial and therefore not shielded by governmental immunity under the GTLA. The court found that C Management was responsible for the Cemetery and its accompanying duties during the term of the agreement, between September of 2013 and March of 2020. After C Management exercised its option to terminate the agreement, it continued its obligations by acting on the Cemetery board's behalf and at the direction of the Cemetery board chairperson, receiving compensation for its services. The court held that while

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

C Management presented sufficient evidence establishing its agency relationship with City defendants, it was unprotected by governmental immunity because its actions while serving as an agent were ministerial.

The trial court further found that dismissal was not warranted under MCR 2.116(C)(7) as to plaintiffs' claims related to the PFCSA, breach of contract, and specific performance on governmental immunity grounds, as the GTLA's grant of immunity from tort liability did not extend to claims sounding in contract law. Concerning plaintiffs' claim under the PFCSA, the court found that "[g]overnmental immunity does not encompass a breach of contract claim, for which a remedy may be obtained in the form of compensatory damages." The court also declined to dismiss that claim under MCR 2.116(C)(10), finding that there remained genuine issues of material fact on the PFCSA's applicability to the contract for the sale of the burial plots and services. The court considered the statutory definitions of burial rights, cemetery services, funeral services, interment, and prepaid contract, and found that reasonable minds could differ as to whether the PFCSA's meaning of those words could encompass the issues in the case at bar. MCL 328.214(e), 213(a) and (g), and 214(e) and (i), and 215(d).

*5 The trial court further found genuine issues of material fact regarding plaintiffs' breach of contract claim, precluding summary disposition as to all defendants under MCR 2.116(C)(10). The court found that plaintiffs adequately presented evidence demonstrating the elements for a breach of contract, as Margaret purchased the burial plot for adequate consideration, with the expectations of being buried therein, and that Margaret, because of defendants' alleged breach of contract, could no longer be buried in that plot without a significant change of circumstances. The court additionally found that specific performance was an available remedy because burial plots constitute real property.

As to plaintiffs' remaining tort claims against C Management, the trial court granted summary disposition in favor of C Management for the wrongful interference with the right of burial and conversion claims, but denied summary disposition regarding plaintiffs' gross negligence and negligence claims. The court found no interference by C Management with plaintiffs' right to bury Nathaniel nor Margaret, and that an action for conversion could not lie with respect to realty such as burial plots. The court further found genuine issues of material fact regarding C Management's gross negligence and negligence. The court found that while C Management provided in its affidavit that it took reasonable steps to verify the correct burial plot, by reviewing records available to it and awaiting approval from the Cemetery board, plaintiffs countered by a showing of their receipts, exhibits, and allegations of other facts to the contrary, precluding summary disposition in favor of C Management.

In Docket No. 362424, C Management argues on appeal that the trial court erred by finding that it was not immune from tort liability under the GTLA, MCL 691.1407(2). C Management argues that the trial court properly found that it had established an agency relationship with City defendants and that its agency relationship with City defendants met the standard of an "employee" under MCL 691.1407(2). C Management argues that it is immune from tort liability under the GTLA because the alleged torts occurred while serving in its capacity as City defendants' agent and during the exercise or discharge of a governmental function, and no exception to governmental immunity applied. Moreover, C Management did not engage in grossly negligent conduct when the alleged torts occurred. On this basis, C Management argues that it is entitled to governmental immunity under MCL 691.1407(2), but that the trial court erred by ultimately denying governmental immunity to C Management based on its erroneous findings that C Management's actions while serving as an agent to City defendants were ministerial in nature. And, its entitlement to governmental immunity necessarily bars plaintiffs' claim under the PFCSA and for gross negligence and ordinary negligence.

In Docket No. 362182, City defendants argue that the trial court erred by treating the Cemetery as a separate legal entity from the City. Additionally, City defendants argue that any liability under the PFCSA is tort liability against which governmental immunity under the GTLA applies.

IV. STANDARD OF REVIEW

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

Summary disposition under MCR 2.116(C)(7) is appropriate based on immunity granted by law. MCR 2.116(C)(7). Whether governmental immunity applies under the GTLA is a question of law that is reviewed de novo on appeal. *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006). When reviewing a summary disposition motion under MCR 2.116(C)(7), "the court considers all documentary evidence submitted by the parties in the light most favorable to the nonmoving party." *Citizens Ins Co of America v Univ Physician Group*, 319 Mich App 642, 648; 902 NW2d 896 (2017). "If no material facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Mays v Snyder*, 323 Mich App 1, 25; 916 NW2d 227 (2018) (quotation marks and citation omitted), aff'd sub nom *Mays v Governor*, 506 Mich 157; 954 NW2d 139 (2020). However, if a question of fact does exist, dismissal is inappropriate. *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010). Whether this Court has jurisdiction is a question of law that is also reviewed de novo. *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009). Similarly, we review de novo issues of statutory interpretation. *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013).

V. JURISDICTION

***6** Preliminarily, we address plaintiffs' argument that this Court does not have jurisdiction as to City defendants' appeal because "all of the claims | | |to which] governmental immunity applied, were dismissed, either voluntarily or by the trial |c|ourt." Plaintiffs also argue that this Court lacks jurisdiction over C Management's appeal because C Management is a private, for-profit corporation with no standing to claim governmental immunity protection. [5]

This Court's jurisdiction is governed by statute and court rule. *Chen*, 284 Mich App at 191. A defendant may appeal as of right an order denying summary disposition under MCR 2.116(C)(7) if the order denied governmental immunity to a governmental party. MCR 7.202(6)(a)(v) (stating that a "final order" includes "an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity"); MCR 7.203(A)(1) (provides an appeal of right from a final judgment or order as defined in MCR 7.202(6)). In an appeal by right from an order denying a claim of governmental immunity, "this Court does not have the authority to consider issues beyond the portion of the trial court's order denying the defendant's claim of governmental immunity." *Pierce v Lansing*, 265 Mich App 174, 182; 694 NW2d 65 (2005).

Here, the trial court denied, in part, City defendants' motion for summary disposition under MCR 2.116(C)(7) on plaintiffs' counts for the alleged violation of the PFCSA and breach of contract. Although the trial court found that City defendants were a governmental agency shielded by governmental immunity, the court ultimately held that governmental immunity does not encompass claims sounding in contract law. City defendants appealed by right the portion of the trial court's order denying their motion for summary disposition on governmental immunity grounds regarding the PFCSA claim, arguing that any liability under the PFCSA is a form of tort liability for which governmental immunity should apply.

The trial court also denied, in part, C Management's motion for summary disposition under MCR 2.116(C)(7), holding that C Management was not entitled to governmental immunity. While the court found that C Management demonstrated sufficient evidence of its agency relationship with City defendants, the court ultimately held that agents of a governmental agency are not cloaked with immunity under the GTLA when the agent's duties were ministerial in nature. C Management appealed by right that portion of the trial court's order denying its motion for summary disposition on the basis of governmental immunity, arguing that the trial court erred because agents are immune from tort liability under MCL 691.1407(2) of the GTLA, irrespective of whether the agents' duties were discretionary or ministerial. C Management also appealed plaintiffs' tort claims remaining against C Management, arguing that those claims are barred by governmental immunity.

***7** City defendants and C Management each appealed as of right the trial court's order denying them, in some fashion, governmental immunity under MCR 2.116(C)(7). See MCR 7.203(A)(1) and MCR 7.202(6)(a)(v). City defendants appeal the trial court's denial of governmental immunity under MCR 2.116(C)(7) on the PFCSA claim, while C Management appeals the

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

trial court's complete denial of its immunity as to any of plaintiffs' claims. In both matters, defendants' arguments were directly considered and denied by the trial court in the context of governmental immunity. The trial court's order fits squarely within the final order definition in MCR 7.202(6)(a)(v) (an order denying governmental immunity to a governmental party under MCR 2.116(C)(7)). This Court has jurisdiction over the claims of appeal. MCR 7.203(A); MCR 7.202(6)(a)(v).

VI. DOCKET NO. 362182—CITY DEFENDANTS

City defendants argue that the trial court erred when it determined that plaintiffs' claim under the PFCSA was a breach of contract claim not barred by the GTLA. Specifically, City defendants argue any liability under the PFCSA is a form of tort liability against which governmental immunity applies and that plaintiffs failed to plead in avoidance of that immunity.

Under the GTLA, MCL 691.1407, government agencies are immune from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The GTLA "speaks only to immunity from tort liability and does not grant immunity from contract claims." *Rocco v Mich Dep't of Mental Health*, 114 Mich App 792, 799; 319 NW2d 674 (1982), aff'd sub nom *Ross v Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984). The GTLA defines "governmental function" to mean "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). Under certain narrowly construed exceptions, "the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government." *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002). The GTLA provides several narrow exceptions to governmental immunity, including (1) the highway exception, MCL 691.1402, (2) the motor vehicle exception, MCL 691.1405, (3) the public building exception, MCL 691.1406, (4) the governmental hospital exception, MCL 691.1407(4), (5) the proprietary function exception, MCL 691.1413, and (6) the sewage system event exception, MCL 691.1417.

A party pleads in avoidance of governmental immunity by stating a claim that fits within one of the statutory exceptions or by pleading facts that demonstrate that the alleged tort occurred outside the exercise or discharge of a governmental function. *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 327; 869 NW2d 635 (2015). "A party filing suit against a governmental agency bears the burden of pleading his or her claim in avoidance of governmental immunity." *In re Bradley Estate*, 494 Mich at 377.

As discussed below, although the trial court erred in holding that plaintiffs' claim arising under the PFCSA sounded in contract, the trial court properly denied summary disposition to City defendants, albeit for the wrong reasons. *Southfield Ed Ass'n v Bd of Ed of Southfield Pub Sch*, 320 Mich App 353, 374; 909 NW2d 1 (2017) (holding that a trial court's ruling will be undisturbed on appeal where the right result was reached, but for the wrong reason).

A. TORT LIABILITY

The trial court erred by finding that plaintiffs' claim under the PFCSA sounded in contract, not tort, as the underlying claim was premised on City defendants' breach of a noncontractual duty imposed by law. The GTLA does not apply when a lawsuit against a governmental agency does not seek to impose "tort liability." *Eplee v Lansing*, 327 Mich App 635, 646; 935 NW2d 104 (2019). "Tort liability" as used in MCL 691.1407(1) of the GTLA, "means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *In re Bradley Estate*, 494 Mich at 385. In determining whether a claim imposes "tort liability," courts must "first focus on the nature of the duty that gives rise to the claim." *Id.* at 388-389.

> ***8** If the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable. However, if the wrong is not premised on a breach of a contractual duty, but

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

> rather is premised on some other civil wrong, i.e., some other breach of a legal duty, then the GTLA might apply to bar the claim. In that instance, the court must further consider the nature of the liability the claim seeks to impose. If the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable. |*Id.* at 389 (footnotes omitted).|

An action in tort will lie when the legal duty arises "separately and distinctly" from the contractual agreement. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 169; 809 NW2d 553 (2011). See also *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 52; 649 NW2d 783 (2002) ("[A]n action in tort may not be maintained where a contractual agreement exists, unless a duty, separate and distinct from the contractual obligation, is established.").

The precise nature of the duty that gave rise to plaintiffs' claim under the PFCSA was noncontractual, as plaintiffs' allegations concerned City defendants' violation of an obligation imposed by law under the PFCSA. *In re Bradley Estate*, 494 Mich at 384 ("when a party breaches a duty stemming from a legal obligation, other than a contractual one, the claim sounds in tort"). Plaintiffs alleged in their complaint that City defendants violated MCL 328.218(1) of the PFCSA by failing to keep "accurate accounts, books, and records" of its transactions, resulting in City defendants' mistaken burial of another person in the plot owned by Margaret. Plaintiffs sought enforcement and relief for City defendants' purported violation of the Act under MCL 328.234, which permits any person to bring an action, "whether or not that person has purchased a prepaid contract," to force compliance with the PFCSA.[6] Although the PFCSA governs prepaid contracts concerning funeral and cemetery merchandise and services, a cause of action alleging violations of the PFCSA may be premised on "a wrong independent of a contract," *In re Bradley Estate*, 494 Mich at 383 (quotation marks and citation omitted), as is the case here.

Plaintiffs' claim was premised on their allegation that City defendants breached their statutory duty to maintain their records under MCL 328.218(1). That duty was "separate and distinct" from their contractual obligations with plaintiffs. *Loweke*, 489 Mich at 169. In fact, plaintiffs separately asserted their claim for breach of contract in their complaint, alleging that City defendants breached the prepaid contract by failing to perform a specific contracted for promise, i.e., securing Margaret's plot, and sought specific performance. Plaintiffs' breach of contract claim concerned only those duties that were voluntarily assumed in the contract and arose out of the intentions of the parties themselves when entering into the agreement. *Hart v Ludwig*, 347 Mich 559, 565-566; 79 NW2d 895 (1956); *Fultz v Union-Commerce Ass'n*, 470 Mich 460, 469-470; 683 NW2d 587 (2004) ("|I|f defendant fails or refuses to perform a promise, the action is in contract."). In contrast, plaintiffs' claim under the PFCSA was predicated on their assertions that City defendants owed them a duty independent of the contract, that is, the statutory duty to maintain their records under MCL 328.218(1). See *Loweke*, 489 Mich at 169 (recognizing that a legal duty, including duties imposed by law, may support a cause of action in tort). And, MCL 328.234 provided plaintiffs with "a right to maintain an action without regard to whether there was a contractual relationship between the plaintiff and the defendant." *Ferrett v Gen Motors Corp*, 438 Mich 235, 245; 475 NW2d 243 (1991). See also MCL 328.234. Plaintiffs' cause of action for City defendants' breach of a legal duty imposed by law under the PFCSA sounded in tort.

***9** Because plaintiffs' cause of action for City defendants' alleged violation of MCL 328.218(1) was premised on a civil wrong independent of the underlying contract, the GTLA will bar plaintiffs' claim "|i|f the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong." *In re Bradley Estate*, 494 Mich at 389. See also *Nat'l Copper Co v Minnesota Min Co*, 57 Mich 83, 93; 23 NW 781 (1885) ("|D|amage alone does not give a right of action there must be a concurrence of wrong and damage."). We conclude that plaintiffs sought to impose tort liability under MCL 328.234 of the PFCSA, as the statute permits a private cause of action by any person to force compliance with the Act and authorizes a court to "award damages, issue equitable orders in accordance with the Michigan court rules to restrain conduct in violation of this act, and award reasonable attorney fees and costs to a prevailing party." MCL 328.234. Plaintiffs requested compensatory and punitive relief[7] for the damages they allegedly sustained as a result of City defendants' failure to comply with the statutory duty imposed by the Act under MCL 328.218(1). See *In re Bradley Estate*, 494 Mich at 388 (providing that tort damages generally take the form of compensatory damages). Given that the statutory language of MCL 328.234 permits

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

an award of damages to plaintiffs for a noncontractual civil wrong and plaintiffs sought that relief in their complaint, we hold that plaintiffs cause of action sought to impose "tort liability" for purposes of the GTLA. *Id.* at 385 (defining "tort liability" to mean "all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages"); *Eplee*, 327 Mich App at 648. We conclude that the trial court erred in concluding that plaintiffs' allegation that City defendants violated the duties imposed by the PFCSA was a claim for breach of contract because that claim sought to impose tort liability against City defendants. In light of our holding, plaintiffs' claim under the PFCSA is barred by statutory governmental immunity unless plaintiffs pleaded in avoidance of immunity.

B. AVOIDANCE OF GOVERNMENTAL IMMUNITY

Having concluded that plaintiffs' claim under the PFCSA imposed tort liability for the purposes of the GTLA, the dispositive issue concerns whether plaintiffs pleaded in avoidance of governmental immunity. *Genesee Co Drain Comm'r*, 309 Mich App at 327 (providing that a party pleads in avoidance of governmental immunity by pleading facts that demonstrate that the alleged tort occurred outside the exercise or discharge of a governmental function or by stating a claim that fits within one of the statutory exceptions enumerated under the GTLA).

The trial court found that the City is a governmental agency and that the City's operation of the Cemetery constitutes a governmental function. A governmental agency is defined under MCL 691.1401(a) as "this state or a political subdivision." Subsection (c) defines political subdivision to include "municipal corporation," which is defined in subsection (d) to include a city. MCL 691.1401(c) and (d). Thus, the City, as a municipal corporation, constitutes a governmental agency for purposes of the GTLA.[8] *Mack*, 467 Mich at 204. The trial court found that the City's operation of the Cemetery was a "governmental function" under MCL 691.1401(b) because those responsibilities were mandated or authorized by chapter 12 of the City's ordinances. See MCL 6911401(b) (" 'Governmental function' means an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."); Benton Harbor Ordinances, § 12-1. Because the parties do not dispute that City defendants were a governmental agency engaged in the exercise or discharge of a governmental function when the alleged torts occurred, City defendants are immune from tort liability unless plaintiffs stated a claim that fits within one of the enumerated statutory exceptions. *Genesee Co Drain Comm'r*, 309 Mich App at 327.

***10** Plaintiffs do not dispute that the enumerated statutory exceptions to governmental immunity do not apply, but instead argue that MCL 328.234 of the PFCSA establishes an exception to the general rule that government agencies are immune from tort liability when performing a governmental function. Although "the Legislature remains free to create additional exceptions, either within the GTLA or another statute[,]" governmental immunity under the Act "may not be held to have been waived or abrogated except that result has been accomplished by an express statutory enactment or by necessary inference from a statute." *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 485; 722 NW2d 906 (2006) (quotation marks and citations omitted). "Whether an express statutory enactment creates an exception to governmental immunity is resolved by reference to the language of the statute." *Id.* MCL 328.234 specifically provides that:

> The department or any other person, in order to force compliance with this act, may bring an action in a circuit court in any county in which the registrant or *any other person has solicited or sold prepaid contracts*, whether or not that person has purchased a prepaid contract or is personally aggrieved by a violation of this act. The court may award damages, issue equitable orders in accordance with the Michigan court rules to restrain conduct in violation of this act, and award reasonable attorney fees and costs to a prevailing party. [Emphasis added.]

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

The PFCSA defines the word "person" to include a "government agency." MCL 328.215(b). On this basis, plaintiffs allege that the Legislature created an exception to governmental immunity from tort liability in the PFCSA because it included governmental agencies among those "persons" subject to a cause of action for damages.

The plain language of the PFCSA demonstrates the Legislature's intent to waive governmental immunity under the GTLA and submit government agencies to the jurisdiction of the circuit court. The Legislature expressly applied the PFCSA to City defendants by including "governmental agency" in the definition of a "person" that can be sued. MCL 328.234; MCL 328.215(b). City defendants do not dispute that they are a "government agency" for the purposes of the PFCSA but argue that the Legislature did not provide specific and express authorization to sue a governmental entity under the PFCSA. Although the PFCSA does not specifically mention governmental immunity, the Act otherwise imposes duties on a "person," i.e., a government agency, and further permits a private cause of action against the "person" for breaches of the duties imposed by the Act, to which the court may award damages or equitable relief. MCL 328.234. The Legislature's imposition of liability on any "person," which explicitly includes a governmental agency, MCL 328.215(b), for their failure to abide by the provisions of the Act demonstrates an express waiver to governmental immunity provided by the GTLA. Compare: *Ballard v Ypsilanti Twp*, 457 Mich 564, 576; 577 NW2d 890 (1998) (holding that the recreational land use act did not create an express statutory enactment subjecting the state to liability because the Act mentions neither the state nor its political subdivisions), with *Anzaldua v Band*, 457 Mich 530, 551; 578 NW2d 306 (1998) (holding that the Legislature intended to create an exception to immunity in the Whistleblowers' Protection Act by including the state and its political subdivisions in the definition of "employer").

Additional support for this conclusion is found in the legislative history of the GTLA and the later enacted PFCSA. The Legislature enacted MCL 691.1407 of the GTLA in 1964 to provide immunity from tort liability to governmental agencies. 1964 PA 170. Decades later, in 1986, the Legislature enacted the PFCSA, formerly known as the Prepaid Funeral Contracting Funding Act, to govern the sale of funeral cemetery services, "to prescribe powers and duties of the departments of licensing and regulation ... and certain other state and local officers|,| ... and to provide certain penalties and remedies|.|" 1986 PA 255. In 2004, the Legislature amended the definition of "person" under MCL 328.215(b) of the PFCSA to include a "government agency" within its meaning, whereas the predecessor statute read, in part, only to include "agency." 2004 PA 21; 1986 PA 255. The Legislature's express inclusion of governmental agencies within the definition of "person" under MCL 328.215(b) was made notwithstanding its knowledge of governmental immunity under the GTLA. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993) ("It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws."). Following the 2004 amendment, any "person," i.e., governmental agency, in violation of the PFCSA was subject to suit in circuit court under MCL 328.234, and, in effect, the historical grant of immunity to governmental agencies under the GTLA was waived.

***11** Accordingly, the trial court did not err by denying City defendants' motion for summary disposition because, despite the PFCSA's imposition of tort liability, the PFCSA's direct inclusion of a "government agency" as a "person" that can be sued for damages indicates the Legislature's intent to waive the immunity conferred by MCL 691.1407(1) for governmental agencies. *Southfield Ed Ass'n*, 320 Mich App at 374.

VII. DOCKET NO. 362424—C MANAGEMENT

C Management argues that it is entitled to governmental immunity under MCL 691.1407(2) because it was acting as an "agent" of City defendants when the alleged torts occurred, and that the trial court erred by relying on an abrogated principle that considered whether C Management's duties were discretionary or ministerial.

The trial court found that although C Management was an agent acting under contract of City defendants, the GTLA's grant of immunity did not apply because its duties were ministerial. The GTLA shields the officers, employees, members, or volunteers

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

of a governmental agency from tort liability for injuries or damages they cause while in the course of employment or services, or while acting on behalf of the governmental agency if all of the following conditions are met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [MCL 691.1407(2)(a) through (c).]

C Management argues that it was entitled to governmental immunity under MCL 691.1407(2) because it was acting as an agent of City defendants when the alleged torts occurred and that agents constitute "employees" for purposes of the GTLA. [9] However, even if C Management was an agent of City defendants, "agents" do not fall under the categories of persons entitled to governmental immunity under MCL 691.1407(2), which lists the individuals entitled to the grant of immunity as officers, employees, members, or volunteers of governmental agencies. Because agents are not listed as an individual entitled to immunity under MCL 691.1407(2), C Management is not entitled to governmental immunity under that statutory provision.

The trial court erroneously relied on *Ross v Consumers Power Co*, 420 Mich at 592, superseded by statute on other grounds as stated in *Ray v Swager*, 501 Mich 52, 81; 903 NW2d 366 (2017), as the *Ross* Court did not construe the statute at issue here. In fact, the Legislature amended the GTLA in response to *Ross*, *Odom v Wayne Co*, 482 Mich 459, 468; 760 NW2d 217 (2006), and MCL 691.1407(2), as amended, applies only to those individual governmental actors listed in the statute. [10]

***12** We further reject C Management's contentions that "employee" under MCL 691.1407(2) includes private for-profit corporations serving as agents to a governmental agency. Two reasons support this conclusion. First, as already noted, the Legislature did not include the term "agent" when describing those who are entitled to immunity under MCL 691.1407(2). That term was included, however, within several other provisions of the GTLA, [11] and the inclusion of the term in those sections allows us to presume that the exclusion of the term from MCL 691.1407(2) was intentional. See *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW2d 217 (1931) ("Express mention in a statute of one thing implies the exclusion of other similar things, expressio unius est exclusio alterius.") (citation omitted); *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) ("The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another."); and *Coblentz v Novi*, 475 Mich 558, 572; 719 NW2d 73 (2006) (providing that "[t]he words chosen by the Legislature are presumed intentional[,] and this Court "will not speculate that it used one word when it meant another").

Second, because "employee" is not defined by the GTLA, it must be given its plain and ordinary meaning, and we may consult a dictionary for guidance. *Rakowski v Sarb*, 269 Mich App 619, 626; 713 NW2d 787 (2006). In *Rakowski*, this Court considered whether the defendant was an employee for purposes of MCL 691.1407(2), and determined that the "*Random House Webster's College Dictionary* (1992) defines 'employee' as 'a person who has been hired to work for another.' " *Id.* at 626. That an "employee" means an individual "person" is consistent with the Legislature's use of that word in subsection 2, which only immunizes certain individual actors, that is, officers, employees, members, or volunteers [12] of a governmental agency, from tort liability, and does not include private entities within the immunity in MCL 691.1407(2). The remaining subsections of MCL 691.1407 are also void of any language evidencing the Legislature's intent for the GTLA's grant of immunity to apply to nongovernmental business entities. C Management is a private for-profit organization that, notwithstanding its purported agency relationship with City defendants, retained its separate corporate identity as a nongovernmental actor or entity. C Management is not an "employee" considered by the Legislature as immune from tort liability under MCL 691.1407(2) of the GTLA. [13]

C Management has not cited any relevant authority showing that private for-profit entities such as C Management may be immune from tort liability under MCL 691.1407(2), which cloaks certain *individuals* with governmental immunity. On the other hand, Michigan courts have repeatedly declined to extend the protection of governmental immunity to private entities

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

in application of the related subsections in MCL 691.1407. *Vargo v Sauer*, 457 Mich 49, 68; 576 NW2d 656 (1998) ("[T]he definition of 'governmental agency' does not include, or remotely contemplate, joint ventures, partnerships, arrangements between governmental agencies and private entities, or any other combined state-private endeavors."), (quotation marks and citation omitted); *Jackson v New Ctr Community Mental Health Servs*, 158 Mich App 25, 34; 404 NW2d 688 (1987) ("A private entity's performance of a governmental function does not confer governmental agency status on that entity"); and *Roberts v Pontiac*, 176 Mich App 572, 578; 440 NW2d 55 (1989) (holding that there is "no reason to extend the protection of governmental immunity to a private entity merely because it contracts with the government"). Michigan courts have even held that the employees of a private entity doing business with a public agency also are not entitled to governmental immunity. See *Rambus v Wayne Co Gen Hosp*, 193 Mich App 268, 270-273; 483 NW2d 455 (1992); *Roberts*, 176 Mich App at 578; and *Vargo v Sauer*, 457 Mich at 71 ("[O]ur examination of the governmental tort immunity statute reveals that although the Legislature extended immunity to a large number of individuals for broad categories of conduct, there is no indication that the statute, when read in conjunction with its definitional sources, even remotely contemplates a grant of immunity for agents who are simultaneously serving a private entity.")

***13** We conclude that the trial court properly denied summary disposition to C Management on governmental immunity grounds, albeit for the wrong reasons. However, a trial court's ruling will be undisturbed on appeal where the right result was reached, but for the wrong reason. *Southfield Ed Ass'n*, 320 Mich App at 374 (citation omitted). Because C Management was not entitled to tort immunity under the GTLA, we need not discuss its remaining issues on appeal.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2023 WL 4043795

Footnotes

1 *Gathright v Mission Hills Memorial Gardens*, unpublished order of the Court of Appeals, entered August 9, 2022 (Docket Nos. 362182 and 362424).

2 The Cemetery and the City, together, moved for summary disposition under MCR 2.116(C)(7) and (C)(10). Defendant C Management moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). Defendants' arguments on appeal relate only to the trial court's denial of governmental immunity under MCR 2.116(C)(7) on their related claims.

3 Defendants do not raise any issues on appeal related to the trial court's rulings on their crossclaims.

4 Plaintiffs voluntarily dismissed against all defendants their claims under the MCPA and for breach of fiduciary duty, NIED, fraudulent misrepresentation, and negligent/innocent misrepresentation. Plaintiffs further agreed to dismiss three counts for wrongful interference with the right of burial, negligence, and conversion against only City defendants.

5 Plaintiffs assert that C Management and City defendants' appeals were improperly filed on the eve of trial in order to stop the trial court proceedings and give them more time to file an application for leave to appeal. However, plaintiffs' argument, speculating as to why defendants' claims of appeal were filed, is irrelevant to this Court's jurisdiction. Nevertheless, the record shows that defendants timely filed their claims of appeal, as City defendants filed a claim of appeal within two days and C Management filed its claim of appeal within 21 days after the trial court denied their motions for summary disposition on governmental immunity grounds. See MCR 7.204(A)(1)(a) (providing that an appeal by right must be taken within 21 days of the judgment or order appealed from).

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

6 MCL 328.234 provides that "[t]he department or any other person, in order to force compliance with this act, may bring an action in a circuit court in any county in which the registrant or any other person has solicited or sold prepaid contracts, whether or not that person has purchased a prepaid contract or is personally aggrieved by a violation of this act. The court may award damages, issue equitable orders in accordance with the Michigan court rules to restrain conduct in violation of this act, and award reasonable attorney fees and costs to a prevailing party."

7 In their complaint, plaintiffs provided a blanket request for the award of damages in excess of $25,000 for compensatory and punitive damages, costs, and attorney fees. Although plaintiffs also requested specific performance in their complaint, the request was premised on City defendants' purported breach of the underlying contract, without any mention or reasoning justifying that relief on the basis of City defendants' purported violation of the PFCSA. Specifically, in their request for specific performance, plaintiffs asserted that Margaret had a "contractual right to possession" of the burial plot and requested that the court order defendant to locate two unused plots for Margaret and Nathaniel. Plaintiffs reaffirmed this point in their response to City defendants and C Management's motions for summary disposition by further requesting that the court order specific performance by way of City defendants' fulfillment of "what was bargained for and an equitable remedy for what their mistake caused: plots where Nathaniel Gathright and Margaret Gathright can rest, in peace, together for eternity." Similarly, plaintiffs' request for treble damages in their complaint was unrelated to their claim under the PFCSA. Plaintiffs sought treble damages for City defendants' alleged conversion of the underlying burial plot under MCL 600.2919a, but plaintiffs voluntarily dismissed their conversion claims against City defendants.

8 Although plaintiffs' complaint named both the City and the Cemetery as defendants, the Cemetery is not a separate legal entity against which a tort action can be directed or from which plaintiffs can recover. *Omelenchuk v Warren*, 466 Mich 524, 526 n 3; 647 NW2d 493 (2002) ("It is agreed that the fire department is not a separate entity from which plaintiffs can recover. Any recovery would be from the city of Warren."); *Davis v Chrysler Corp*, 151 Mich App 463, 466 n 1; 391 NW2d 376 (1986) ("Although plaintiffs' complaint named the Detroit Public Lighting Department as a defendant, the Department is not a separate legal entity against which a tort action can be directed."); and *Michonski v Detroit*, 162 Mich App 485, 490; 413 NW2d 438 (1987).

9 C Management improperly relies on *Pomilee v Detroit*, 121 Mich App 121; 328 NW2d 595 (1982), for the proposition that "agents" are immune from liability under MCL 691.1407(2) by quoting the following language from *Pomilee*: "Officers, agents and employees of immune institutions are themselves cloaked with governmental immunity when acting within the scope of their employment." *Id.* at 125. However, the *Pomilee* Court indicated that the quoted language was a paraphrased statement drawn from *Everhart v Bd of Ed of Roseville Co Sch*, 108 Mich App 218, 222; 310 NW2d 338 (1981). Neither *Pomilee* nor *Everhart* considered what effect, if any, an agency relationship had on governmental immunity under MCL 691.1407(2). In fact, the words "agent" or "agency" do not appear anywhere in the *Everhart* decision.

10 The trial court ultimately held that governmental immunity under the GTLA did not apply to C Management because its actions while serving as agent were "ministerial" in nature. The court cited *Ross*, which conditioned immunity to government actors on whether they were: "a) acting during the course of their employment and are acting, or reasonably believe they are acting, within the scope of their authority; b) acting in good faith; and c) performing discretionary-decisional, as opposed to ministerial-operational, acts." *Ross*, 420 Mich at 592. As C Management argues, the court erred by relying on the abrogated principles outlined in *Ross*, which distinguished discretionary and ministerial acts. The Legislature amended the GTLA in 1986 in response to *Ross*, and the amended statute immunized individual governmental actors "without regard to the discretionary or ministerial nature of the conduct in question." MCL 691.1407(2); *Odom v Wayne Co*, 482 Mich at 468. Thus, except as to intentional torts brought against individuals, the ministerial act consideration is no longer relevant to determining whether an individual is entitled to governmental immunity. *Odom*, 482 Mich at 480. Even still, *Odom* only refers to those individuals designated under the statute —officers and employees—without any inclusion of "agents" being lower-ranking governmental actors under MCL 691.1407(2). *Id.* at 479-480.

11 The term "agent" is explicitly mentioned in the motor vehicle exception, MCL 691.1405, and the governmental hospital exception, MCL 691.1407(4), under the GTLA.

12 In fact, the GTLA defines "volunteer" to mean "an *individual* who is specifically designated as a volunteer and who is acting solely on behalf of a governmental agency." MCL 691.1401(i) (emphasis added).

13 C Management argues for the first time on appeal that under the economic-realities test, see *Rakowski*, 269 Mich App at 625, it qualified as an "employee" for purposes of MCL 691.1407(2). However, because C Management raised this argument for the first time on appeal, it is not properly preserved. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005) (holding that an issue is generally preserved for review if it was raised before, addressed, or decided by the trial court). In any event, our reading of MCL 691.1407(2) renders the argument moot.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

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

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

EXHIBIT 6

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

2020 WL 1968684
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Ray SCHORNAK, Plaintiff-Appellee,
v.
MARTINREA HOT STAMPINGS, INC., doing business as Martinrea Fabco Hot Stampings, Inc., and Wayne County Road Commission, Defendants,
v.
City of Detroit, Defendant-Appellant,
and
Downriver Lawn & Landscape, Inc., doing business as Blue Water Disposal, Defendant/Third-Party Plaintiff,
and
Greg Davis Landscape Services, Inc., Defendant/Third-Party Defendant.

No. 347191
|
April 23, 2020

Wayne Circuit Court, LC No. 17-008147-NO

Before: Riordan, P.J., and Fort Hood and Swartzle, JJ.

Opinion

Per Curiam.

*1 Defendant, the city of Detroit, appeals as of right from an order denying its renewed motion for partial summary disposition on the basis of governmental immunity.[1] We affirm.

I. FACTUAL BACKGROUND

This negligence action arises from a slip-and-fall, which occurred in March 2016 at a building owned by Martinrea Hot Stampings, Inc. (Martinrea), in Detroit, Michigan. Plaintiff is a security inspector, and was scheduled to inspect a fire security system at Martinrea with a coworker, Jonathan Burns (Burns). Plaintiff arrived at Martinrea and parked on the street outside of the building. The street and sidewalks were covered in snow. Plaintiff got out of his car to follow Burns into the building. Plaintiff attempted to step up onto a sidewalk, which was covered with approximately two to three inches of snow. The sidewalk outside of Martinrea's building had not been salted or shoveled, and plaintiff lost his footing when he stepped on a portion of the sidewalk that was missing a large piece of cement. Plaintiff explained his fall as follows:

> I stepped up with my left foot onto—over the curb onto the sidewalk, and when I stepped up with the next foot to get up onto the sidewalk ... there was nothing under my foot but snow, and there was supposed to be a curb there, I think, and my foot went down and backwards. I fell forward on an angle toward

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

> |Martinrea's| door, and there was |a| fire hydrant. I tried to brace myself with my left hand. My face hit the fire hydrant. My nose hit the collar around the fire hydrant. The top of my forehead hit on the rounded part of the fire hydrant.

Burns turned around, saw plaintiff lying on the ground, and helped him stand up. Burns told plaintiff that plaintiff's eye was bleeding and walked him into Martinrea's lobby. Plaintiff informed a secretary that he slipped and fell outside the building. A security officer attempted to help plaintiff stop the bleeding from his eye and called an ambulance. Plaintiff was taken to the hospital. Plaintiff later had reconstructive surgery to repair his nose, which was broken in the fall, and received a series of treatments for an infected wound on his knee.

Plaintiff filed a negligence complaint, and defendant filed a motion for summary disposition in lieu of filing an answer. Defendant's first motion for summary disposition was denied. Defendant later filed a renewed motion for summary disposition, which was also denied. This appeal followed.

II. STANDARD OF REVIEW

In general, this Court reviews the grant or denial of a motion for summary disposition de novo. *Value, Inc. v. Dep't of Treasury*, 320 Mich. App. 571, 576; 907 N.W.2d 872 (2017). Defendant moved for partial summary disposition under MCR 2.116(C)(7), premised on governmental immunity. MCR 2.116(C)(7) requires the moving party to "allege facts justifying the application of an exception to governmental immunity." *Beals v. Michigan*, 497 Mich. 363, 370; 871 N.W.2d 5 (2015). The reviewing court is required to "consider[ ] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Id.* If no factual dispute exists, and "reasonable minds could not differ concerning the legal effect of those facts, whether the claim is barred by immunity is a question for the court to decide as a matter of law." *Id.* "The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal." *Moraccini v. Sterling Hts.*, 296 Mich. App. 387, 391; 822 N.W.2d 799 (2012).

***2** "A motion under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Anzaldua v. Neogen Corp.*, 292 Mich. App. 626, 630; 808 N.W.2d 804 (2011). A genuine issue of material fact " 'exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.' " *Bennett v. Russell*, 322 Mich. App. 638, 642; 913 N.W.2d 364 (2018) (citation omitted). This Court also "reviews de novo questions of statutory interpretation." *Paris Meadows, LLC v. Kentwood*, 287 Mich. App. 136, 141; 783 N.W.2d 133 (2010).

III. GOVERNMENTAL IMMUNITY

Defendant argues that the trial court erred by denying its renewed motion for summary disposition because plaintiff's negligence claim is barred by the governmental tort liability act (GTLA), MCL 691.1401 *et seq.* We disagree.

The GTLA provides governmental agencies with immunity from tort liability. MCL 691.1407. The immunity granted by the GTLA is broad, and any statutory exceptions to the rule of governmental immunity "are to be *narrowly* construed." *Nawrocki v. Macomb Co. Rd. Comm.*, 463 Mich. 143, 158; 615 N.W.2d 702 (2000). Six statutory exceptions exist to the broad grant of immunity given to governmental agencies:

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

> [T]he 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 government-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3). [*Goodhue v. Dep't of Transp.*, 319 Mich. App. 526, 531 n. 1; 904 N.W.2d 203 (2017) (quotation marks and citation omitted).]

This action concerns the application of the highway exception to the GTLA, which covers actions that "include[ ] a bridge, sidewalk, trailway, crosswalk, or culvert on the highway." MCL 691.1401(c). The highway exception to governmental immunity, MCL 691.1402(1), states:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

Governmental agencies have a duty to keep sidewalks in reasonable repair. The duty to maintain sidewalks is specifically governed by MCL 691.1402a, which states, in relevant part:

> (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.
>
> (2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.

Defendant argues that the highway exception does not apply because plaintiff failed to provide evidence that defendant knew, or should have known, that the defect in the sidewalk existed at least 30 days before plaintiff's injury occurred, in accordance with MCL 691.1402a(2). Defendant relies on *Bernardoni v. Saginaw*, 499 Mich. 470, 471; 886 N.W.2d 109 (2016), in which our Supreme Court held that a series of photographs taken 30 days after an accident were insufficient "to establish a genuine issue of material fact regarding whether the defect existed at least 30 days *before* the accident." In *Bernardoni*, the plaintiff submitted photographs showing a raised portion of a sidewalk where the plaintiff fell and was injured. Our Supreme Court reasoned:

> ***3** The necessary inference that would connect the photographs to the sidewalk's condition 60 days earlier becomes tenable *only with additional evidence*. Absent such evidence, one can imagine any number of scenarios in which the defect formed within 60 days of when the photographs were taken. Yet plaintiff has offered no evidentiary support of any kind for her assumptions that the defect existed for the necessary amount of time. For example, she has offered no affidavits from neighbors who viewed the sidewalk 30 days before the accident, nor did she introduce expert testimony demonstrating that the sidewalk discontinuity was of a type that usually forms or enlarges over a long period of time. Such additional evidence might have narrowed or closed the inferential gap between the photographs and the

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

> conclusions plaintiff and the Court of Appeals drew from them .... [M]ore is needed to explain why the current condition is probative of the past condition. [*Id.* at 475-476 (emphasis added).]

This case is distinguishable from *Bernardoni* because plaintiff submitted photographs and additional evidence demonstrating that the defect existed at least 30 days before plaintiff was injured. In addition to the photographs, plaintiff presented an affidavit from Luigi Ferdinandi (Ferdinandi), who opined that the sidewalk and curb "existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before March 2, 2016." Ferdinandi's opinion was on the basis of his experience as a construction worker for a family business, which focused primarily on "commercial and residential cement work including sidewalks, driveways and roads." When paired with the photographs, Ferdinandi's affidavit suggests that the deteriorated condition of the sidewalk would have existed more than 30 days before plaintiff was injured. Thus, plaintiff presented sufficient evident to support his argument.

Nevertheless, defendant asserts that the trial court should not have considered Ferdinandi's affidavit because it constituted inadmissible expert testimony. Defendant directs this Court to MRE 702,[2] and argues that Ferdinandi's affidavit was inadmissible because it contained no facts, data, or information regarding the methods that Ferdinandi used to draw his conclusions regarding the condition of the sidewalk. However, under MCR 2.116(G)(5), the content of an affidavit need only be admissible in substance, not in form. *Dextrom v. Wexford Co.*, 287 Mich. App. 406, 428; 789 N.W.2d 211 (2010). An expert witness's qualifications and descriptions of his or her methodology do not need to be incorporated into an affidavit that is submitted in response to a motion for summary disposition. *Id.* Further, whether Ferdinandi "will ultimately meet the MRE 702 requirements to be sworn as a witness is a matter reserved for trial." *Id.* The trial court did not err by considering Ferdinandi's affidavit when ruling on defendant's renewed motion for summary disposition. Under these circumstances, plaintiff presented proof that defendant knew or should have known about the condition of the sidewalk at least 30 days before plaintiff's injury. Accordingly, defendant is not entitled to summary disposition on the basis of governmental immunity.

IV. STATUTORY NOTICE

Defendant argues that the trial court erred by denying its renewed motion for summary disposition because plaintiff's notice of injury and defect did not conform to MCL 691.1404(1). We disagree.

***4** Defendant first argues that plaintiff's notice did not conform to MCL 691.1404(1) because he did not provide a list of known witnesses. MCL 691.1404(1) states that the injured party must supply "the names of the witnesses known at the time by the claimant," in a notice to the appropriate governmental agency. The parties specifically disagree regarding whether plaintiff was required to include Burns on the list of potential witnesses, despite the fact that Burns did not actually witness plaintiff's fall. Plaintiff contends that he was not required to include Burns on a list of witnesses because Burns did not see plaintiff's fall. Conversely, defendant argues that Burns was required to be included on a list of witnesses regardless of whether he saw plaintiff's fall.

This Court has previously held that witnesses, under MCL 691.1404(1), "are those persons who witnessed the occurrence of the injury and the defect." *Milot v. Dep't of Transp.*, 318 Mich. App. 272, 278; 897 N.W.2d 248 (2016) (quotation marks omitted). This Court specified that " 'the names of the witnesses' are the names of those persons who witnessed the occurrence." *Id.* at 279-280, quoting MCL 691.1404(1). In this case, Burns attested that he did not actually see plaintiff fall:

> *Q.* Okay. What happened next?
>
> *A.* I heard a commotion behind me, so I turned around.
>
> *Q.* And [plaintiff] was on the ground.

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

* * *

Q. Okay. Now, you had indicated that you actually didn't observe [plaintiff] fall, correct?

A. Correct.

Since Burns did not actually witness plaintiff's accident, plaintiff was not required to identify him in his notice of injury and defect. *Milot*, 318 Mich. App. at 280. Accordingly, defendant cannot convincingly argue that plaintiff's notice failed to conform to MCL 691.1404(1) for failure to identify known witnesses.

Defendant next argues that the notice of injury and defect was defective because (1) plaintiff did not personally sign the notice and (2) plaintiff did not personally serve a copy of the notice on defendant. In support of this argument, defendant directs this Court to the language of MCL 691.1404(1), which states, "[a]s a condition to any recovery for injuries ... the injured person ... shall serve a notice on the governmental agency of the occurrence of the injury and the defect." Defendant argues that this means plaintiff was personally responsible for signing and serving the notice.

This issue is governed by *Russell v. City of Detroit*, 321 Mich. App. 628; 909 N.W.2d 507 (2017). In *Russell*, the plaintiff initiated a negligence action by filing a notice of injury and defect under MCL 691.1404(1). *Id.* at 630. The defendant argued that the plaintiff violated MCL 691.1404(1) by failing to sign and personally serve his notice of injury and defect on the defendant. *Id.* at 636-637. The defendant further contended that, "because MCL 691.1404(1) does not specifically allow for service through an attorney, an injured person over 18 must personally serve notice." *Id.* at 637. This Court disagreed, finding that the statute did not require an injured person to "personally send the notice by certified mail or to appear in person to personally serve the notice." *Id.* at 639. This Court observed that the defendant's argument ignored well-settled principles of agency, and observed that agents, including attorneys, "have the implied power to carry out all acts necessary in executing [the principal's] expressly conferred authority." *Id.* at 641. This Court opined that, to comply with MCL 691.1404(1), the notice of injury should specify that the notice is being given on behalf of the injured party. *Id.* at 641-642. Additionally, this Court addressed whether the injured party is required to sign the notice, and found that "all that is required by MCL 691.1404(1) is that the injured person *serves* the notice on the governmental agency," *id.* at 645 (emphasis added), suggesting that the injured party need not sign the notice.

**5 Applying this Court's analysis in *Russell* to the instant case, it is clear that defendant cannot show that the notice of injury and defect failed to conform to MCL 691.1404(1). The notice was signed by plaintiff's attorney and stated that plaintiff was the claimant. The content of the notice makes it apparent that plaintiff's attorney wrote the document and submitted it on plaintiff's behalf. Thus, the service of the notice satisfied the requirements of MCL 691.1404(1). Defendant is not entitled to summary disposition on the basis of deficiencies in the notice of injury and defect, and the trial court did not err by denying defendant's renewed motion for summary disposition.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2020 WL 1968684

Footnotes

1 "[T]his Court has jurisdiction to decide an appeal of right from an order denying governmental immunity under MCR 2.116(C)(7) ...." *Seldon v. Suburban Mobility Auth. for Regional Transp.*, 297 Mich. App. 427, 436; 824 N.W.2d 318 (2012).

2 MRE 702 states as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

End of Document © 2025 Thomson Reuters. No claim to original U.S. Government Works.

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

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

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,
Plaintiff,

v. File No. 2022-197937-NZ

NINA BROWN, et al,
Defendants.
_____/

MOTIONS FOR SUMMARY DISPOSITION
BEFORE THE HONORABLE CHERYL A. MATTHEWS, CIRCUIT COURT JUDGE
Pontiac, Michigan (via Zoom) - Wednesday, October 11, 2023

APPEARANCES:

For Plaintiff:	MR. DANIEL A. GROVES, P-74026 6725 Daly Rd, #252561 West Bloomfield, MI 48325 734-644-4996
For Defendant Brown:	MR. BRIAN CATRINAR, P-76320 4000 Town Center, Suite 909 Southfield, MI 48075 248-355-4141
For Defendant DTE:	MR. FRANK A. MISURACA, P-55643 30833 Northwestern Highway, Suite 200 Farmington Hills, MI 48334 248-626-5000
For Defendant Kaltz:	MR. MICHAEL F. SCHMIDT, P-25213 1050 Wilshire Drive, Suite 320 Troy, MI 48084 248-649-7800
For Defendant Independence Township:	MS. ANDREA M. PIKE, P-74755 27555 Executive Drive, Suite 250 Farmington Hills, MI 48331 248-482-8767
TRANSCRIBED BY:	Teresa R. Kozlowski, CER-1316 THERESA'S TRANSCRIPTION SERVICE PO Box 21067 Lansing, MI 48909-1067 517-882-0060

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

TABLE OF CONTENTS

PAGE

WITNESSES:

None

EXHIBITS: MARKED ADMITTED

None

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

Pontiac, Michigan

Wednesday, October 11, 2023 - 9:32 a.m.

[TRANSCRIPTIONIST NOTE: Proceedings were conducted remotely via Zoom video recording.]

COURT STAFF: Your Honor, now calling Zezula versus Brown, case number 2-2-1-9-7-9-3-7-N-Z.

THE COURT: Good morning.

MR. GROVES: Good morning, your Honor --

UNIDENTIFIED SPEAKER: Good morning --

MR. GROVES: -- Daniel Groves --

UNIDENTIFIED SPEAKER: -- your Honor.

MR. GROVES: -- on behalf of the plaintiff, Brian Zezula.

MR. CATRINAR: Your Honor, Brian Catrinar on behalf of defendant Nina Brown.

MS. SCHMIDT: Good morning, your Honor. Michael Schmidt on behalf of defendant Kaltz.

MS. PIKE: Good morning, your Honor. Andrea Pike on behalf of defendant Independence Township.

MR. MISURACA: And good morning, your Honor. Frank Misuraca on behalf of defendant DTE.

THE COURT: Oh, we can't see you, just so you know.

MR. MISURACA: Oh, I --

THE COURT: Maybe it --

MR. MISURACA: -- I apologize --

THE COURT: -- maybe it's cause you're, maybe it's cause you're, you're in your pajamas but --

(Mr. Misuraca appears on video)

MR. MISURACA: Yes.

THE COURT: Oh, you're not in your pajamas. I just want to make sure everyone is wearing pants and stuff like that.

All right. Uh, which motion would you like to go forward with first?

MS. PIKE: Your Honor --

MR. CATRINAR: Your Honor --

MS. PIKE: Oh, sorry, your Honor.

MR. CATRINAR: -- no -- (inaudible words) -- Andrea. Go ahead.

MS. PIKE: Uh, the township's motion, if that's okay, your Honor.

THE COURT: Uh, okay. Uh, we, we have, we have questions about this with, but I'm going to let you argue your motion. Uh, I guess initially there was a, a, a, at one time there was a motion with regard to discovery, uh, and to, to enforce discovery, but then I, I put that off, uh, because, uh, Independence Township alleges immunity. Right?

MS. PIKE: Yes, your Honor. That hearing for motion for protective order and motion to compel is scheduled for October 18th.

THE COURT: Okay. Uh, I, I guess -- we, we have a, we

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

want to dig into some MISS DIG issues so I, I think that's where we're, uh, I'm, well, I'm going to let you ar-, argue your, your, uh, your motion.

MS. PIKE: Okay. Thank you, your Honor. Shall I begin?

THE COURT: Sure.

MS. PIKE: Thank you.

Independence Township filed a motion for summary disposition, disposition pursuant to M-C-R 2 point 1-1-6 under both C-7 and C-8. C-7 is for governmental immunity, and C-8 is for failure to state a valid claim based on the pleadings.

There is no exception to the township's entitlement to governmental immunity under the G-T-L-A, and there is no allegation in the second amended complaint dated June 13, 2023, that an exception to immunity applies. There is one --

THE COURT: Is there --

MS. PIKE: -- (inaudible words) --

THE COURT: -- is there on-, why do you think their only, you, you think their only remedy is to go to the commission or something and get a ticket or something like that?

MS. PIKE: Yes, your Honor. So the MISS DIG act says that you can file a complaint with the commission, and then the G-T-L-A says that the G-T-L-A doesn't affect liability under MISS DIG. And MISS DIG says it doesn't affect governmental immunity under the G-T-L-A.

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

THE COURT: Okay. But if, if you guys didn't do MISS DIG right, then, uh, why is a complaint enough?

MS. PIKE: The, the commission would investigate, and then the commission looks at fees and damages but the comm- commission is the exclusive remedy for someone that is damaged. It is not, uh, it's not an exception to immunity. And I can, it, you know, elaborate on that language if that's okay.

THE COURT: Yeah. I'm, yeah, I'm familiar -- go ahead. I'm familiar with the immunity but.

MS. PIKE: Okay. Sorry.

THE COURT: Yeah. Yeah. No, go ahead. I, I'm just, it, like if I, if Mr. Zezula's house was blown into smithereens, uh, he, he only has a right to make a complaint with a commission.

MS. PIKE: It --

THE COURT: That's, that's a -- I don't --

MS. PIKE: Well, and it depends on the circumstances. So if there was a defect in the township main, then we would look at the sewer exception cause there'd be an event. But that's not what was pled, that there was a --

THE COURT: Then that, well, that's out. Isn't it? There's no sewer backup.

MS. PIKE: Right. Uh, but it --

THE COURT: But that's out. Yeah.

MS. PIKE: It was argued so I didn't know if, if we

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

should --

THE COURT: Yeah. I mean, I don't know. The, we don't think it's a sewer. We don't think it's one of those 100 year --

MS. PIKE: Right.

THE COURT: -- events that happened in Royal Oak or -, we don't, we don't have any evidence that there was some kind of sewer backup that went into Mr. Zezula's basement. Right?

MS. PIKE: Right.

THE COURT: Okay.

MS. PIKE: Okay.

THE COURT: All right. Go ahead.

MS. PIKE: Thank you. So plaintiff did not plead an exception to governmental immunity except a very generic statement in paragraph 44 of the second amended complaint that says governmental immunity does not apply when the governmental entity is operating or failing to operate outside the descriptions and duties of the premised governmental duties.

With regard to MISS DIG, the complaint just says that the township is negligent because it violated MISS DIG Underground Facility Damage Prevention and Safety Act and it viola-, violated the township's ordinance. It cites to M-C-L 460 7-2-1, which is the title page for MISS DIG, and never alleged that, that the township didn't flag anything, didn't do anything. There was no factual support for it. But, as you

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

know, defendant called, did make some arguments, and so those will be addressed. They were addressed in both reply briefs, but I'll address them before the court today. So call --

THE COURT: It's, it's kind of hard to, uh, allege something, uh, when they don't have the background information with regard to a potential, uh, with, with regard to conflict. Right?

MS. PIKE: Well, we --

THE COURT: Like --

MS. PIKE: -- don't --

THE COURT: -- the township said no conflict, but --

MS. PIKE: Oh, I see what you mean. So we, when we were added to the complaint because the, the lawsuit started awhile back, you know, we were added two and a half years after the damage was done to this, uh, private drain or private lead to Mr. Zezula's home. So on June 13th there's a second amended complaint filed, and we were added. Uh, that was because it was after Kaltz filed a notice of non party fault. So --

THE COURT: Uh huh.

MS. PIKE: -- plaintiff did have, you know, more information. There were subpoenas, there was documents produced prior to this. But, uh, I understand, you know, your argument about maybe all the details weren't there.

But the clear, but the, what needs to be done is if you read the G-T-L-A section 7 and you read it hand in hand with

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

the MISS DIG act, it, they're both clear and unambiguous. And so that's not left to an interpretation. Uh, you know, Kaltz argues that there are seven exceptions to governmental immunity and that MISS DIG is somehow the seventh exception.

But when you look at all the caselaw that was published and, and unpublished after MISS DIG was added to section 7 of the G-T-L-A, it talks about six exceptions over and over and over.

THE COURT: Okay.

MS. PIKE: (Inaudible words) --

THE COURT: So, but, no, I agree, I agree that it's not a specific exception, uh, to the governmental im-, immunity. But the, the thing I was struggling with is if you guys mess up your MISS DIG conflict notice and Mr. Zezula's house blows up he has to talk to some commission that consists of what -- two people from the township and some --

MS. PIKE: Oh --

THE COURT: -- some person and someone from DTE or I, I mean, I don't, I don't know. Commissions scare me, I guess.

MS. PIKE: Yes. So let me explain --

THE COURT: So he doesn't have --

MS. PIKE: -- (inaudible words) --

THE COURT: -- he doesn't have any, he doesn't have any legal recourse if the township messes up. That's, that's what concerns me.

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

MS. PIKE: So the MISS DIG act says that the complaint gets filed with the Public Service Commission. I don't think that the township's involved with the Public Service Commission at all. Uh, I think it's a state agency, a state commission that looks at the evidence and reviews it to see if any municipality in Michigan has violated MISS DIG. And then it says that the facility owner or operator, which would be Mr. Zezula, the plaintiff, that he could file this complaint -- he can seek a fine -- and then it even says, if applicable, damages, damages from a governmental agency could be applied, which would be the township. Uh, and there's a time period to file this complaint. Unfortunately, it wasn't filed.

But when I, when I read the G-T-L-A and the MISS DIG and I read the MISS DIG in its entirety and this is the only part that talks about a remedy to file this complaint with the Public Service Commission, then I see the --

THE COURT: So they --

MS. PIKE: -- next --

THE COURT: -- blew the time, you're, are you telling me they blew the time frame? I don't remember seeing that.

MS. PIKE: Yes.

THE COURT: Was there a certain time frame to file something with the commission about a violation of MISS DIG?

MS. PIKE: There is, your Honor.

THE COURT: I, I'm, I missed that.

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

MS. PIKE: (Pause) -- sorry -- (pause) -- this -- (inaudible words) --

THE COURT: Maybe, maybe you guys all agree. You have to file it within one year. I don't know.

(No verbal response)

THE COURT: Like how, how long do we have to file a complaint with the commission?

MS. PIKE: It must be filed 270 days of the damage or 90 days of determining that there was a violation.

THE COURT: Okay.

MS. PIKE: And that's from the Michigan Administrative Code, R-460 point 11. And it's also in M-C-L 460 7-3-2, subsection 2. So that's MISS DIG. So 270 days of damage. We're at 2 1/2 years now.

THE COURT: Okay.

MS. PIKE: Well, I'm sorry. We're passed that. So at 2 1/2 years the second amended complaint was filed and the township was added as a party. So that --

THE COURT: That's a --

MS. PIKE: -- that per- --

THE COURT: -- 2022 case so, yeah.

MS. PIKE: -- period has unfortunately passed. But that, that, you know, we read it as the exclusive remedy because there's nothing else in the MISS DIG act that says you can file a civil action in circuit court for a facility owner or

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

operator, that this complaint to the Public Service Commission is your remedy and then the Public Service Commission determines what to do, you know, from there.

So the express language in the G-T-L-A, section 7, and the MISS DIG act, which is section 12, subsection 2, are clear that a, a violation of MISS DIG is not an ex-, exception to governmental immunity, which I believe this court may or not agree with for torts, such as negligence. Cause, again, there is one count and it was for negligence against the township. And governmental immunity does not preclude a complaint to the commission. You know, it expressly states that that remedy is available. And vice versa the MISS DIG cit-, cites to the G-T-L-A.

THE COURT: (Inaudible word) --

MS. PIKE: MISS DIG actually says except as provided in this section this act does not affect the liability of a governmental agency for damages for tort or the application of 1964 P-A 170. And then it cites the M-C-Ls, which is the G-T-L-A. So it, it understands that municipalities do have this governmental immunity, but it's saying that you can file this complaint to the Public Service Commission.

THE COURT: (Inaudible word) --

MS. PIKE: And, your Honor, I was going to argue this, how the sewer exception doesn't apply, but, uh, it sounds like, that we have an agreement on that.

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

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

And then also under M-C-L 6-9-1-1419, which is for that sewer exception, 45 day notice needed to be, uh, filed to tell the township it was filing a sewer exception claim against the township and that wasn't done. Obviously it's been 2 1/2 years and they had 45 days.

We believe that it wasn't timely, a notice of claim wasn't timely filed because the plaintiff as, you know, many parties here know, that the backup wasn't a deficiency in the township system. There was no issue with the township main that it was, you know, called, had severed the drain or lead to plaintiff's home, his private lead.

And I'm happy to answer any more questions.

MR. GROVES: Your Honor, may I just ask, uh --

THE COURT: Who's responding? Mr. Groves.

Okay. Go ahead.

MR. GROVES: Your Honor, I, I missed it. Uh, counsel said 270 days from the event or 90 days -- I didn't hear the last part.

MR. SCHMIDT: Yeah.

THE COURT: Was it in, in the brief somewhere? Cause if it did, I didn't see it.

MS. PIKE: We didn't --

MR. GROVES: It was not.

MS. PIKE: No.

THE COURT: Oh, okay. Well, good --

MS. PIKE: No.

THE COURT: -- then I'm innocent. Yeah.

MS. PIKE: Page 3 of the reply to Kaltz's answer to the motion for summary disposition -- it's the, uh, first full paragraph on that page and it's the very last line. And it says, furthermore, complainant must file the complaint form with the commission -- after it cites about the commission -- within 270 days of the damage or 90 days of determining that there was a violation. And then we said which has passed.

MR. SCHMIDT: How could it pass?

THE COURT: You said it's in your reply?

MS. PIKE: Yes. Reply to Kaltz's answer on page 3.

THE COURT: Hmm.

MS. PIKE: So we did a reply to plaintiff's response and then a reply to Kaltz's answer. And so page 3 of Kaltz's answer. So there's that -- you'll see it starts with section 12 of the MISS DIG act and then --

THE COURT: Oh, okay. Yeah.

MS. PIKE: -- the last sentence of that paragraph --

THE COURT: (Inaudible words) --

MS. PIKE: -- it has --

THE COURT: -- is not --

MS. PIKE: -- the citation.

THE COURT: (Inaudible words) -- (pause) -- I don't see any time frame in there. That doesn't mean it doesn't

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

exist.

MS. PIKE: I'm sorry, your Honor. Do you see the --

THE COURT: Oh, I --

MS. PIKE: -- (inaudible words) --

THE COURT: -- I don't see the time frame in here, but that doesn't mean it doesn't exist so.

MS. PIKE: Okay.

THE COURT: Yeah. All right. Uh, go ahead. A response.

MR. GROVES: Uh, your Honor, plaintiff would first defer to Kaltz's response of, with the foundation or the basis that plaintiff believes -- depending on how this court rules -- plaintiff, uh, should be allowed to amend its complaint because as sister counsel, uh, noted in the second amended complaint we did talk about government immunity in paragraph 44. If this court requires --

THE COURT: Uh huh.

MR. GROVES: -- a more extensive, uh, paragraph, uh, for the immunity exception, then plaintiff would only request -- depending on how this court rules -- uh, that plaintiff be allowed to amend its paragraph 44. With that, I defer to, uh --

THE COURT: Okay.

MR. GROVES: -- (inaudible word) --

THE COURT: What would the amendment be, though? That, I guess that's, that's the difficulty. Is it futile? I

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

mean is there, there's not a MISS DIG exception to immunity so.

MS. GROVES: But there, I, we, plaintiff believes there, there is, uh, but would that be --

THE COURT: Okay. Well, what is it?

MR. GROVES: I would defer to brother counsel Kaltz for his response at this time.

MR. SCHMIDT: Your Honor, your Honor, Michael Schmidt for Kaltz.

Uh, there clearly is an exception. It couldn't be clearer. It's 6, uh, 6-9-1-14-0-7, sub 7. The immunity provided by this act does not apply to liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act. It couldn't be clearer and on, in April of '14, the governmental immunity act and the MISS DIG act were amended to provide and allow suits against government entities for not marking. That's back when you mentioned the Rochester, I'm sorry, the Oak Park, Royal Oak problem with all those sewers blowing up.

And, uh, counsel has cited not a sing-, she cites a bunch of cases. They have nothing to do with MISS DIG. She's got a case about mis burial of somebody, a public building exception, a highway exception --

THE COURT: We don't care about that.

MR. SCHMIDT: -- (inaudible words) --

THE COURT: We don't care about that. Right?

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

MR. SCHMIDT: Nothing to do with this case, but the, the, the statute clearly says that there's immunity. And then counsel, she goes and cites to the MISS DIG act. Well, the MISS DIG Act, uh, was amended --

THE COURT: Does this, does it create, okay, does it create an exception to the governmental immunity?

MS. SCHMIDT: Yes. It couldn't be -- Judge, that's it, that's what, section --

THE COURT: Page 5?

MR. SCHMIDT: -- 6-9-1-14-0-7 is quoted in my brief on page 5. That --

THE COURT: Yeah. I see --

MR. SCHMIDT: -- is --

THE COURT: -- it on page 5.

MR. SCHMIDT: -- right under the exception section for --

THE COURT: Okay.

MR. SCHMIDT: -- governmental immunity. And it, it's clear. I mean that's what that says. And --

THE COURT: Okay. The immun-, the, uh, amendment on April 1st, 2014. Right?

MR. SCHMIDT: Yes. Yes. And that same date the, uh, and the same date that, uh, MISS DIG act was also amended to comply with, to show that there's claims allowed against a governmental entity for not complying with the MISS DIG act.

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

THE COURT: Okay.

MR. SCHMIDT: And --

THE COURT: So don't you guys have to provide discovery for that?

MR. SCHMIDT: And that's the point, Judge. We, be- before they --

THE COURT: Yeah.

MR. SCHMIDT: -- got part of the case we sent a subpoena to them and asked for --

THE COURT: Yeah.

MR SCHMIDT: -- facilities.

THE COURT: Yeah.

MR. SCHMIDT: They sent a bunch of nonsense -- no, no, no response. As soon as they got --

THE COURT: Okay. Well --

MR. SCHMIDT: -- in the case, I filed a request to produce. They didn't answer anything. Objected.

THE COURT: Well, I think I'm going to make them do it. I, I sort of thought we were going this way. But, you know, I just, I -- I guess since I have my own governmental immunity I, I prize it and I, and I've had a lot of governmental immunity cases. Uh, so, you know, I wanted to address this part first. But, uh, it seems like you guys have to give discovery about, uh, MISS DIG and whether you guys messed up with your conflict report. I don't know how you can avoid that.

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

MS. PIKE: Your Honor, we produced it in a subpoena, and so he has it. He attached it to his motion re-, Kaltz attached it to his motion response, the --

THE COURT: Are they --

MS, PIKE: -- MISS DIG --

THE COURT: -- missing --

MS. PIKE: -- reports.

THE COURT: -- something though? Is something missing?

MS. PIKE: But what, what the township did or did not do doesn't come into account when you're looking at governmental immunity.

THE COURT: Okay. But this says the that, it, they say does-, it doesn't, immunity doesn't apply to liability of a govern-, governmental agency under the MISS, MISS DIG Underground Facility Damage Prevention and Safety Act.

MS. PIKE: And, yes, it, it says that, and then you have to read it with MISS DIG. You have to read section 12 of MISS DIG that says except as provided in this section, which talks about the commission complaint, this act does not affect the liability of a governmental agency for damages for tort or the application of 1964 P-A 170, M-C-L 6-9-1-14-0-1 to 6-9-1-14-19, which is the G-T-L-A and includes section 7 of the G-T-L-A. So when that was added to the G-T-L-A, section 7, and it says the immunity provided by this act does not apply to liability of

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

a governmental agency under MISS DIG. Then you go to MISS DIG and read it and it says except provided in this section, which talks about filing a complaint to the commission, which is the exclusive remedy against the township for a MISS DIG violation.

MS. SCHMIDT: Your Honor, can I respond to that?

THE COURT: Yeah. Yeah. Because this --

MR. SCHMIDT: This --

THE COURT: -- this was what, this was our hangup. It, you know, you got to keep in mind whenever you, uh, argue a motion in front of the judge, you guys know your case frontwards and backwards and inside out. I had five S-Ds today. So when I started to get a headache I decided to let you guys explain it to me so. Okay.

MS. PIKE: Of course.

MR. SCHMIDT: Okay.

MR. PIKE: I completely --

MR. SCHMIDT: Well --

THE COURT: Uh huh.

MS. PIKE: -- (inaudible word) --

MR. SCHMIDT: -- the MISS DIG, the MISS DIG act, uh, was amended and these were the amendments they made. They said the, the first part is what, what MISS DIG requires is for the facility owner to respond to a ticket by marking its facilities in the area of proposed excavation. That's what the facility owner has to do. The amendment indicated that a facility owner

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

is defined as including a person, and a person was amended to include a governmental agency, department or agency. So they specifically amended to show that the facility owner who has got to mark includes a government. And then --

THE COURT: This is the 2014 amendment?

MR. SCHMIDT: Yes. It's, it's M-C --

THE COURT: Okay.

MR. SCHMIDT: -- L 4-6-0 point 7-2-3-Q and W. And then, uh, 4-6-0-7-2-3-O, which is cited in my brief on page 8. And what they did here is they say they don't have to mark things. They're required by law to mark it. This, this exception counsel is talking about is not changing what the law is. It just says the facility owner or operator may file a complaint. That's just giving another alternative and gives a procedure there. But the, that doesn't, this, this section doesn't just take out the fact that they've taken out immunity for not complying with the MISS DIG act. That's absurd.

The legislative analysis says and I'll quote, uh, under the bill municipalities will be held liable for damages caused to underground facilities. That's the whole reason the MISS DIG act was amended and this, and the governmental immunity act was amended was to say you don't have immunity any more.

And the other part of it, Judge, is that the, the sewer exception also applies because counsel, in this case they're trying to say our main didn't leak so we're off the

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

hook. That is not what MISS DIG says. MISS DIG says you've got to mark the facilities in the area --

THE COURT: Uh huh.

MR. SCHMIDT: -- and all the appurtenances, which would be a connection to the main by the property owner.

THE COURT: Sure.

MR. SCHMIDT: So when your sanitary sewer hooks up with the, with our route in the street, that connection is owned by the government.

THE COURT: Uh huh.

MR. SCHMIDT: And they're supposed to mark that. And they didn't mark that in this case. They didn't mark anything. They said no --

THE COURT: Wait. Are you --

MR. SCHMIDT: -- (inaudible word) --

THE COURT: -- alleging a sewer backup, though? Do you allege that there's --

MR. SCHMIDT: Yes. That's the point. That's what I'm getting to.

THE COURT: Okay. You're alleging a sewer backup --

MR. SCHMIDT: It, it --

THE COURT: -- because of the dr-, because of --

MR. SCHMIDT: -- it, yeah.

THE COURT: -- it being that --

MR. SCHMIDT: His, his sewer backed up because they

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

didn't mark. And the case, the, the statute about the, the sewage backup disposal system says you have to show there was a disposal system defect. And defect is defined by 6-9-1-14-16 as a construction, design, maintenance, operation or repair defect.

And in the *State Farm versus Corby* case they said we conclude that the prevention of actual damage to the city's water system through notification is within the scope of the water department's operations. So, therefore, they didn't prevent actual damage because they didn't mark in that case. So, therefore, that's operation.

So it isn't limited to a sewer main backing up into somebody's house. It --

THE COURT: Right.

MR. SCHMIDT: -- includes an operation defect, which is not marking. And that's exactly what the case says.

So their arguments, your Honor, are completely contrary to what the statute says. I mean that's section 7 that I quoted. I mean how, how could they, how could they put that language in there -- the immunity provided by this act does not apply to liability of a governmental agency under MISS DIG Underground Facility Damage Prevention and Safety Act -- and then say, no, it doesn't apply, you have to file it within 22 days or whatever to some -- that's, that's an alternative you can do if you want to. But as you noted, that's, that only all-, allows for, I think, a, a, a minor amount of damage. I think

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

it only allows for a $15,000 fine. It's like you said. His house blows up --

THE COURT: (Inaudible word) --

MR. SCHMIDT: -- and people are killed, you get $15,000. That's not what the intent of that is. That, that's to provide another -- it says may file a complaint. So you got some little deal that happened, okay, file a complaint, we'll get a civil fine, whatever. That's not what this is talking about. This is liability of the third parties. So immunity doesn't apply.

Plus the point is they refused to produce anything. They refused to answer the subpoena. They refused to answer the request to produce. All the fil-, they didn't file one document, nothing. And what we asked for is what do they have there. And so we can see what they didn't mark. They know exactly what they have there. They don't want to tell us.

MS. PIKE: Your Honor, if I may respond?

THE COURT: Uh huh.

MS. PIKE: Please. The complaint is for negligence. The complaint is for not, not a violation of the MISS DIG act. It's a tort. There's one count and it's for negligence.

THE COURT: Okay.

MS. PIKE: So immunity would dismiss the negligence count. Even if, if the complaint was amended to say a com-, you know, a new count, violation of MISS DIG, there is nowhere in

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

MISS DIG where it says you can file a civil complaint with the circuit court. It is not in the jurisdiction of the court and is in jurisdiction of the commission. When he talks about a fine, that's a fine in addition to potential damages that they could award to the facility owner, which would be Mr. Zezula. It wouldn't be Kaltz that would be able to file the complaint. It would be Mr. Zezula that would have been able to file that complaint. But there is no MISS DIG act violation. And even if there was we would file a motion saying that that's not a cause of action.

But the cause of action that's before this court that's in the second amended complaint that was filed back in June is for negligence. And that's the only count in there against the township. There's other counts against other parties, but ours is again-, is for negligence. There's nowhere in the complaint that says we didn't mark, we didn't properly mark, we, we, that the township did or didn't do anything, it just says we, we somehow maybe violated, uh, actually it says upon information and belief the township violated the MISS DIG act and the ordinance. That's all it says. There is no allegation about marking.

And I do agree that, that MISS DIG says that, that the township will mark its facilities in the area. You know, we weren't in the area. But I don't want to get into a factual dispute about where we could have marked and where we should

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

have marked because I feel like that's a separate motion and that would be a C-10 motion. We're here on C-7 and C-8.

And, you know, with regard to the sewer exception, we tried to explain it in the reply brief because Kaltz misinterprets it. It takes a case and stretches it out and says because this one is about water and this one, and ours is about sewer, that failure to mark is the defect. That is not the defect. There must --

THE COURT: Well --

MS. PIKE: -- be --

THE COURT: -- they're, they're saying that the, it's not that the sewer line broke and then backed up like the Royal Oak 100 year flood. They're, they're saying when the line was hit maybe it caused a sewer backup.

MS. PIKE: Okay. But --

THE COURT: But not that the sewer back, not that the sewer is defective, but the --

MS. PIKE: I see.

THE COURT: -- hitting of the line. Right? Am I wrong, Mr. Schmidt?

MR. SCHMIDT: That's exactly correct, your Honor. That case says op-, operation includes marking your facilities.

UNIDENTIFIED SPEAKER: (Possible inaudible word) --

MR. SCHMIDT: And, and we, we submitted, there was a MISS DIG request submitted to all these different entities --

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

Comcast, Consumers Energy, everybody, Independence Township. Independence Township answered in capital letters no conflict.

THE COURT: Uh huh.

MR. SCHMIDT: That is nonsense. They have stuff there. Okay. They didn't mark anything. And, and, and we want, we want them to show us -- so plaintiff can't, in his complaint, he wasn't familiar, he didn't have this information. And the point is we don't even know all we, they had there. We know there's a main near there they didn't mark. And that's enough. And the main crossed exactly where this work was being done. So they didn't mark --

THE COURT: Wait.

MR. SCHMIDT: -- the main.

THE COURT: Do you -- wait. Is there an allegation that the main was hit?

MR. SCHMIDT: No. The, the --

MR. GROVES: No.

MR. SCHMIDT: -- the question is Mr. Zezula's service was hit. But they didn't --

THE COURT: Okay. Right.

MR. SCHMIDT: -- they didn't mark where his service connected with the main.

THE COURT: Okay.

MR. SCHMIDT: So how would we know to avoid it?

THE COURT: Okay.

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

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

MR. SCHMIDT: Everything is below ground. I mean you're, you're just at a mercy of the people marking it correctly.

THE COURT: Yeah.

MR. GROVES: Your --

THE COURT: No. I know.

MS. PIKE: Your Honor, if we look to the express language of M-C-L 6-9-1-14-16-K, subsection 2, it says that operational defects in building drains are, excludes operation de-, operational defects in building drains. If there's an overflow or backup, it's not a sewage disposal event if any of the following was a substantial proximate cause of the overflow or backup, a connection to the sewer disposal system on the affected property, including but not limited to a sump sys-, sorry, sump system, building drain, surface drain, gutter or downspout.

Zezula, plaintiff's private sewer lead is a building drain. That is an exception so there was no event that triggers this exception to immunity. He has a building drain. And so it wasn't like we talked about. There was no allegation that the main caused this. The overflow or backup was because, as alleged in the complaint in paragraph 31 and thir-, through 34, defendant Kaltz damaged plaintiff's private sewer lead or drain. It was damaged. And that is what caused the backup. So there is no event that triggers any liability for the township under

the sewer exception. When the backup is caused by something in a private lead or drain it is not considered a sewage disposal system event and the incident is not actionable.

MR. SCHMIDT: Your Honor, I don't know how we can just so confuse simple language. The, the, the exception for sewage disposal, 6-9-1-14-17, says you've got to show one thing is a sewage disposal system had a defect. And then defect is, is defined as construction, design, maintenance, operation or repair defect.

And in the *State Farm* case it says operation, it would include failing to provide information to a notification within the scope of the water department's operations, which means going out and marking it.

So counsel is limiting their liability -- say if you, if you hit our main or if it's, our main makes a mistake or whatever, then we're, we have a, we're not, it's our, it's our problem, but if we don't mark anything that's too bad.

Well, that's not what the governmental immunity act -- it can't say any clearer in three lines they're not immune from that. And this, and this, the exception for the separate exception for the sewage disposal situation, that applies, too. It doesn't have to be their main. They didn't mark where Mr. Zezula's lead hooked into their main. So how would anyone know it was there? You wouldn't.

MS. PIKE: Your Honor, the *State Farm* case doesn't say

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

that operating a sewer main or a water main is a defect that triggers the sewer exception. What the *State Farm* case says on page 484 in footnote 2 it says that a sewage system is a governmental function. So that's where they get into the immunity discussion. There is no question that it is a governmental function, and Kaltz cites it in his answer on page 7 when he cites, cites to the *State Farm* case. It's a governmental function. But operating its sewer does not make it an event. What makes it an event is where the defect is, and the defect was in the building drain and that's an exception to the sewer exception.

THE COURT: They, they say the operation, uh, defect, the defect was, uh, their failure to provide information by not marking. That's what they say.

MS. PIKE: But marking --

MR. SCHMIDT: But in --

MS. PIKE: -- it --

MR. SCHMIDT: -- *State Farm versus Corbin*, your Honor, that case was issued and decided before the 2014 amendments. And in that case they said we find there's governmental immunity because there wasn't the exception. But they said in that footnote that the sewage disposal system situation would apply because it's, they didn't notify. That's what the footnote says.

THE COURT: All right. You know what, I, I want to

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

read the two -- it, it seem, it seems like the bigger issue is what I perceive at the moment, at least in my brain, is a conflict, uh, about, uh, whether, uh, the MISS DIG situation, uh, how it affects governmental immunity. So I want to re-read those. Okay. So --

MR. GROVES: And, your Honor, Dan Groves for plaintiff, Mr. Zezula. That's why I was asserting earlier, we, first, one of my initial responses was this, these M-S-Ds are premature. Discovery is not done. We don't even have all the information yet. And, as such, with further information plaintiff reserves the right to come before this court, which liberally grants amendments to its complaint. So I, I just, I understand what your Honor is saying you want to read, but, uh, plaintiff just wants it also that the plaintiff is not giving up or waiving its right to amend should the court allow it for that.

THE COURT: O-, okay. Su-, sure. Uh, uh, just so you know, I don't think I have any 2021 cases left. I'm trying cases like a banshee so you guys are on my radar. So I've tried 22 cases this year, and I intend to continue. So I'm, I'm, the heat will be on. All right.

Okay. So I want to turn to, uh, Ms. Brown.

MR. CATRINAR: Yes, your Honor.

THE COURT: So what, what do you have to say about Ms. Brown?

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

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

MR. CATRINAR: So for Ms. Brown, she's the homeowner. She is Mr. Zezula's neighbor. Uh, she brought this motion pursuant to C-10. Uh, it sounds like your Honor has very, uh the facts of her, at least with respect to her, are not quite as complicated. Uh, if you need me to give --

THE COURT: She decided to be a good citizen and call when she saw something awry.

MR. CATRINAR: Yeah. Her, her electrical --

THE COURT: That's her --

MR. CATRINAR: -- company's --

THE COURT: -- that's her crime. Right?

MR. CATRINAR: Right. So she contacted DTE. DTE made the decision on what the fix would need to be. Uh, DTE made the decision on who to hire. They hired Kaltz. Uh, Kaltz appears to have done what they were supposed to do and pull a MISS DIG ticket to figure out what's underneath the ground.

Uh, to the extent something went awry, Ms. Brown isn't taking a position on that. It doesn't really matter.

Uh, but the issue is is Ms. Brown does not owe Mr. Zezula a duty to aid or protect him or warn him or, generally, that's the general duty. And that's from *Williams versus Cunningham Drugs*, 429 Mich App 499.

Uh, but there is an exception to that, and I think uh, plaintiff's counsel and I both agree, uh, that there is a special relationship exception to that. So if a special

relationship exists, then a duty could be imposed to protect someone. But the special relationship exception is, relies upon and is based completely upon control.

And we have gotten the affidavit of Ms. Brown that we attached to our motion. We've got requests to admit back from DTE. We've got requests to admit back from Kaltz. We have anybody who played any role in any of this we have gotten evidence to present to this court that it can consider on a motion for summary disposition to say she had no part and had no control over what was being done to fix this sparking wire, which is something that DTE asks its customers to do and that all of us sitting here would do if we saw this situation happening at our house.

Uh, she left to go to work and she came back and the work had already been started and everything was done. She didn't control Kaltz, what they did. She didn't tell them where to dig. And, most importantly though, is that MISS DIG statute statutorily they, they are responsible for pulling that MISS DIG and they're responsible for what happens. And if someone fails to mark, obviously that goes to the facility owner. But to the extent Kaltz screwed up -- and like I said we're not taking a position either way -- you know, that all statutorily falls back onto Kaltz.

Uh, so Ms. Brown did not control what happened here. She had no control over any of that. Uh, and so we would argue

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

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

that no special relationship existed, and that there was, uh, therefore, no duty for her to protect Mr. Zezula in this situation.

Uh, that, that's the crux of the main argument. I can get into the more specifics, uh, if you would like.

THE COURT: Uh, is -- (pause) -- is it correct that you've, you contacted the plaintiff, uh, repeatedly to ask them to dismiss the case. Right?

MR. CATRINAR: Yeah, I did. At the very beginning of the case I contacted plaintiff and, and, understandably, at that time he was, uh, hesitant to do so, uh, which, at the time I could understand. So we engaged in the discovery. But we told him what was going to come out after all this. Uh, we engaged in discovery. We got all the information that, you know, we told them we would have, uh, and, again, presented that to him before preparing the motion, before filing the motion, uh, and, again, uh, I think our correspondence is there, uh, he didn't feel comfortable dismissing at that point. I think he felt the motion was premature.

Uh, but, again, all the evidence was there from every interested party. And so we, uh, you know, had to go forward with this motion and we prepared the motion and, uh, that's what we're here on today.

THE COURT: Uh, what do you have to say, Mr. Groves?

MR. GROVES: Your Honor, where brother counsel talks

about control -- control doesn't start with DTE and Kaltz. Control starts with Ms. Nina Brown. She is the homeowner. She has the information that Kaltz or DTE would never have, such as uh, well, first, your Honor, we rely on our brief. And, second, your Honor, plaintiff believes that this motion is premature for that very reason.

Brother counsel asserts to this court that the only thing, uh, that Ms. Nina Brown did was report a sparking wire. She did her community service reporting sparking wire.

That may not be true and discovery was needed because in plaintiff's response there are, uh, plaintiff, who is the neighbor, Mr. Zezula is the neighbor to Ms. Brown. In that cul-de-sac there's four homes. Three of the homes have underground electrical wires. Ms. Brown was the only one with overhead pole wires, and Mr. Zezula has asserted that she, through casual conversation over a long period of time, has, was made it known she wanted her house to match the other three and to have DTE take those overhead wires down to bury them.

And I am requesting discovery now, uh, from DTE for those conversations. But I understand that Ms. Brown did a affidavit. If you read that affidavit, all Ms. Brown says in her affidavit is that she called for the sparking wire, uh --

THE COURT: And you, see I, I, I don't think she had to call at all. You can watch someone drown legally. Right? So, so when, when your client's house is on fire or he is laying

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

in the middle of his driveway she shouldn't call anyone. Right?

MR. GROVES: No. The, the problem is that she should call. But because she is the one that granted the easement on her private property to Mr. Zezula, she should have, probably long before any sparking wire, at least afforded him the information of her own private property and the utilities underground and where they're located and, if there's any work going to be done, that those utilities through the easement -- there is a special relationship -- through the --

THE COURT: I haven't heard anything about an easement. DTE already said that she didn't request anything and she had no involvement. Where is, you know, where is any legal authority for that easement argument?

MR. GROVES: It's exhibit A, your Honor, for, uh, Zezula's response to Nina Brown's M-S-D. It's --

THE COURT: What is their special relationship? They're neighbors. She was --

MR. GROVES: She's the property --

THE COURT: (Inaudible words) --

MR. GROVES: -- she's the property owner, your Honor. She owns the land. She owns the property and all the utilities underneath. And so Mr. Zezula's house, which is the neighbor next to her, he can't just go onto her private property whenever he feels like, uh, so she granted him a utility easement, which is plaintiff's exhibit A. Uh, the easement is actually exhibit

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

B. The land deed and the plat which Ms. Brown possesses and owns is exhibit A. She had the plat from the county -- well, she should have -- she's the one that had access to it, not Mr. Zezula. Uh, she had the plat and she had the deed and all this explains the utilities underneath her ground on her property. And she grants an easement to Mr. Zezula saying for utility purposes you can have your utilities on my private property.

So then if there's any work to be done, whether it's sparking wires or cosmetic -- and I don't know the answer to that yet -- but I'm just saying if it's cosmetic and she wanted to match the other three houses, the next, then her, her giving notice --

THE COURT: It's not cosmetic, though. And she, she didn't have anything to do with what DTE, E did.

MR. GROVES: I, what I'm saying through the process of discovery, which I believe this M-S-D is premature, uh, I may be able to find out whether it's cosmetic or not because, allegedly, she was requesting for quite some time that her overhead wires be buried like the three other houses in the cul-de-sac. And if that's the case, then she wanted those overhead wires buried, right, and she never gave notice to Mr. Zezula other than saying, you know, I want these overhead wires buried in my ground. Uh, but it's her private property. She's the, she, it's her plat, it's her land deed, it's her utility easement that she granted him. She had all this information.

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

She was, she, she, with that information, easement, was to provide it to Mr. Zezula. And if work is going to be done, she breached the duty by not notifying that work is going to be done.

That's why I said control starts beforehand. It doesn't start with DTE and Kaltz. She, all she would had to do is say there's work going to be done on my private property that involves your sewer lead and --

THE COURT: How does she know that?

MR. GROVES: I'm sorry.

THE COURT: How does she know that?

MR. GROVES: Because she knew that the lines were going to be buried. And, and --

THE COURT: Uh, what does, what does D-T, what does DTE have to say about that?

MR. MISURACA: Uh --

MR. GROVES: It --

MR. MISURACA: -- (inaudible word) -- whether or not we knew that the lines were going to be buried, your Honor -- this is Frank Misuraca for DTE. Is, is that your question?

THE COURT: Yeah. And like Ms., Ms., was Ms. Brown out there helping you dig the hole? And, I mean, like to me that's ridiculous. I don't know.

MR. MISURACA: Well, no --

THE COURT: You tell me.

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

MR. MISURACA: -- I don't believe Ms. Brown was out there helping us dig the hole. But --

THE COURT: Okay.

MR. MISURACA: -- I mean there is the argument that who would know where these lead, the sewer line is. I mean the only entities would be Independence Township, Ms. Brown or Mr. Zezula. Obviously, not Kaltz or DTE would know about these lines. And I believe that that's what the argument is -- that somebody must know where these lines are. And it's, because of the easement that Mr. Groves is pointing to, there's at least an issue of fact of whether or not Ms. Brown knew about those lines and the same with Independent Township.

So I mean who would know? Who would be in the best position to know about those lines? It's not DTE, and it certainly isn't Kaltz. So I don't, I mean that's where we are.

THE COURT: Okay. Uh, can you, can DTE confirm that Brown, uh, the only involvement in this incident was that she reported the sparking lines. Right?

MR. MISURACA: We provided initial discovery to the plain-, you know, to the plaintiff's responses. And, and my understanding of that discovery is that there was a complaint of sparking wires -- if that is your question, your Honor. That --

THE COURT: She made a phone call?

MR. MISURACA: Yes. I, I, that is my reading of the documents. If Mr. Groves has a different reading, then please

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

go ahead. But my reading and memory of those documents is that there was a specific complaint about some sparking wires.

THE COURT: Okay. What does anybody else have to say about this?

MR. CATRINAR: Your Honor, I, I would just add that, you know, we, it's a C-10 motion. We brought the evidence. We have an affidavit from Ms. Brown saying exactly why she called. DTE's evidence backs that up. If plaintiff claims that his client heard my client say that this was a cosmetic fix instead of, which, you know, there's just no evidence for this court to consider to even draw that conclusion or find a question of fact on that issue.

And I think, more importantly, is this idea of an expanded duty. A duty exists or it doesn't. And, you know, whether it was cosmetic, I don't think that that establishes a duty, a different duty, than if it was a sparking wire. But the fact is even assuming plaintiff is correct, even taking that assumption, the fact is that all the evidence points to the fact that she had a sparking wire and she called, called DTE, and that was the end of her involvement. There is nothing plaintiff has produced to refute that evidence.

MR. SCHMIDT: Your Honor --

MR. CATRINAR: And we've, and we've got the, we've got evidence from everybody involved in that situation saying that that was the extent of it. Further discovery is not going to

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

point towards anything else. I mean plaintiff can say it's premature, that's fine, but he also has the obligation to identify exactly what further discovery is going to benefit him moving forward and what he expects to find.

And the fact of the matter is he could have got an affidavit, he could have refuted any of this stuff. I don't think it would have mattered, personally, but the fact is, based on these plead-, the motions in front of you, there is undisputed evidence that she had nothing to do with this. She had no control over what work was going to be performed.

To the extent there's underground, you know, his own underground, uh, utilities running through her property -- again, that's what the MISS DIG statute is for. And that's where it places the responsibility on the excavator and it replac-, and it places it on anybody who owns those utilities so that situations like this don't happen.

She had no control over this situation.

MR. GROVES: Your Honor --

MR. SCHMIDT: Your Honor, there's one more point. And that's that, what Edison raised.

Since we don't have any discovery information, we don't know what's there. But this, this situation, uh, the prior owner of Ms. Brown's property, uh, was mis-, his, his name was Forest (sp), and he created this area, and he created various easements. And it's in this deed, and it's very

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

confusing that's attached to plaintiff's, uh, response. But it appears -- we don't know this because we don't have any response from, uh, Independence Township -- but it appears that some of these connections are made on Brown's, which is formerly Forest's property. And it, and it's all on Brown's deed. And that's their responsibilities.

So we don't know what the information is as to that -- cause we don't know where the facilities are. We don't know why they're all on Brown's property, et cetera. And until Independence Township --

THE COURT: Well, at a minimum --

MR. SCHMIDT: -- produces --

THE COURT: -- it's not -- if, if it was in Brown's deed, it, it, it's not something Brown did at a minimum. Right?

MR. SCHMIDT: Well, she has --

THE COURT: I mean I --

MR. SCHMIDT: -- the deed. It runs with her property. It runs, your duties run with the land.

MR. GROVES: She's the -- (inaudible word) --

MR. SCHMIDT: If you've got easements and stuff, it runs with the land. It goes forever.

MR. GROVES: Yes.

MR. SCHMIDT: It doesn't end with, cause Mr., uh, whoever it is, sold it to Ms. Brown. Whatever responsibilities

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

are in that deed apply to the whole area. That, for instance, that --

THE COURT: Okay.

MR. SCHMIDT: -- road there --

THE COURT: This --

MR. SCHMIDT: -- that's a private road. It's not a, that's not a public road.

MR. GROVES: It's a private --

THE COURT: Okay.

MR. GROVES: -- (inaudible word) --

THE COURT: I'm sorry.

MR. GROVES: It is --

THE COURT: What?

MR. GROVES: I'm sorry, your Honor. It's a private easement, I agree. And as a private easement, uh, it, DTE did not have a right of way. Correct. So it's a private easement and that goes straight to Ms. Nina Brown. And, and whether that easement was set up by, uh, Forest Jarvis (sp) years ago, she became the property owner, that's hers and it runs with her forever. That's her property.

And brother counsel for Ms. Nina Brown keeps saying she had no control over what Kaltz did. That's not what the plaintiff is saying. She had the control when she knew that she was having to call. He's saying, well --

THE COURT: And she did.

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

MR. GROVES: -- when she called -- and she called. She did call. But she never --

THE COURT: Right.

MR. GROVES: -- let Mr. Zezula know that there was going to be work or I, at least I called and they're coming on my property that includes your sewer lines and your sewer leads and your water lines and, and --

THE COURT: Okay. She's supposed to know what they're going to do about it?

MR. GROVES: She should at least alert Mr. Zezula that work and boring, digging into the ground where his sewer leads are, she should let him know that. She has the duty and obligation because he can't go onto her property. And --

THE COURT: Okay. You know what, the, this is ridiculous. This is ridiculous. The plaintiff's allegations against Ms. Brown are completely speculative. There's no duty. There's no special relationship. There's no control, uh, by, by Ms. Brown. Uh, she specifically says she made a phone call, which is what she's supposed to do. That's what she's supposed to do may-, maybe or maybe not.

But I, this, this is completely frivolous, completely frivolous as against, against Ms. Brown. Uh, it, you know, it, with regard to this, it seems like to me like the plaintiff had every chance to take the exit ramp and did not. So, uh, I think it's frivolous. I'm granting $1,000 in sanctions, uh, against

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

the Bashore law firm payable to Ms. Brown. And I, I mean this is ridiculous. This, I, completely ridiculous.

MR. GROVES: Plaintiff also requested --

THE COURT: What are you supposed to do? You're supposed to call -- like if you smell gas, what are you supposed to do? Right? What should you do? But there is no special relationship between them and it, it, it's, it's so speculative and, and, frankly, outrageous. So I'll sign an order.

MR. GROVES: Your Honor, plaintiff also requested to amended its complaint, which should be granted liberally, for, which was in its brief about a private, which she's a private landowner, uh, trespass nuisance. There's only two elements. Did it happen on --

THE COURT: Well, I --

MR. GROVES: -- her --

THE COURT: -- think it, I think it would --

MR. GROVES: And did it --

THE COURT: -- be futile.

MR. GROVES: -- effect --

THE COURT: I think it would be futile. Sh-, Ms. Brown, Ms. Brown did nothing.

MR. GROVES: Well, according to the --

THE COURT: It's clear.

MR. GROVES: -- nuisance there's only two elements. Did it happen on her property and did it negatively adversely

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

affect somebody else? The answer is yes to both of those. Plaintiff should be allowed to amend his complaint because she's the property owner with the easement with the deed with the plat and it happened on her property and it negatively affected someone else. The two elements of a private nuisance trespass are met. The plaintiff is requesting to amend its complaint.

MR. CATRINAR: Your Honor, we, we did address that issue briefly cause we didn't have a lot of space in the reply brief. But the same control issue applies for nuisance claims, uh, in Michigan.

Uh, we cited to, uh, *Scholberg versus Truman*, which is 496 Mich at page 6. Uh, so I would agree with you, your Honor, that any amendment would be futile, cause you still need that same control, uh, element, uh, that you would need to show a special relationship.

MR. GROVES: Your Honor --

THE COURT: In, in theory --

MR. GROVES: -- (inaudible words) --

THE COURT: -- the con-, in theory, the trespass, pass was, if there was one, was by Kaltz or DTE.

So, no, I'm, I'm dismissing as to Ms. Brown, $1,000 at, at, against the Bashore law firm. I, it's, it's frivolous. An amendment would be futile. I mean it's, it's, it's a frivolous lawsuit as far as I'm concerned. And the plaintiff had a chance, uh, to bow out. So, all right.

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

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

I'm going to get back to you when I read, when I read about MISS DIG. All right.

MR. CATRINAR: Thank you, your Honor.

THE COURT: All right. Thank you.

MS. PIKE: Thank you, your Honor. Do you need an order that says it's being taken under advisement?

THE COURT: No.

MS. PIKE: Okay.

THE COURT: We're going --

MS. PIKE: We --

THE COURT: -- do, we'll do something soon. You guys are on my radar so.

MR. SCHMIDT: We have motions next week, Judge, that their, uh, Independence Township has a motion for protective order. I have a motion to compel and to answer the stuff we've been asking for.

THE COURT: Well, it'll --

MR. GROVES: And also --

THE COURT: -- probably be resolved by --

MR. GROVES: -- (inaudible words) --

THE COURT: -- it'll probably be resolved by, uh, when I look at the, the statutes side by side. Right? My ruling on this will probably resolve that. Right?

MR. GROVES: The --

MR. SCHMIDT: No --

MR. GROVES: There's two --

MR. SCHMIDT: -- because they, unless, if they're still in the case, Judge, we've got to find -- even if they're not in the case, they've got to tell us what they got in the area. We need their information. But the point is they, they don't have immunity. But the other point is, uh, we, we've been trying to get this stuff since day one. They just, they don't comply with subpoenas. They don't reply with a, a request to produce. They just don't answer any of this and we object and we're not producing anything. And discovery is cut off. Uh --

THE COURT: If I determine --

MR. SCHMIDT: -- they'd have --

THE COURT: -- that they don't have, if, if I determine that, that they don't have immunity, then they're going to have to provide discovery. Right?

MS. SCHMIDT: Yes. And we have, discovery is cut off a week, two days after the motion next week.

THE COURT: Okay.

MR. SCHMIDT: And we --

THE COURT: Well, I'll --

MR. SCHMIDT: -- we never --

THE COURT: -- help you --

MR. SCHMIDT: -- had discovery from them.

THE COURT: I'll help you with that, but your, what, what's your current trial date?

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

MR. SCHMIDT: I don't know if we have one but --

MR. GROVES: We have --

THE COURT: Oh, you have one.

MR. GROVES: -- facilitation in November and --

THE COURT: Okay.

MR. GROVES: -- it would be for, for the trial date. But there were two prayers of relief for extending because the depositions haven't been done yet and discovery isn't completed yet.

THE COURT: Okay.

MR. GROVES: Uh, so there's been two requests and a prayer for relief to extend discovery for these very reasons.

THE COURT: Okay. Well, a, a lot of that will fall into place after I rule on this. I just got to look at both these. Okay.

MS. PIKE: Thank you, your Honor.

THE COURT: All right.

MR. CATRINAR: Thank you.

THE COURT: Thank you.

MR. SCHMIDT: All right, your Honor. Thank you.

MR. MISURACA: Thank you.

(At 10:24 a.m., proceedings concluded)

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

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

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I certify that this transcript, consisting of 50 pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case, Brian Zezula, Plaintiff, versus Nina Brown, et al, Defendants, on Wednesday, October 11, 2023, via Zoom video technology.

Dated: November 30, 2023

/s/ Teresa R. Kozlowski
Teresa R. Kozlowski, CER-1316

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

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

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

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