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STATE OF MICHIGAN
IN THE SUPREME COURT

BRIAN ZEZULA,
Plaintiff/Appellee,

vs.

INDEPENDENCE TOWNSHIP OF OAKLAND COUNTY,
Defendant/Appellant,

and

KALTZ EXCAVATING COMPANY, INC.,
Defendant/Appellee,

and

NINA BROWN, DTE ENERGY COMPANY,
Defendants.

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

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ANSWER BY DEFENDANT/APPELLEE KALTZ EXCAVATING COMPANY, INC. TO APPLICATION FOR LEAVE TO APPEAL BY DEFENDANT/APPELLANT INDEPENDENCE TOWNSHIP

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Does MCL 691.1407(7) provide an exception to governmental immunity for the liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act?

   The trial court's answer is "yes."

   Plaintiff/appellant Independence Township's answer is "no."

   Defendant/appellee Kaltz Excavating Company, Inc.'s answer is "yes."

   The Court of Appeals' answer is "yes."

2. Does MCL 460.732 provide an exclusive remedy for the MCL 691.1407(7) immunity exception for the liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act?

   The trial court's answer is "no."

   Defendant/appellant Independence Township's answer is "yes."

   Defendant/appellee Kaltz Excavating Company, Inc.'s answer is "no."

   The Court of Appeals' answer is "no."

3. Did Public Act 2013 Nos. 173 & 174, effective April 1, 2014 amend the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*. and repeal the former Protection of Underground Facilities Act, MCL 460.701 *et seq*. and replace it with the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq*. to provide a governmental immunity exception for the liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act per MCL 691.1401(7) and define "person" to include a "governmental agent, department or agency" per MCL 460.723(w), and define "facility owner" as "a person that owns a

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facility" per MCL 460.723(q), so that a "government agency" which is a "facility owner" or "facility operator" has the duties of a "facility owner" or "facility operator" pursuant to the Miss Dig Act, MCL 460.727, to respond to a Miss Dig ticket by the start date and time for the excavation by marking its facilities in the area of the proposed excavation and to mark the location of each facility with paint, sticks, flags or other customary methods and provide notification to the notification system using positive response per MCL 460.727?

The trial court's answer is "yes."

Defendant/appellant Independence Township's answer is "no."

Defendant/appellee Kaltz Excavating Company, Inc.'s answer is "yes."

The Court of Appeals' answer is "yes."

4. Does the Legislative Analysis of Public Act 2013 Nos. 173 & 174 confirm the legislative intent to require governmental agencies who are facility owners or operators to respond to a Miss Dig ticket by marking the location of its facilities in the area of a proposed excavation, and to provide that governmental immunity does not apply to the liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act?

The trial court's answer is "yes."

Defendant/appellant Independence Township's answer is "no."

Defendant/appellee Kaltz Excavating Company, Inc.'s answer is "yes."

The Court of Appeals' answer is "yes."

5. Does the so-called sewage disposal system event exception to governmental immunity per MCL 691.1417 apply where a governmental entity fails to respond to a Miss Dig

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ticket to mark its facilities in the area of a proposed excavation and indicates "NO CONFLICT" thereby creating a "defect" in its "operation"?

The trial court's answer is "yes."

Defendant/appellant Independence Township's answer is "no."

Defendant/appellee Kaltz Excavating Company, Inc.'s answer is "yes."

The Court of Appeals' answer is "yes."

6. Is the MCL 691.1419 notice of claim a valid defense where the plaintiff provided notice as required by MCL 691.1419(1) providing written notice of the claim, its name, address and telephone number, the address of the affected property, the date of discovery of any property damage and a brief description of the claim, and Independence Township failed to comply with MCL 691.1419(2) by failing to provide the plaintiff with any explanation of the notice requirements of MCL 691.1419(1), which pursuant to MCL 691.1419(3) prevents Independence Township from raising any failure by the plaintiff to comply with the notice requirements of MCL 691.1419(1)?

The trial court did not answer this question.

Defendant/appellant Independence Township's answer is "yes."

Defendant/appellee Kaltz Excavating Company, Inc.'s answer is "no."

The Court of Appeals did not answer this question.

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COUNTER-STATEMENT OF FACTS

I. PLAINTIFF'S COMPLAINT.

Plaintiff Brian Zezula ("Zezula") initially filed suit against his neighbor, Nina Brown, DTE Energy Company ("DTE") and Kaltz Excavating Company, Inc. ("Kaltz") by complaint filed on 12/23/2022 alleging that a water lead from a water main leading to Zezula's home was damaged by mechanical boring and the water lead was punctured and drilled through causing long-term flooding into Zezula's basement drainage pipes and into his home causing property damage on 12/02/2020 and 12/29/2020. (Appx 1, ¶¶ 20-21; 31-32).

Plaintiff Zezula then filed a first amended complaint on 12/30/2022 against the same three defendants but changed the allegations from a water line from a water main being punctured and drilled through causing water to flood into plaintiff's basement, to allege that a sewer lead had been punctured and drilled through causing sewage to flood into plaintiff's basement drainage pipes and into his home causing property damage. (Appx 2, ¶¶ 19-20; 31-32).

Plaintiff's allegations against Kaltz in the first amended complaint were that Kaltz had been hired by DTE to perform electrical line work for the defendant Nina Brown and that Kaltz caused damage to plaintiff's sewer lead due to mechanical boring. (Appx 2, ¶¶ 31-32).

Plaintiff reported the incident to Independence Township on 12/03/2020 and was advised by Independence Township (the "Township") that the Township had no liability or responsibility whatsoever and that the responsible parties were Kaltz and DTE. (Appx 6, pp 43, 52-57, 64-65).

II. PROJECT INFORMATION.

Investigation established that the plaintiff's neighbor, Nina Brown, made a complaint of sparking at the electrical service to her home. DTE determined that there was a fault in the

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electrical service to Nina Brown's residence under the street in front of her home and DTE hired Kaltz to bore a new underground electrical service to Nina Brown's residence.

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 have all facilities marked in the area of the bore job. (Copy of request attached as Appx 3). Per the MISS DIG Act, MCL 460.726, the Miss Dig system provided notice to multiple companies and governmental entities who potentially had underground facilities in the area including four different entities of Independence Township including sanitary sewers and water. (Appx 3).

Pursuant to the Miss Dig Act, MCL 460.726, Miss Dig then issued to Kaltz the responses by the various responding entities and the response by Independence Township sanitary sewers and Independence Township water was "NO CONFLICT." (Copy of Miss Dig Response, Appx 4).

Kaltz employees then went to the scene to perform the work on 12/02/2020 and did not note any marks showing any conflict for the bore job for any underground sewers which would require green paint, stakes or flags per MCL 460.727(2)(h) which was in accord with the response by Independence Township sanitary sewers and water of "NO CONFLICT." (Appx 4).

Kaltz then completed the work as directed by DTE with no problems, running the bore job from the DTE pedestal across Forrest View Drive to the Brown residence, following the existing underground service which was being replaced.

The next day on 12/03/2020, Kaltz was contacted by the plaintiff Zezula, apparently on direction from the Township, and was advised that Zezula had a sewage backup into his basement. In accordance with Kaltz' policy to immediately respond to any such claim, Kaltz immediately sent a crew to the site, and discovered that the bore job had struck Zezula's sanitary

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sewer lead under the street in front of the Zezula residence, along the path of the bore job from the DTE pedestal to the Brown residence. The Kaltz crew repaired the damaged sewer lead that day.

III. DISCOVERY REQUESTS TO INDEPENDENCE TOWNSHIP REGARDING INDEPENDENCE TOWNSHIP FACILITIES IN THE AREA OF THE BORE JOB

After the suit was filed against Kaltz and Kaltz answered the complaint, Kaltz served a subpoena and notice of records deposition on the Township, because the Township was not a party to the case. (Appx 5, subpoena and notice of records deposition to Independence Township). The purpose was to determine if the Township had sewer or water facilities in the area which should have been marked by the Township per the Miss Dig request (Appx 3) and whether the Township response of "NO CONFLICT" was accurate. (Appx 4).

There were only five requests but the first request had 20 subparts to include the description of any and all types of underground services the Township may have had in the area pursuant to its own ordinances. (See Appx 5, Township Brief, pp 3-4). The subpoena stated:

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.

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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. (Appx 5, pp 31-32)

The Township responded with non-responsive documents (per copy attached as Appx 6) and a letter from the Township's attorney, Morgan A. McAtamney, stating:

> "Enclosed, please find Independence Township's response to your recent subpoena and Notice of Records Deposition." (Appx 6, p 37, Independence Township response to subpoena).

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The response was in violation of MCR 2.305 by failing to produce ***any*** of the requested documents. The only documents produced were: (1) a list of objections by its attorney, (2) the request to Miss Dig to mark the facilities, (3) a permit for a water/sewer connection for one of the six addresses on Forrest View Drive, (4) a copy of a residential builders license for Jidas Custom Homes with an expiration date of 05/31/2001, (5) an email from plaintiff Zezula to David McKee, DPW Director of the Township, dated 12/04/2020 attaching several photographs apparently of the damages to the Zezula basement and the repairs being done by Kaltz, and thanking the Township "for fighting Kaltz for me," (6) several additional emails between the Township employees dated 12/28/2020 discussing following up with the Township attorney regarding the complaints by the plaintiff Zezula regarding Kaltz and the sewer line, (7) letters of 12/30/2020 from the Township's attorney to Kaltz Excavating and DTE denying that the Township has any liability and that the damage is the responsibility of Kaltz and DTE, (8) several emails from Amerisure, the insurer of Kaltz, advising that the Township had failed to mark its facilities, and (9) multiple emails between the plaintiff Zezula and the Township employees stating that the Township had no liability, that Kaltz was the at-fault party and the Township regrets that Kaltz has failed to admit its liability, that Zezula may want to seek an attorney's advice, and if Zezula retains an attorney, the Township will be happy to provide information to assist with any action they feel is necessary. (Copy of the Township's response to subpoena attached as Appx 6). As stated, the documents produced did ***not*** contain a single document requested to be produced to identify whether the Township had any facilities in the area of the Miss Dig request, or any documents regarding the Township's response to the Miss Dig request, or any documents that could be used to locate any of the Township's facilities that would have been in the area of the Miss Dig request.

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Since plaintiff Zezula had been convinced by the Township that the Township had no liability and that only DTE and Kaltz were at fault, Kaltz then filed a notice of non-party fault on 04/28/2023 naming the Township 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 the Township ordinances including 40-53, 40-82 and 40-84, including failing to respond to the Miss Dig request to mark its facilities and failing to mark its facilities in response to the request, but rather indicating "NO CONFLICT." (Notice of non-party fault attached as Appx 7).

Plaintiff then filed a motion on 05/23/2023 to add the Township as a defendant which was granted by the court by order of 06/07/2023.

Plaintiff then filed plaintiff's second amended complaint on 06/15/2023. (Appx 8). It added Count IV for Negligence as to the Township for violation of the MISS DIG Underground Facility Damage and Safety Act, MCL 460.721 *et seq.*, and the Township's ordinances.

After being served with the complaint, the Township then engaged in delay tactics to avoid producing any documents regarding its facilities before filing a motion for summary disposition based on governmental immunity.

First, the Township requested a stipulation and order to extend the time to file its answer from the due date of 07/10/2023 to 07/31/2023. (Copy of stipulation and order attached as Appx 9).

The Township then filed its responsive pleadings on 07/31/2023.

Kaltz then filed a request to produce to the Township on 08/01/2023, the day after the Township filed its first responsive pleadings. (Copy of Kaltz 08/01/2023 requests to produce attached as Appx 10, pp 89-92) The requests to produce were ***identical*** to the requests previously made by Kaltz to the Township by subpoena and notice of records deposition (Appx

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5, pp 31-32) in response to which the Township had failed to produce any of the requested documents and not a single document in regard to any of its facilities located in the area of the Miss Dig request (Appx 6).

The Township then waited 28 days to 08/29/2023 to respond to Kaltz' request to produce and served what it called "Objections And Response To Defendant Kaltz Excavating Company's Requests To Produce." (Copy attached as Appx 11, pp 94-99). Not a single document was produced. Every request was answered with the same objection that Independence Township has governmental immunity, has no liability and does not have to produce anything.

The Township's response to Kaltz' discovery requests were in direct violation of MCR 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.

At the time Kaltz made the request there were only 10 weeks left in discovery and at the time that the Township filed its non-responses there were only 6 weeks left in discovery. The Township's strategy was to produce nothing regarding its facilities.

The Township then filed a motion for protective order on 09/01/2023 arguing that all discovery involving the Township should be terminated pending argument of the Township's motion for summary disposition. Kaltz filed a response to the Township's motion for protective order on 09/08/2023 arguing that the Township's motion for protective order was based on misrepresentations of the facts and law and that the Township had engaged in a strategy to avoid producing anything in discovery before arguing its motion for summary disposition. (Copy attached as Appx 13).

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IV. ARGUMENT OF INDEPENDENCE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION AND TRIAL COURT OPINION.

Independence Township filed its motion for summary disposition on 08/14/2023 based on governmental immunity.

The motion argued first that there are only six exceptions to governmental immunity citing pre-2014 case law (Appx 12, p 108) and ***ignoring*** the 04/01/2014 amendment to MCL 691.1407(7) (the so-called Government Tort Liability Act (GTLA)) adding paragraph (7) to the act, MCL 691.1407(7):

> (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.

The motion argued next that the MCL 691.1417 immunity exception for a "sewage disposal system event" also did not apply because the sewer lead that was struck was a private sanitary sewer lead on private property (Appx 12, pp 109-10) ignoring that the claim was not regarding a "defect" in the private sanitary sewer lead, but rather a "defect" in the Township's "operation" of its sewage disposal system by violating the Miss Dig Act by not responding to the request to mark its facilities.

The court held oral argument on the motions for summary disposition by the Township and defendant Nina Brown on 10/11/2023. (Transcript of hearing attached to the Township's Application for Leave to Appeal as Appx 12). The court granted summary disposition to defendant Nina Brown as to any and all claims made by the plaintiff which is irrelevant to this appeal. After hearing oral argument on the Township's motion for summary disposition, the court advised that she would take the matter under advisement and issue an opinion. Regarding the discovery cutoff issue, the court advised that ". . . If I determine that, that they don't have immunity, then they're going to have to provide discovery." (Township Appx 12, p 291).

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The Township argued that there were only six exceptions to governmental immunity and no seventh exception for violation of the Miss Dig Act. (Township Appx 12, pp 251-52; Township Appx 7, p 64) and that the "exclusive remedy" for a Miss Dig violation is to file a complaint with the Public Service Commission. (Township Appx 12, pp 252-53, 254-55).

Plaintiff argued that plaintiff should be allowed to amend plaintiff's complaint to answer the objections of the Township. (Township Appx 12, p 258).

Kaltz argued that there is a specific government immunity exception for liability under the Miss Dig Act per the 04/01/2014 amendment to the Governmental Tort Liability Act along with similar amendments made at that time to the Miss Dig Act (Township Appx 12, pp 259-61). Kaltz also argued that there was no so-called "exclusive remedy" for a violation of the Miss Dig Act, and that this argument was based on a complete misstatement by the Township of the Miss Dig Act, Section 12, MCL 460.732, which only applies to a "facility owner" or a "facility operator," who "may" file a complaint with the Public Service Commission. (Township Appx 12, pp 263-65). Kaltz argued that there was also another applicable immunity exception, the so-called "sewer disposal system event exception," MCL 691.1417, in regard to the Township's failure to mark any of its facilities, per the Court of Appeals decision in *State Farm v Corby Energy*, 271 Mich App 480, 484 n2; 722 NW2d 906 (2006), that failing to mark is considered an "operation" and thus a "defect" per MCL 691.1416 and 1417. (Township Appx 12, pp 264-67).

The trial court issued its Opinion and Order on the Township's Motion For Summary Disposition on 10/23/2023 (Appx 14) holding that the Township is not entitled to governmental immunity pursuant to MCL 691.1407(7) for liability under the Miss Dig Act, and that the plaintiff may also amend its complaint to state a claim pursuant to MCL 691.1417(3), and that the sewage disposal system had an alleged defect pursuant to MCL 691.1417(3)(b). The Court further held that it had addressed the statutory immunity issue but questioned whether plaintiff

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gave the notice required by MCL 691.1419 and held that issue was insufficiently discussed and thus the Township's request for summary disposition premised on notice was held in abeyance pending supplemental briefing to be filed by the parties and set forth a briefing schedule. (Appx 14). This briefing did not occur, because the Township filed the current appeal and proceedings in the trial court were stayed.

V. COURT OF APPEALS OPINION.

The Court of Appeals affirmed the trial court by a 2-1 published decision on 03/11/2025. (Township Appx 1, pp 1-14). Contrary to the Township's arguments in its application for leave to appeal, the majority opinion did not contain any factual errors or legislate from the bench or ignore decades of Michigan jurisprudence, but rather, held, contrary to the Township's argument and the dissent, that there are seven, not six, exceptions to governmental immunity, which include the so-called Miss Dig exception, MCL 691.1407(7), effective 04/01/2014, which unambiguously states in clear and simple language: "(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."

Second, the Court held, contrary to the Township's second argument on appeal, that Section 12 of the Miss Dig Act, MCL 460.732, by its terms "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" but only provides an alternative remedy limited to a "facility owner" or a "facility operator" who "may file a complaint with the commission seeking a civil fine . . ." MCL 460.732(1) and (2). Nowhere in this section does it state that it is the "exclusive" or "mandatory" or "only" immunity exception per MCL 691.1407(7).

Third, the Court of Appeals held, contrary to the Township's third argument, that the sewage disposal event exception to governmental immunity, MCL 691.1417 does not require

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that there must be a backup in a public owned sewer but that it also can apply to a "defect" in the "operation" of the Township's sewer system by failing to mark its facilities.

The Court of Appeals followed well-settled Michigan law regarding statutory construction "to give effect to the Legislature's intent." *McCormick v Carrier,* 487 Mich 180, 191-2; 795 NW2d 517 (2010).

After the Court of Appeals order was issued denying the Township's motion for reconsideration (Township Appx 4), the Township filed the current application for leave to appeal to the Supreme Court.

ARGUMENT

I. JURISDICTION AND LACK OF GROUNDS TO REVIEW.

Defendant/appellee Kaltz agrees that the application for leave to appeal was timely filed per MCR 7.305. However, Kaltz does not agree that the Township has established ***any*** grounds required by MCR 7.305(B) to justify granting its application for leave to appeal. The trial court and Court of Appeals simply enforced the plain language of MCL 691.1407(7):

> (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.

This language is unambiguous and clear and per well-settled case law in such case "it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted." *McCormick v Carrier,* 47 Mich 180, 191-2; 795 NW2d 517 (2010). ". . . A court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta County,* 466 Mich 57, 63; 642 NW2d 668 (2002). "Courts may not speculate regarding legislative intent beyond the words expressed in the statute . . . We need not, and consequently will not, speculate regarding legislative intent beyond the

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plain words expressed in the statute." *Omne Financial v Shacks Inc.*, 460 Mich 305, 311-12; 596 NW2d 591 (1999). "The express wording in the statute in this case does not fall within the above provisions so as to justify judicial interpretation. Certainly it is plain, unambiguous and not subject to different interpretations by two reasonable minds. It is clear, definite and would be easily understood by even those not trained in the law. The language of the statute, therefore, leaves no room for judicial construction . . ." *City of Lansing v Lansing Township*, 356 Mich 651, 649-50; 97 NW2d 84 (1999).

The plaintiff/appellant ***alleged*** that the Township violated the Miss Dig Act. (Appx 8, pp 82-83). Per MCL 691.1407(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." MCL 691.1407(7). Whether the Township is liable, although it certainly is, was not the question, the question was whether plaintiff's ***allegations*** were for a claim that was excepted from governmental immunity. The Court of Appeals held on this issue:

> "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." (Township APPX 1, p 5, emphasis added)

The argument raised in the Township's motion for summary disposition was that it was entitled to governmental immunity and that MCL 691.1407(7) is not an immunity exception. This could not be any more wrong than it is.

Similarly, the Township's argument that Section 12 of the Miss Dig Act, MCL 460.732, limits the immunity exception of MCL 691.1407(7) to a complaint, which only a "facility owner" or "facility operator" "***may***" file to the Public Service Commission, ignores the unambiguous language of MCL 460.732 which specifically states that "it ***does not*** affect the liability of a governmental agency for damages . . . or the application of . . . MCL 691.1401 to

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691.1419," "except as provided in this section." (emphasis added). The section provides only that: "(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***. . ." (emphasis added). There is no language in MCL 691.1407(7) or anywhere in the Miss Dig Act including MCL 460.732 that this language is anything other than an optional, alternative remedy, limited to only a "facility owner" or a "facility operator," only under Section 12 (MCL 460.732). There is no language that it is the "exclusive" or "mandatory" or "only" immunity exception per MCL 691.1407(7). For example, per the language of MCL 460.732 "a facility owner or a facility operator may" decide in the alternative ***not*** to "file a complaint with the Commission . . .", and there is nothing in MCL 460.732 to prevent a "facility owner" or "facility operator" from deciding in the alternative to sue a governmental agency in tort per MCL 691.1407(7) rather than file a complaint with the Commission. Once again the Township's argument ignores every rule of statutory construction including that "nothing may be read into a statute that is not within the manifest intent of the legislature as derived from the act itself . . ." *Omne Financial, supra,* at 311-12. The immunity exception, MCL 691.1407(7) is straightforward and does not provide for ***any*** exceptions: "(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."

Similarly, the decisions of the trial court and Court of Appeals are not "clearly erroneous", will not "cause material injustice" and do not conflict with any Supreme Court or Court of Appeals decision.

Clearly the Township has failed to establish ***any*** of the grounds ***required*** by MCR 7.305(B) to justify granting this application for leave to appeal.

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II. INDEPENDENCE TOWNSHIP'S ARGUMENTS MISREPRESENT THE FACTS AND LAW REGARDING GOVERNMENTAL IMMUNITY AND THE MISS DIG ACT.

In this case, the standard of review was set by the Supreme Court in *Sunrise Resort v Cheboygan Road Commission*, 511 Mich 325, 333; 999 NW2d 423 (2023), for a case such as this involving governmental immunity:

> The defendant moved for summary disposition under MCR 2.116(C)(7), which allows for "dismissal of the action" because of "immunity granted by law or statute of limitations . . . ." We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When a party brings a motion for summary disposition under MCR 2.116(C)(7), "[t]he contents of the complaint are accepted as true unless contradicted by the documentation submitted by the movant." *Id.* at 119. For purposes of this appeal, the defendant concedes that the facts in the plaintiffs' amended complaint are accepted as true.

There are two separate and distinct exceptions to governmental immunity at issue on this appeal.

Public Act 2013 Nos. 173 & 174, effective April 1, 2014, comprised of Senate Bills 539 and 540, amended the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.* to add MCL 691.1407(7), and repealed the former Protection of Underground Facilities Act, MCL 460.701 *et seq*. and replaced it with the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq.* effective April 1, 2014.

The first immunity exception at issue in this case is that contrary to the Township's argument that there are only six exceptions to governmental immunity, a seventh exception was ***added*** by Public Act 2013 Nos. 173 & 174 to MCL 691.1407 as (7) which states:

> "(7) The immunity provided by this Act does not apply to liability of a governmental agency under the MISS DIG Underground Facility Damage Prevent and Safety Act."

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Not only does the Township argue that this exception to governmental immunity, MCL 691.1407(7), does not exist (Brief, pp 10-11, 15), it also argues that it had no facilities near where the job site was located. (Brief, pp 2-3, 9, 17-18). Both arguments are totally wrong.

The second immunity exception at issue is the immunity exception provided by MCL 691.1417 for liability for a "sewage disposal system event." The Township's argument on this issue once again ignores both the law and facts and argues that the exception cannot apply here because there was only a sewage backup caused by the Kaltz bore job striking Zezula's ***private*** sanitary sewer lead (Brief, pp 15-19). This ignores that the sewage backup was caused by a "defect" in the "operation" of its sewer system by the Township by refusing and failing to mark its facilities, which contrary to the Township's argument, were in the area requested to be marked and were not marked and in addition the Township reported in its response to the Miss Dig request that there was "NO CONFLICT." (Appx 4).

A. CONTRARY TO INDEPENDENCE TOWNSHIP'S ARGUMENT THERE IS A GOVERNMENTAL IMMUNITY EXCEPTION FOR LIABILITY OF A GOVERNMENTAL AGENCY UNDER THE MISS DIG ACT.

1. Contrary to Independence Township's argument, MCL 691.1407(7) provides an exception to governmental immunity for the liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act.

The Township's brief argues that there are only six exceptions to government immunity which must be "narrowly construed" citing numerous highway exception cases. (Brief, pp 10-11, 15). The Township's brief totally ignores the problems that have been caused by governmental entities for years by failing to comply with the Miss Dig Act and its predecessor act resulting in multiple personal injuries, deaths and property damage. The Township's strategy was to refuse to produce any information regarding its facilities in the area of the project requested to be marked and to argue that there is no governmental immunity exception for

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liability under the Miss Dig Act by citing multiple cases to the trial court and Court of Appeals which were all decided before April 2014 when the Miss Dig exception was added to MCL 691.1407 as (7) stating that immunity "does not apply to liability of a governmental agency under the MISS DIG underground facility damage prevention and safety act." The Township repeats this false argument in its application for leave to appeal (pp 10-11, 15) stating that there are only six exceptions, the highway exception, the motor-vehicle exception, the public building exception, the proprietary function exception, the government-hospital exception and the sewage-disposal-system-event exception citing once again another ***pre-2014*** case, *Odom v Wayne County*, 482 Mich 459, 478 n62; 760 NW2d 217 (2008). This argument is an insult to intelligence. The trial court and Court of Appeals were not misled and applied the plain and unambiguous language of MCL 691.1407(7). On the other hand, the Court of Appeals dissent discussed only the six exceptions cited by the Township and also only cited in support the pre-2014 *Odom* case, and ignored MCL 691.1407(7) as an immunity exception. (Township Appx 2, p 9).

The April 1, 2014 amendment to the GTLA adds the following exception to the GTLA as (7):

> (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. MCL 691.1407(7).

It is well-settled Michigan law that statutory language must be enforced as written to give effect to the Legislature's intent. In *McCormick v Carrier*, 487 Mich 180, 191-92; 795 NW2d 517 (2010), the Supreme Court held:

> The primary goal of statutory construction is to give effect to the Legislature's intent. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. *Id.* Judicial construction of an

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> unambiguous statute is neither required nor permitted. *In re MCI Telecom Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999). When reviewing a statute, all non-technical "words and phrases shall be construed and understood according to the common and approved usage of the language," MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid in its goal. *Oakland Co Bd of Co Rd Com'rs v Mich Prop & Cas Guaranty Ass'n,* 456 Mich 590, 604; 575 NW2d 751 (1988). A court should consider the plain meaning of a statute's words and their 'placement and purpose in the statutory scheme.'"

The statutory language of MCL 691.1407(7) could not be any clearer and clearly did not include ***any*** exceptions or indicate as the Township argues, that it does not exist. The Court of Appeals opinion held that this is a "broad exception to governmental immunity for alleged violations of the MISS DIG Act." (Township Appx 1, p 5)

As noted above, the addition of this exception to the GTLA, MCL 691.1407, was also done in accord with replacing the former Protection of Underground Facilities Act, MCL 460.701 *et seq* with the new MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq.* The new Miss Dig Act confirms the legislative intent to create an immunity exception for violation of the Miss Dig Act. Specifically, the Miss Dig Act included new definitions to confirm that the Act applies to a governmental agency:

1. "Facility operator" is defined in MCL 460.723(p) as: "'Facility operator' means a person that controls the operation of its facility."

2. "Facility owner" is defined in MCL 460.723(q) as: "'Facility owner' means a person that owns a facility."

3. "Person" is defined in MCL 460.723(w) to include as a "person" a "governmental agency, department or agency."

4. "Governmental Agency" is defined at MCL 460.723(t) as "the state and its political subdivisions, including counties, townships, cities, villages or any other governmental entity."

These definitions confirm the legislative intent that every governmental entity is required to comply with the duties of a "facility operator" and a "facility owner" pursuant to the Miss Dig Act, per MCL 460.727, which provides:

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(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, sticks, flags, or other customary methods using the uniform color code of the American National Standard Institute as follows:

* * * *

(h) Green – sewers and drain lines.

(3) A facility owner or facility operator ***shall*** provide notification to the notification system using positive response. (emphasis added).

* * * *

The legislative intent is further confirmed by the use of the word "shall" which the Michigan Supreme Court has held indicates a mandatory and imperative directive. *Burton v Reed City Hospital*, 471 Mich 745, 752; 691 NW2d 424 (2005) (". . . The Legislature's use of the word 'shall' indicates a mandatory and imperative directive . . ."); *Oakland County v State of Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997) ("The phrase 'shall administer a public welfare program' is mandatory, not permissive." n 10 "There is a presumption that 'shall' is mandatory.").

As discussed in the Court of Appeals opinion (Township Appx 1, pp 4-5), it is the governmental entity's "liability" for not complying with these mandatory directives which is excepted from governmental immunity by MCL 691.1407(7), that "the immunity provided by this act does not apply to ***liability*** of the governmental agency under the MISS DIG underground facility damage prevention and safety act." (emphasis added)

The Miss Dig Act defines "facility" at MCL 460.723(o):

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> (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 . . . sewage . . . water . . ." (emphasis added)

This definition was intended to provide a very broad definition of "facility" to avoid arguments raised by governmental entities that attempt to strictly limit the definition of a "facility" to avoid having to mark all of their facilities. The definition intentionally adds and includes not just the underground conductor, pipe or structure, but to also include "a conduit, duct, line, pipe, wire or other device ***and its appurtenances*** . . ." (emphasis added)

In compliance with Public Act 2013 No. 174, the Michigan Damage Prevention Board issued its 2015 Best Practices regarding the definition of "facility" (Appx 15, p 133):

> **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. (Appx 15, p 133, emphasis added)
>
> The Best Practice defines "appurtenances" as:
>
> It states that "appurtenances" is defined by Webster's New College Dictionary as:
>
> Appurtenances - as defined by Webster's New College Dictionary
>
> 1: an incidental right (as a right-of-way) attached to a principal property right and passing in possession with it
> 2: a subordinate part or adjunct
> 3: plural: accessory objects: apparatus (Appx 15, p 133)

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The Best Practice further discusses the danger caused by governmental entities such as the Township not marking appurtenances to its facilities:

> ***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. (Appx 15, p 133, emphasis added)

The 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. (Township Appx 7, p 102, emphasis added.)

2. Contrary to Independence Township's argument, Independence Township's brief confirms that Independence Township had multiple "facilities" as defined by the Miss Dig Act, MCL 460.723(o), which it was required by the Miss Dig Act to respond and mark and provide notification of.

Contrary to the Township's argument to the Court of Appeals and in its Application for Leave to Appeal, the only issue it raised on its motion for summary disposition was the legal issue of whether the Township had governmental immunity.

The Township's motion and brief for summary disposition and reply briefs (Township Appx 7, pp 57-108, Appx 10, pp 188-215, and Appx 11, pp 216-243) moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10), but cited no facts or evidence in support and did not attach any affidavits, evidence or records. At oral argument in the trial court (Township Appx 12, pp 244-293), the Township did not cite to any evidence and simply argued that the Township was entitled to summary disposition based on governmental immunity. The Township's brief to the Court of Appeals did not attach any supporting affidavits, evidence or

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records or argue about any evidence.

On the contrary, Kaltz responded to the Township's motion for summary disposition in the trial court by producing the Kaltz request to Miss Dig to mark for the project and the response by the various entities including the Township with the Township Sanitary and Water responding "NO CONFLICT". (Township Appx 9, pp 125-133). Kaltz also attached to its response brief its subpoena and notice of records deposition to the Township and its discovery request to the Township and the Township's responses, failing to produce a single requested document regarding what facilities the Township had in the area requested for the Miss Dig markings but producing multiple documents not requested including documents confirming notice provided to the Township of the backup by the plaintiff. (Township Appx 9, pp 133-187). Kaltz also attached these documents to its brief on appeal to the Court of Appeals.

At oral argument in the Court of Appeals, the Township shifted gears entirely and began its oral argument by arguing that the Township had marked all of its facilities and that Kaltz should not have relied on the Miss Dig response but should have gone to the various entities such as the Township and utilities to determine if they had any records of any privately owned facilities in the area. The only record evidence before the trial court, Court of Appeals and this Court was the request by Kaltz to Miss Dig to mark all facilities in the area of the project which Miss Dig sent to four different entities of the Township, INDSNI, INDTWP, INDTWPM and INDWTR (Appx 3), and the response by the various entities to Miss Dig and to Kaltz including the Township Sewers and Water response indicating "NO CONFLICT." (Appx 4)

The Court of Appeals opinion noted that:

> "Specifically, Kaltz alleged that it requested Independence Township mark its facilities. Independence Township replied there was "NO CONFLICT" and failed to mark the facilities." (Township Appx 1, p 2)

The Court of Appeals further noted that the Township's motion included a request for

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summary disposition under MCR 2.116(C)(10), (no issue of material fact), but the Township advanced no arguments under that rule and thus that issue and claim was "abandoned":

> 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 NWS2d 874 (2009). (Township Appx 1, p 2, and note 1).

There is no record evidence that Independence Township marked anything.

The issue on whether there is governmental immunity is whether there are ***allegations*** that fit within an exception.

In *Sunrise Resort v Cheboygan Road Commission*, 511 Mich 325, 333; 999 NW2d 423 (2023), this court held:

> The defendant moved for summary disposition under MCR 2.116(C)(7), which allows for "dismissal of the action" because of "immunity granted by law or statute of limitations . . . ." We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). ***When a party brings a motion for summary disposition under MCR 2.116(C)(7), "[t]he contents of the complaint are accepted as true unless contradicted by the documentation submitted by the movant."*** *Id.* at 119. For purposes of this appeal, the defendant concedes that the facts in the plaintiffs' amended complaint are accepted as true. (emphasis added)

Similarly, in *Fane v Detroit Library Commission*, 465 Mich 68, 74; 631 NW2d 678 (2001), this court held:

> We review decisions on summary disposition motions de novo. *Sewel v Southfield Pub Schs*, 456 Mich 670, 674, 576 NW2d 153 (1998). Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff ***must allege*** facts justifying the application of an exception to governmental immunity. *Wade v Dep't of Corrections,* 439 Mich 158, 164, 483 NW2d 26 (1992). We consider all documentary evidence submitted by the parties, ***accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically***

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> ***contradict them.*** *Sewell, supra* at 674, 576 NW2d 153; MCR 2.116(G)(5). (emphasis added).

As applied here, the plaintiff's second amended complaint alleges that the Township was in violation of the Miss Dig Act. (Township Appx 5, pp 50-51). The Township submitted no documentary evidence supporting any claim that it marked anything. As held by the Court of Appeals: "Because Zezula ***alleges*** Independence Township violated MISS DIG, Independence Township cannot claim governmental immunity." (Township Appx 1, p 5, emphasis added)

The Township's brief admits that Kaltz complied with its statutory duty per the Miss Dig Act to request that all underground facilities in the area of its bore job be marked:

> To its credit, Kaltz submitted a request to MISS DIG to have all underground facilities in the area of the bore job marked. (Township's Brief, p 2).

The Township then continued with its new appellate strategy by including a "demonstrative map" in its brief in support of its application (p 2) that was ***not*** previously produced in discovery or otherwise by the Township, including in response to Kaltz' subpoena and request to produce in violation of MCR 2.305 and MCR 2.313(A)(4). The Township refused to produce ***any*** documents regarding ***any*** facilities it owned in the area of the bore job in order to attempt to obtain a summary disposition based on governmental immunity by misleading the trial court. The Township's ***new*** argument is that it had no facilities in the area and thus there was nothing to mark: "As is clear from the demonstrative exhibit above, no sanitary or water facilities owned, operated or maintained by the Township would be at the job site, thus, the Township responded 'NO CONFLICT,' because there was no conflict." (Township Brief, p 3). The Township also argues that "this case does not involve a dispute regarding whether Independence Township failed to mark public facilities in response to a MISS DIG request. This appears to be about whether the Township had an obligation under the MISS DIG Act to also mark *private lines,* i.e., building drainage, private sewer leads that it did not own, operate, or maintain."

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(Township Brief, p 9). The Township further argues that Kaltz incorrectly argues: that the Township had "to mark not only the sewer main, but also the connector stub between the sewer main and the Zezula's private lead . . . it is clear from the map provided *supra* that the sewer main *and the connector* were not even close to where Kaltz hit the private lead" and thus the Township had no obligation to mark. (Township Brief, pp 17-18). The Township further argues that the Best Practice argued by Kaltz (Appx 15) does not apply because the Best Practice only applies to facilities which are in a "public right-of-way" and Zezula's lead was "beneath a private road" and "not in a 'public' right-of-way." (Township Brief, p 18).

Below is a copy of the "demonstrative map" from p 2 of the Township brief.



Each and every one of the Township's arguments is totally and completely wrong.

First and foremost, if this "demonstrative map" had been produced in response to the Miss Dig request, the Kaltz crew would have seen the Township facilities in the area and could have easily avoided striking Zezula's depicted private lead. But instead, the Township responded: "NO CONFLICT". (Appx 4)

Second, the "demonstrative map" produced in the Township's brief on appeal (p 2) was

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not previously produced by the Township including in response to a subpoena and request for documents which specifically asked for any such documents. (Appx 5, 6, 10, 11).

Next, it was never presented to the trial court or the Court of Appeals by the Township and the Township is thus in violation of MCR 7.210 by submitting a document which is not part of the record on appeal.

In *Moore v St. Clair County*, 120 Mich App 335, 338; 328 NW2d 47 (1992), the Court of Appeals held:

> Initially, it should be noted that the affidavits of defendant's right-of-way agent and director of public works, submitted for the first time on appeal, cannot be used to enlarge the appellant record and will be disregarded. *Philips Industries, Inc. v Smith*, 90 Mich App 237, 249-250; 282 NW2d 788 (1979).

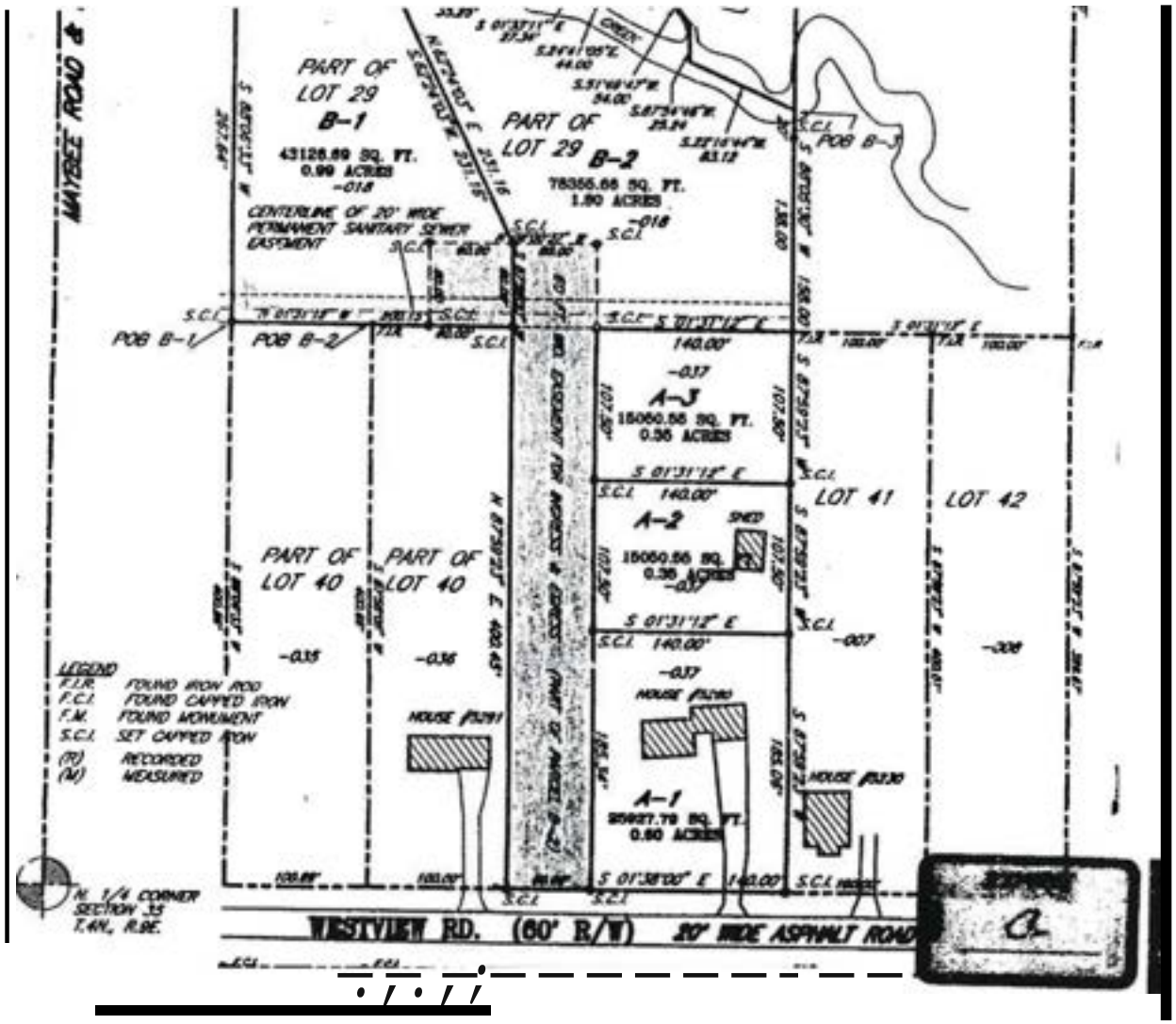
Next, contrary to the Township's arguments quoted above, that the Zezula lead was "not in a public right-of-way" (Township brief, p 18), the Township's brief states that "The grayed-out portion of Forrest View Drive represents the public right-of-way. The road that continues past the public right-of-way is a private road." (Township Brief, p 2). This is another attempt to confuse the record by false information. The grayed-out area on the "demonstrative map" has been incorrectly designated to mislead this Court.

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Below is the recorded page from the Oakland County Register of Deeds which shows that the public right-of-way of Forrest View Road continues past "the grayed-out" area on the "demonstrative map," continuing east to directly in front of Zezula's and Brown's property. See below:



Contrary to the Township's argument, there is no limitation in the Miss Dig Act regarding marking facilities only in public right-of-ways. Per MCL 460.727(2):

> A facility owner or facility operator ***shall*** mark the location of each facility with paint, sticks, flares, or other customary methods using the uniform color code of the American National Standard Institute as follows . . .

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This is not limited to public property.

Contrary to the Township's argument, the "demonstrative map" shows facilities of the Township in the area requested to be marked which per the request was to "LOCATE ENTIRE FRT OF PROP AND BTH SDS OF RD AT ADDRS 5112, 5116, & 5128." (Appx 3, p 22). This would include both sides of the street in front of Zezula's property labeled 08-35-22-6049 (upper right corner), both sides of the street in front of Brown's property labeled 08-35-226-050 (lower right corner) and both sides of the street in front of 5128 labeled 08-35-226-048 next to Brown's property. This would thus ***include*** the "yellow lines with arrows" which represents the Oakland County sewer main, the "green lines with arrows" which are the Township's sewers running along the south side of Forrest View Road, the "daisy-like circles" which are the manholes on the south side of Forrest View Road, and most importantly the "white dots" ***which show the connectors of the private leads*** from 08-35-226-047 and 08-35-226-048 on the south side of Forrest View Road, and most importantly ***the connector to Zezula's lead*** from 08-35-226-049.

Contrary to the Township's argument, the "demonstrative map" establishes that there were public facilities owned, operated and controlled by the Township located in the exact area requested to be marked by the Kaltz Miss Dig request. (Appx 3, p 22)

Contrary to the Township's argument, this dispute is not about whether the Township had an obligation to mark ***private*** lines. The Township had an obligation to mark its facilities regardless of whether they thought they were under a public right-of-way. MCL 460.727(1).

Contrary to the Township's argument, the Michigan Damage Prevention Board Best Practice is not limited to marking an appurtenance connection of a private lead to a government owned sewer on public property. (Appx 15)

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Contrary to the Township's argument, from the Kaltz Miss Dig request for a "boring" (Appx 3), there is no way that the Township would know that "it is clear from the map provided *supra* that the sewer main *and the connector* were not even close to where Kaltz hit the private lead." (Township Brief, p 18). The bore job hit Zezula's lead in the middle of Forrest View Road directly in front of Brown's property and Zezula's property, the exact area requested to be marked and within a matter of feet from where the Zezula lead connected with the Township sewer main as depicted on the "demonstrative map" as a "white dot", which the Township was required to mark and admittedly did not mark.

Applying the Miss Dig Act, per MCL 460.723(p), (q), (t) and (w), the Township is a "facility operator," and a "facility owner." "Facility operator" is defined in MCL 460.723(p) as: "'Facility operator' means a person that controls the operation of a facility." "Facility owner" is defined in MCL 460.723(q) as: "'Facility owner' means a person that owns a facility." "Person" is defined in MCL 460.723(w) to include as a "person" a "governmental agency, department or agency." "Governmental agency" is defined in MCL 460.723(t) as "the state and its political subdivisions including counties, townships, cities, villages or any other government entity."

Per the Miss Dig Act, the Township as a "facility operator" and "facility owner" has the following duties per MCL 460.727:

> (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, sticks, flags, or other customary methods using the uniform color code of the American National Standard Institute as follows:
>
> * * * *

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(h) Green – sewers and drain lines.

(3) A facility owner or facility operator ***shall provide notification to the notification system using positive response***. . . . . (emphasis added).

As argued above, the legislative intent is confirmed by the use of the word "shall."

The Miss Dig Act defines "facility" at MCL 460.723(o):

(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 . . . sewage . . . water . . ." (emphasis added)

The Township violated each of these requirements by not responding to the ticket by marking its facilities in the area requested, by not marking the location of each facility and by not providing a positive response but rather declaring "NO CONFLICT." Although the Township did not have to mark Zezula's private lead, it did have to mark where that lead connected with the Township's sewer main which would have alerted Kaltz that there was a private lead running toward Zezula's house which would then have to be located. The bore job went from a DTE utility box on the north side of Forrest View Road in front of 08-35-226-036 to the Brown property (08-35-226-050) on the south side of Forrest View Road across the street from Zezula's property (08-35-22-6049) and thus would have to cross both the Oakland County main and Zezula's private lead.

3. Contrary to Independence Township's argument, the legislative history of Public Act 2013 Nos. 173 and 174 comprised of Senate Bills 539 and 540 which added the immunity exception for "liability of a government agency under the MISS DIG Underground Facility Damage Prevention And Safety Act," MCL 691.1407(7) and repealed the former Protection of Underground Facilities Act, MCL 460.701 *et seq* and replaced it with the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 establishes that there was no intent to limit the immunity exception to a complaint by a facility owner or facility operator to the public service commission.

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Multi Michigan appellate cases have referred to the legislative history of an Act to ascertain the reason for the Act and the meaning of its provisions. In *North Ottawa Community Hospital v Kieft*, 457 Mich 394, 406 n12; 578 NW2d 267 (1998), the Supreme Court noted:

> We find support for our determination on this point in the House Legislative Analysis of 1981 P.A. 216, which makes clear that the intent of the bill was to harmonize and update earlier versions of the MWPA: . . . .

In *Kern v Blethen-Coluni*, 240 Mich App 333, 338 n1; 612 NW2d 838 (2000), the Court of Appeals stated:

> We recognize that legislative bill analyses are not official statements of legislative intent. Nevertheless, bill analyses may be of probative value. See *Seaton v Wayne Co Prosecutor (On Second Remand)* 233 Mich App 313, 321 n3, 590 NW2d 598 (1998), and cases cited therein.

See also: *Seaton v Wayne County Prosecutor*, 233 Mich App 313, 321 n3; 590 NW2d 598 (1998): ("We recognize that legislative bill analyses are not official statements of legislative intent. Nevertheless, bill analyses may be of probative value. See, e.g., *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 406, n12, 578 NW2d 267 (1998); *Nemeth v Abonmarche Development, Inc.*, 457 Mich 16, 27-29, 576 NW2d 641 (1998); *People v Grant*, 455 Mich 221, 239-241, 565 NW2d 389 (1997); *Travis v Dreis & Krump Mfg. Co.*, 453 Mich 149, 164-166, 551 NW2d 132 (1996) (opinion by Boyle, J.). See also *People v Hall*, 391 Mich 175, 191, 215 NW2d 166 (1974). Cf. *Hagerman v Gencorp Automotive*, 457 Mich 720, 761, n14, 579 NW2d 347 (1998) (dissenting opinion by Taylor, Jr.))".

See also, *Twentieth Century Fox Home Entertainment, Inc. v Department of Treasury*, 270 Mich App 539, 546; 716 NW2d 598 (2006) ("Nevertheless, '[c]ourts may look to the legislative history of an act, as well as to the history of the time during which the act was passed, to ascertain the reason for the act and the meaning of its provisions.'"); *Kinder Morgan Michigan LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007) ("Nevertheless, '[c]ourts

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may look to the legislative history of an act, as well as to the history of the time during which the act was passed, to ascertain the reason for the act and the meaning of its provisions.' *Twentieth Century Fox Home Entertainment, Inc. v Dep't of Treasury;* 270 Mich App 539, 546, 716 NW2d 598 (2006) (citation omitted). Indeed, legislative bill analyses do have probative value in certain, limited circumstances. See *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 406 n12, 578 NW2d 267 (1998); *Kern v Blethen-Coluni*, 240 Mich App 333, 338 n1, 612 NW2d 838 (2000); *Seaton v Wayne Co. Prosecutor*, 233 Mich App 313, 321 n3 590 NW2d 598 (1998);" *DeHart v Joe Lunghamer Chevrolet, Inc.*, 239 Mich App 181, 185-86; 607 NW2d 417 (1999).

(a) The Senate Bill Analysis is attached as Appx 16 and confirms the arguments made by Kaltz regarding the provision at issue:

> Senate Bill 539 amended the governmental immunity law ***to provide that immunity does not apply to a governmental agency acting under the MISS DIG Underground Facility Damage Prevention and Safety Act***. (Appx 16, p 136, emphasis added)
>
> * * * *
>
> ***Notice to the notification system constitutes notice to all facility owners or operators*** regarding facilities located in the area of the proposed excavation or blasting. (Appx 16, p 139, emphasis added)
>
> *** * * ***
>
> Governmental Agency. Except as otherwise provided, the Act does not affect the liability of a governmental agency for damages for tort or the application of the governmental immunity law. A facility owner or operator may file a complaint with the PSC seeking a civil fine and, if applicable, damages from a governmental agency for any violation of the Act. (Appx 16, p 142)
>
> *** * * ***
>
> **Senate Bill 539**
>
> ***. . . . The bill provides that immunity under the law does not apply to liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act***. (Appx 16, pp 143-44, emphasis added)
>
> *** * * ***

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Senate Bill 539

The bill will have little or no impact on State finances. On the local level, ***the bill will expose a municipality to liability for any damage to underground facilities it causes.*** It is not known how many instances of a municipality damaging underground facilities occur during a year, or what the average cost of each instance is. For these reasons, the fiscal impact of the bill on local governments is indeterminate, but will be negative to the extent that the potential liabilities of municipalities increase. (Appx 16, p 144, emphasis added)

(b) The House Legislative Analysis is attached as Appx 17 and includes the following:

Senate Bill 539 ***would amend the Governmental Immunity Act (MCL 691.1407) to specify that the immunity provided to state and local governmental units does not apply to the liability of a governmental agency under the Miss Dig Underground Facility Damage Prevention and Safety Act. The bill is tie-barred to Senate Bill 540, which would create that new act.*** (Generally speaking, the Governmental Immunity Act provides governmental agencies immunity from tort liability if they are engaged in the exercise or discharge of a governmental function.) (Appx 17, p 146, emphasis added)

*** * * ***

The fiscal impact of Senate Bill 539 on local units of government is indeterminate. ***Under the bill, municipalities would be held liable for damages caused to underground facilities.*** Information is not available on how often municipalities cause damages to underground facilities, or what the costs to the municipalities are. (Appx 17, p 149, emphasis added)

There is nothing in the legislative analysis that talks about limiting the language of MCL 691.1407(7) or that the Miss Dig Act, MCL 460.732, creates an exclusive remedy for the immunity exception for liability of a governmental agency under the MISS DIG Underground Facility Damage Prevention And Safety Act to the provision that a "facility owner or a facility operator may file a complaint with the Commission seeking a civil fine . . ."

B. CONTRARY TO INDEPENDENCE TOWNSHIP'S ARGUMENT, THE SO-CALLED SEWAGE DISPOSAL SYSTEM EVENT EXCEPTION TO GOVERNMENTAL IMMUNITY PER MCL 691.1417 ALSO APPLIES.

1. Contrary to Independence Township's Argument, the Sewage Disposal System Event Exception, MCL 691.1417 Applies to a

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"Defect" in the "Operation" of the System Such as by Failing to Comply With the Miss Dig Act and Mark the Township's Facilities.

The Township argues that the exception cannot apply because the damage occurred to a private sewer lead on private property. (Brief, pp 15-19). There is nothing in the statute, MCL 691.1417, or any case law that the exception is limited to public property as claimed by the Township. The requirements are set forth at MCL 691.1417(3) which provide:

> (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.
>
> (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 691.1416(e) defines "defect" as: "A construction, design, maintenance, ***operation***, or repair defect." (emphasis added).

In its Opinion and Order denying the Township's motion for summary disposition (Appx 14), the trial court relied on *State Farm v Corby Energy*, 271 Mich App 480, 484, n2; 722 NW2d 906 (2006), where the Court of Appeals held that such a "defect" would include the governmental agencies' "operation" of its system including properly marking its water system pursuant to the Miss Dig Act:

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> 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. Construing the term "governmental function" broadly as we must, see *Maskery v Univ of Michigan Bd of Regents,,* 468 Mich 609,614; 664 NW2d 165 (2003), 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.

Similarly in *Willett v Waterford Charter Township,* 271 Mich App 38, 51-52; 718 NW2d 386 (2006), the Court of Appeals held that a "defect" could include "maintenance":

> The statute defines "defect" as "a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). The statute does not further define the terms used to define "defect." Given that the definition of "defect" itself uses the term "defect," and the second use of the term is undefined in the statute, we reference dictionary definitions. *Laurence G. Wolf, supra,* at 271; *Pierce, supra,* 265 Mich App 178. A "defect" is defined as "a fault or shortcoming; imperfection." *Random House Webster's College Dictionary* (1997). "Maintenance" is defined as "the act of maintaining," and "maintain" is defined as: "1. To keep in existence or continuance; preserve. 2. To keep in due condition, operation or force. 3. To keep in a specified state, position, etc." *Id.* . . . Defendant's response to the obstruction indicates that it viewed the obstruction as a fault or a defect requiring immediate maintenance. After being notified of the sewer backup, defendant deployed a "jet truck" to attempt to dislodge the obstruction and restore proper operation of its sewer lines. Thus, under the plain language of the statute, there was evidence to support plaintiff's allegation that the "sewage disposal system had a defect."

The trial court correctly held that the plaintiff alleged a sewage disposal system defect pursuant to MCL 691.1417(3)(b) because the failure to mark is an "operation" of the Township and thus a "defect" per the statute. The Court of Appeals affirmed to allow the plaintiff to amend the complaint on this issue, and holding there was a question of fact as to whether there was a failure to mark. (Township Appx 1, pp 6-7). It was only a question of fact at that time because the Township had refused to produce requested documents as to the location of all of its facilities in the area of the Miss Dig marking request in response to the Kaltz subpoena and discovery requests. It is now clear from the Township's current brief that it did fail to mark because, contrary to its argument, it did have facilities that were within the area of the Miss Dig

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request, as established by its own "demonstrative map" (Brief, p 2), which were not marked and instead responded "NO CONFLICT."

The Township argues that there has to be a defect in one of the Township's sewer lines for the exception to apply. (Brief, pp 16-17). There is no such limitation in MCL 691.1417. The Township argues that "because no sewage disposal system under the jurisdiction and control of Independence Township caused an 'event,' Zezula could never successfully plead a sewage-disposal-system-event claim . . ." (Brief, p 17). The Township goes on to argue that "In Kaltz's view, the Best Practices necessitated that the Township would see to mark not only the sewer main, but also the connector stub between the sewer main [and] sic Zezula's private lead. Kaltz seemed to think that if those two items had been marked with green paint or green flags, it would have prevented them from hitting Zezula's private lead." (Brief, pp 17-18). Contrary to the Township's argument, this immunity exception is not limited to a defect in the Township's own sewer line which causes a backup. Rather it was the Township's blatant violation of the Miss Dig Act by not responding to the ticket, and not marking the location of each of ***its facilities*** and then provide a false notification of "NO CONFLICT," that caused the backup to occur. Contrary to the Township's argument, it was required to mark the connector stub (which it owned) between the sewer main and Zezula's private lead which, directly contrary to the Township's argument, would have provided direct notice to Kaltz of the presence of Zezula's private sewer lead, and Kaltz would then have known to locate Zezula's lead and avoid it in its bore job. The Township's failure to respond to mark and also provide a false report of "NO CONFLICT" was a direct violation of the Miss Dig Act and certainly qualifies as a "defect" in the Township's "operation" of its sewage disposal system. The Township's violation is magnified by the fact that it had the "demonstrative map" and did not provide it to Kaltz per the Miss Dig request.

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2. Contrary To Independence Township's Argument, The Plaintiff Is Not Barred From Asserting An MCL 691.1417 Sewage Disposal System Event Exception To Immunity By The MCL 691.1419 Notice Of Claim Provision.

The Township's last argument on appeal is that the trial court erred by failing to grant summary disposition based on the plaintiff's failure to comply with the pre-suit notice requirements of MCL 691.1419. (Brief, pp 19-20).

The trial court did not rule on this issue and advised in its Opinion and Order that it was holding the issue in abeyance pending additional briefing. (Appx 14, pp 129-30). Similarly, the Court of Appeals declined to address this issue noting that due to the Township's appeal, the parties were unable to comply with the trial court's Opinion and Order for further briefing on the issue (Township Appx 1, p 7). This is in accord with the well-settled rule that an appellate court will not rule on an issue not decided by the trial court. *Smit v State Farm,* 207 Mich App 674, 685; 525 NW2d 528 (1994) ("As a general rule, this Court declines to consider an issue that was not decided by the trial court. *Allen v Keating,* 205 Mich App 560, 564; 517 NW2d 830 (1994)).

But regardless, this is another totally misleading argument by the Township. First, the Township wants the Court to rule on this issue, before the evidence can be presented that the Township had notice, because per the record, the plaintiff complied with the notice provision of MCL 691.1419(1). Second, the Township failed to comply with the requirements of MCL 691.1419(2) by failing to advise the plaintiff regarding what notice had to be provided, which thus bars the Township per MCL 691.1419(3) from attempting to argue that the plaintiff failed to comply with the notice provision.

MCL 691.1419(1) requires that a claimant seeking recovery for an MCL 691.1417 sewage disposal system event must provide notice to the governmental agency within 45 days after the date of the damage:

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MCL 691.1419(1)

> (1) Except as provided in subsections (3) and (7), a claimant is not entitled to compensation under section 17 unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered. . . .

MCL 691.1419(2) provides duties on the part of the governmental agency, that upon being notified of a claim by a claimant who owns or occupies affected property, the governmental agency "shall" respond in writing providing the claimant with all of the listed specific information required for MCL 691.1419(1) notice:

MCL 691.1419(2)

> (2) If a person who owns or occupies affected property and notifies a contacting agency orally or in writing of an event before providing notice of a claim that complies with subsection (1), the contacting agency ***shall provide*** the person with all of the following information ***in writing***:
>
> (a) A sufficiently detailed explanation of the notice requirements of subsection (1) to allow the claimant to comply with the requirements.
>
> (b) The name and address of the individual within the governmental agency to whom a claimant must send written notice under subsection (1).
>
> (c) The required content of the written notice under subsection (1), which is limited to 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. (emphasis added)

As noted above, MCL 691.1419(1) provides that the claimant's duty to provide notice in writing applies "***except***" as provided in subsections (3) and (7). The cited subsection, MCL 691.1419(3), provides that if the governmental agency does not provide the information to the claimant as required by MCL 691.1419(2), any failure of the claimant to comply with the notice

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requirements of MCL 691.1419(1) does ***not*** bar the claimant from bringing a civil action against the governmental agency:

> (3) A claimant's failure to comply with the notice requirements of subsection (1) does not bar the claimant from bringing a civil action under section 17 against the governmental agency notified under subsection (2) if the claimant can show both of the following:
>
> (a) The claimant notified the contacting agency under subsection (2) during the period for giving notice under subsection (1).
>
> (b) The claimant's failure to comply with the notice requirement of subsection (1) resulted from the contacting agency's failure to comply with subsection (2).

The record is clear in this case that the plaintiff provided notice in writing to the Township within 45 days of the date of the damage in compliance with MCL 691.1419(1), but the Township failed to comply with MCL 691.1419(2) to provide the plaintiff with the specified information to provide notice, which thus bars the Township from raising the notice defense per MCL 691.1419(3).

According to plaintiff's complaint, the incident occurred on 12/02/2020. (Appx 1, p 3, ¶ 9). The plaintiff reported the event to the Township two days later per the emails the Township produced in response to Kaltz' subpoena (Appx 18, pp 151-59), which provided notice to David McKee of the Township by email of 12/04/2020, two days after the event, which included photos of the damage to Zezula's basement and of the repairs by Kaltz with the response by David McKee of Independence Township on 12/04/2020: "Thanks Brian! Will keep you informed as we move forward . . ." (Appx 18, pp 151-59). There were further emails from David McKee and David Ziegler of the Township on 12/28/2020 instructing the plaintiff to follow-up with the Township's attorney regarding Kaltz and the sewer line. (Appx 18, pp 160-61). There were letters of 12/30/2020 from the Township's attorney to Kaltz and to DTE describing the event in detail and denying any liability of the Township and blaming Kaltz and DTE. The letters

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included the address of the affected property, the date of discovery of the damage, a brief description of the claim, and the claimant's name and address. (Appx 18, pp 162-165). These communications were all within 45 days after the damage per MCL 691.1419(1). Pursuant to these communications, the plaintiff had clearly provided notice to the Township per MCL 691.1419(1) and the Township had all of the notice information required by MCL 691.1419(2) as indicated by the correspondence of 12/30/2020 from the Township's attorney to DTE and Kaltz. (Appx 18, pp 162-65).

Further, the Township is barred from raising this defense by its failure to comply with MCL 691.1419(2) by failing to provide the plaintiff with any of the MCL 691.1419(2) requirements set forth above, thus barring the Township from raising this defense per MCL 691.1419(3). Per MCL 691.1419(3) as quoted above, any failure by the claimant to comply with the notice requirements of MCL 691.1419(1) "does not bar the claimant from bringing a civil action" if the claimant can show both of the following:

(a) "The claimant notified the contacting agency under subsection (2) during the period for giving notice under subsection (1)." It is undisputed from Appx 18 that the plaintiff notified the Township two days after the event well within the 45 days allowed.

(b) "The claimant's failure to comply with the notice requirement of subsection (1) resulted from the contacting agency's failure to comply with subsection (2)." The record is clear that if there was any additional information the Township needed, it would have been provided by the claimant. Moreover, as indicated above, the Township's own 12/30/2020 letters to Kaltz and DTE (Appx 18, pp 162-165) establish that the Township had ***all*** of the information required by MCL 691.1419(2) including the address of the affected property, the date of discovery of the property damage, a brief description of the claim and the name and address of the claimant within 45 days of the damage per MCL 691.1419(1).

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The Township's argument is directly contrary to the Court of Appeals decision in *Dybata v County of Wayne,* 287 Mich App 635; 791 NW2d 499 (2010), which held that the defendant County of Wayne was barred from raising the lack of notice defense by its failure to comply with MCL 691.1419(2):

> Despite receiving the list, which constituted the notice of an event sufficient to trigger its obligation under section 19(2), it is undisputed that the county's "contacting agency" never provided the affected individuals with any written information concerning where and how to file a claim as required by § 19(2).
>
> * * * *
>
> We conclude that plaintiffs have made the necessary showing required by § 19(3)(a) and (b) namely, that the county received timely notice of an event that affected plaintiff's properties as envisioned by § 19(2), that the county failed to provide plaintiff any information concerning where and how to file a claim as required by § 19(2), and that plaintiff's failure to file a notice of their claims under § 19(1) was caused by the county's failure to provide the information required by § 19(2). Accordingly, plaintiffs' failure to comply with the notice requirements of subsection (1)(d) [Id] not bar [plaintiffs] from bringing a civil action under Section 17 against [the county] . . . ." MCL 691.1419(3). (287 Mich App at 646-47).

See also: *Wheeler v City of Livonia,* 2018 Mich App LEXIS 3525 (unpublished per curiam decision of the Michigan Court of Appeals Docket No. 338704) (Appx 19)[1] ("Thus, to the extent that plaintiffs failed to comply with the notice requirement of subsection (1), their claim is not barred because defendant was in fact notified almost immediately of the sewage backup event and failed to apprise plaintiff that they had only 45 days to submit a written claim in that regard or they would forfeit that right – a right they obviously had no intention of forfeiting considering their prior claim related to a 2014 sewer backup event.") (Appx 19, p 171); *Detroit Invest Corp v Detroit Water and Sewage Department,* 2020 Mich App LEXIS 7069 (unpublished per curiam decision of the Michigan Court of Appeals Docket No. 348675) (Appx

[1] Pursuant to MCR 7.215(C)(1), Kaltz cites to this unpublished opinion as it provides guidance on applying the established law to facts similar to this case.

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20)[1] ("Plaintiff immediately notified defendant of the October 2017 flooding event, which was sufficient to trigger defendant's obligation under MCL 691.1419(2). However, defendant did not inform plaintiff that it was required to file another written claim or provide any other information required by subsection (2). Because defendant failed to provide that information, plaintiff could proceed with a suit as to damages for the October 2017 event pursuant to MCL 691.1419(3)." (Appx 20, pp 180-81).

Thus, there is no merit whatsoever to the Township's argument that plaintiff's MCL 691.1417 sewage disposal system event claim is barred due to lack of notice. The record is clear from the Township's own correspondence that it had full notice of every issue required by MCL 691.1419(2)(c) even despite the fact that the Township failed to comply with MCL 691.1419(2) which bars the Township from raising the lack of notice defense.

RELIEF REQUESTED

It is respectfully requested that this Honorable Court deny the application for leave to appeal filed by the defendant/appellant Independence Township and affirm the decisions of the Trial Court and Court of Appeals.

Respectfully submitted,
HARVEY KRUSE, P.C.

BY:/s/Michael F. Schmidt
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CERTIFICATE OF CONFORMITY

Pursuant to MCR 7.205(B)(1) and MCR 7.212(B), the undersigned certifies that this Brief contains 13,200 words, as determined by the word-counting function in Microsoft Word.

/s/ Michael F. Schmidt
Attorney for Defendant/Appellee
Kaltz Excavating Company, Inc.

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: June 3, 2025

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