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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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ATTORNEYS & COUNSELORS
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LIST OF APPENDICES

Appendix 1 Plaintiff's First Complaint

Appendix 2 Plaintiff's First Amended Complaint

Appendix 3 Miss Dig Request

Appendix 4 Miss Dig Response

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HARVEY KRUSE
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Appendix 5	Notice of Record Dep and Subpoena
Appendix 6	Independence Township Response to Kaltz Subpoena
Appendix 7	Notice of Non-Party Fault
Appendix 8	Plaintiff's Second Amended Complaint
Appendix 9	Stipulation and Order to Extend Time to Answer
Appendix 10	Kaltz Request to Produce to Independence Township
Appendix 11	Independence Township Objections and Response
Appendix 12	Independence Township Motion for Summary Disposition
Appendix 13	Kaltz Objection to Independence Township Motion for Protective Order
Appendix 14	Court's Opinion and Order Denying Independence Township's Motion for Summary Disposition
Appendix 15	Michigan Damage Prevention Board Best Practice
Appendix 16	Senate Bill Analysis
Appendix 17	House Legislative Analysis
Appendix 18	Documents Produced by Independence Township Which Show Notice of Claim by Zezula to Independence Township per MCL 691.1419
Appendix 19	*Wheeler v City of Livonia*, 2018 Mich App LEXIS 3525 (unpublished per curiam decision of the Michigan Court of Appeals Docket No. 338704)
Appendix 20	*Detroit Invest Corp v Detroit Water and Sewage Department*, 2020 Mich App LEXIS 7069 (unpublished per curiam decision of the Michigan Court of Appeals Docket No. 348675)

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APPENDIX 1

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

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

2022-197937-NZ
JUDGE CHERYL A. MATTHEWS -NZ

BRIAN ZEZULA

Plaintiff,

Case No. 22-
Hon.

v

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

Defendants.

/

LIONEL E. BASHORE (P-58599)
DANIEL A. GROVES (P-74026)
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/

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

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

COMPLAINT

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

COMMON ALLEGATIONS, JUSIDICTION AND VENUE

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

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

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

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

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

COUNT I

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO NINA BROWN

6. Plaintiff incorporates by reference paragraphs 1 through 5.

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

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

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

1/4/2023 10:23:26 AM (GMT-05:00)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT II

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

17. Plaintiff incorporates by reference paragraphs 1 through 16.

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

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

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

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

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

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

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

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

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

1/4/2023 10:23:26 AM (GMT-05:00)

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

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

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

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

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

COUNT III

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

29. Plaintiff incorporates by reference paragraphs 1 through 28.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1/4/2023 10:23:26 AM (GMT-05:00)

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

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

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

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

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

Dated: December 23, 2020

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APPENDIX 2

FILED Received for Filing Oakland County Clerk 12/28/2022 3:45 PM

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

BRIAN ZEZULA

Plaintiff,

Case No. 22-197937-NZ

NZ
v

Hon. Cheryl A. Matthews

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

Defendants.

/

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

/

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

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

FIRST AMENDED COMPLAINT BY RIGHT

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

COMMON ALLEGATIONS, JUSIDICTION AND VENUE

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

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

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

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

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

COUNT I

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO NINA BROWN

6. Plaintiff incorporates by reference paragraphs 1 through 5.

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

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

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

RECEIVED by MSC 6/3/2025 11:20:12 AM

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

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

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

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

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

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

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

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

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

RECEIVED by MSC 6/3/2025 11:20:12 AM

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

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

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

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

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

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

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

COUNT II

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO DTE ENERGY COMPANY

17. Plaintiff incorporates by reference paragraphs 1 through 16.

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

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

RECEIVED by MSC 6/3/2025 11:20:12 AM

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

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

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

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

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

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

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

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

RECEIVED by MSC 6/3/2025 11:20:12 AM

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

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

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

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

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

COUNT III

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

RECEIVED by MSC 6/3/2025 11:20:12 AM

29. Plaintiff incorporates by reference paragraphs 1 through 28.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: December 28, 2022

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APPENDIX 3

Ticket: 0003360157-00B EMER NEW LREQ GRID

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

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

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

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

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

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

Remarks:

Members: ATTD CEGDIS CEGTRN COMTV1CTV COMTV1FBR DE0010 INDSANI INDWTR OAKCDRSWR

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

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

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

TRS Grids: T04NR09E26 T04NR09E35

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APPENDIX 4

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Ticket Response Inquiry

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

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

B003360157 Inquire

Information for ticket B003360157

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

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

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

Responses for ticket B003360157

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

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

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

Response Definitions

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

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

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APPENDIX 5

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

Approved, SCAO

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

Court address 1200 N. Telegraph, Pontiac, MI 48341

Court telephone no (248) 858-0344

Police Report No. (if applicable)

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

✓ Civil Criminal

v

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

Charge

Probate in the matter of

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

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

YOU ARE ORDERED TO:

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

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

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

2. Testify at trial / examination / hearing.

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

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

5. Testify at deposition.

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

7. Other:

✓ 8.

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

Address
1050 Wilshire Drive, Ste. 320

City State Zip
Troy, MI 48084

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

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

March 1, 2023
Date

Judge/Clerk/Attorney

P25213
Bar no

Court use only
☐ Served ☐ Not served

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

MCL 600.1455, 600.1701, 600.6110, 600.6119, MCR 2.306

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SUBPOENA

Case No. 22-197937-NZ

PROOF OF SERVICE

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

CERTIFICATE / AFFIDAVIT OF SERVICE / NONSERVICE

OFFICER CERTIFICATE

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

OR

AFFIDAVIT OF PROCESS SERVER

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

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

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

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

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

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

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

Signature

Name (type or print)

Title

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

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

Notary public, State of Michigan, County of _____

ACKNOWLEDGMENT OF SERVICE

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

_____ on _____
Day, date, time

_____ on behalf of _____
Signature

AFFIDAVIT FOR JUDGMENT DEBTOR EXAMINATION

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

Signature

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

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

Notary public, State of Michigan, County of _____

MCR 2.105

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EXHIBIT A

1. Any and all records pertaining to the area of Forrest View Road from West View Road to the end point of Forrest View Road, including for any and all lots on the north or south side of Forrest View Road from West View Road to the end point of Forrest View Road including but not limited to 5260, 5134, 5128, 5122, 5312, 5290, 5166 Forrest View Road for the following items:
    a. Any and all easements whatsoever.
    b. Any and all utility rights of way.
    c. Any and road rights of way, dedications, or easements.
    d. Any and all surveys.
    e. Any and all water mains.
    f. Any and all sewer mains.
    g. Any and all lateral sewers.
    h. Any and all intercepting sewers or interceptor sewers.
    i. Any and all building sewers.
    j. Any and all combined sewers.
    k. Any and all common sewers.
    l. Any and all county sewers.
    m. Any and all municipal sewers.
    n. Any and all public sewers.
    o. Any and all sanitary sewers.
    p. Any and all trunk sewers or trunk lines.
    q. Any and all facilities, including underground facilities.
    r. Any and all appurtenances to any facilities, including stubs, taps, sewer taps, and/or sewer stubs.
    s. Any and all connections between the sewer main and sewer leads or sewer laterals.
    t. Any and all building sewers, sewer laterals, and/or sewer connection.
2. Any and all records of any and all water service or sanitary sewer leads or connection points to or from any water mains or sewer mains for 5260, 5134, 5128, 5122, 5312, 5290, 5166 Forrest View Road.
3. Any and all records, including drawings, sketches, photos, plans, permits, and/or inspection reports for construction or installation of any sewer laterals, building sewers, stubs, or connections for the properties on Forrest View Road from West View Road to the end point of Forrest View Road, including for any and all lots on the north or south side of Forrest View Road from West View Road to the end point of Forrest View Road including but not limited to 5260, 5134, 5128, 5122, 5312, 5290, 5166 Forrest View Road.
4. Any and all records, including photos, regarding the response by or on behalf of Independence Township and/or its agents to the Miss Dig request by Kaltz Excavating of 12/01/2020.

5. Any and all records, including reports, correspondence, demand letters, emails, videos, and photos, regarding any damage claims, sewer backup claims, or injury claims regarding Brian Zezula and/or 5116 Forrest View Road.

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

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

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

vs.

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

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

Defendants.

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

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

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

NOTICE OF RECORDS DEPOSITION OF INDEPENDENCE TOWNSHIP

To: Attorneys of Record:

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

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

The deponent is required to produce the following documents:

1. Any and all records pertaining to the area of Forrest View Road from West View Road to the end point of Forrest View Road, including for any and all lots on the north or south side of Forrest View Road from West View Road to the end point of Forrest View Road including but not limited to 5260, 5134, 5128, 5122, 5312, 5290, 5166 Forrest View Road for the following items:
    a. Any and all easements whatsoever.
    b. Any and all utility rights of way.
    c. Any and road rights of way, dedications, or easements.
    d. Any and all surveys.
    e. Any and all water mains.
    f. Any and all sewer mains.
    g. Any and all lateral sewers.
    h. Any and all intercepting sewers or interceptor sewers.
    i. Any and all building sewers.
    j. Any and all combined sewers.
    k. Any and all common sewers.
    l. Any and all county sewers.
    m. Any and all municipal sewers.
    n. Any and all public sewers.
    o. Any and all sanitary sewers.
    p. Any and all trunk sewers or trunk lines.
    q. Any and all facilities, including underground facilities.
    r. Any and all appurtenances to any facilities, including stubs, taps, sewer taps, and/or sewer stubs.
    s. Any and all connections between the sewer main and sewer leads or sewer laterals.
    t. Any and all building sewers, sewer laterals, and/or sewer connection.
2. Any and all records of any and all water service or sanitary sewer leads or connection points to or from any water mains or sewer mains for 5260, 5134, 5128, 5122, 5312, 5290, 5166 Forrest View Road.
3. Any and all records, including drawings, sketches, photos, plans, permits, and/or inspection reports for construction or installation of any sewer laterals, building sewers, stubs, or connections for the properties on Forrest View Road from West View Road to the end point of Forrest View Road, including for any and all lots on the north or south side of Forrest View Road from West View Road to the end point of Forrest View Road

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

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APPENDIX 6

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THE KELLY FIRM

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

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

March 13, 2023

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

Re: Response to Subpoena

Dear Mr. Schmidt,

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

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

Very truly yours,

THE KELLY FIRM, PLC

Morgan A. McAtamney

Morgan A. McAtamney

MAM/ndr

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

GENERAL OBJECTIONS

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

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

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

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

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

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

Document received by the MI Macomb 16th Circuit Court.

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

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

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

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RECEIVED by MSC 6/3/2025 11:20:12 AM

Miss Dig

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

Importance: High

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

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

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

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

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

Flora

PERMIT NO 00-0154

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

CHARTER TOWNSHIP OF INDEPENDENCE
WATER/SEWER CONNECTION PERMIT

ACCOUNT NO 030-00674-01

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

LOT NO _____ SUBDIVISION _____

PROPERTY ADDRESS 5116 Forrest View Drive

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

ADDRESS 5122 Forrest View Drive Clarkston MI 48346

CURB BOX LOCATION

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

TEMPLATE ISSUED
C of O ISSUED
SEWER FINALED
WATER FINALED

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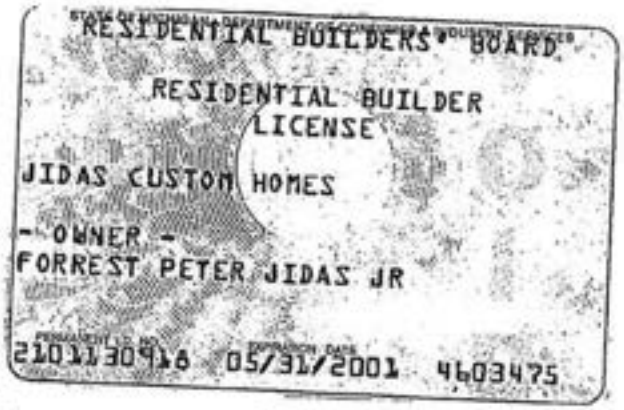
RESIDENTIAL BUILDERS' BOARD
RESIDENTIAL BUILDER
LICENSE
JIDAS CUSTOM HOMES
- OWNER -
FORREST PETER JIDAS JR
21011309\6 05/31/2001 4603475

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RECEIVED by MSC 6/3/2025 11:20:12 AM

Cari Neubeck

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

Thank you.

Sent from Yahoo Mail for iPhone

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

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

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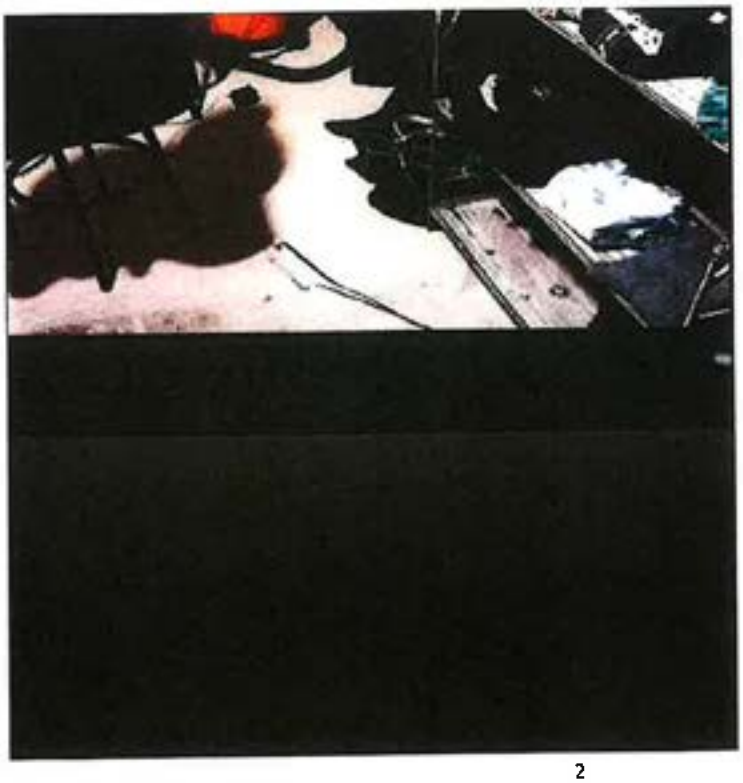
IMG_1053.JPG

IMG_1066.JPG



IMG_1066.JPG

IMG_1063.JPG



IMG_1063.JPG

IMG_1058.JPG



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RECEIVED by MSC 6/3/2025 11:20:12 AM



IMG_1058.JPG

IMG_1064.JPG



IMG_1064.JPG

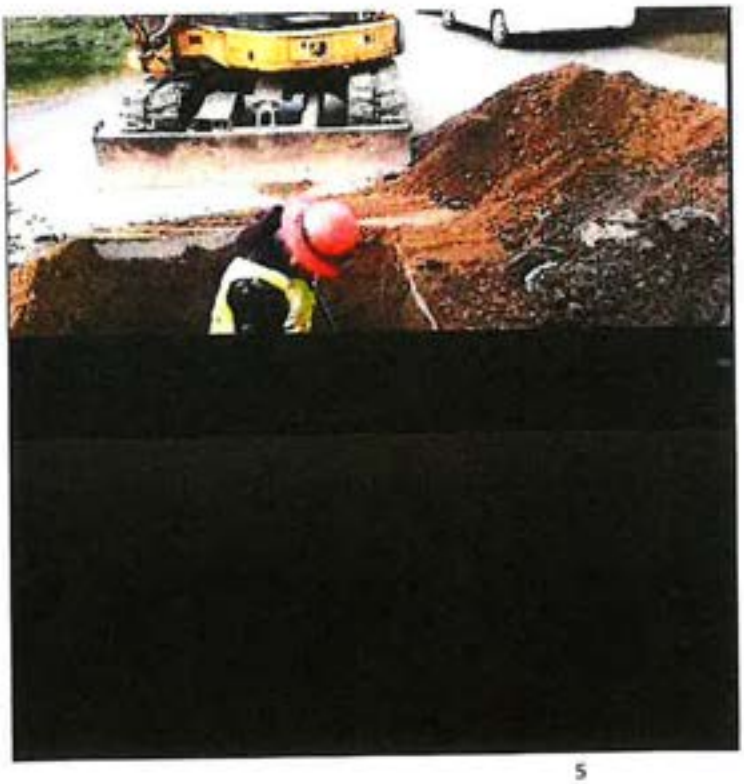
IMG_1073.JPG

RECEIVED by MSC 6/3/2025 11:20:12 AM



IMG_1073.JPG

IMG_1081.JPG



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IMG_1084.JPG



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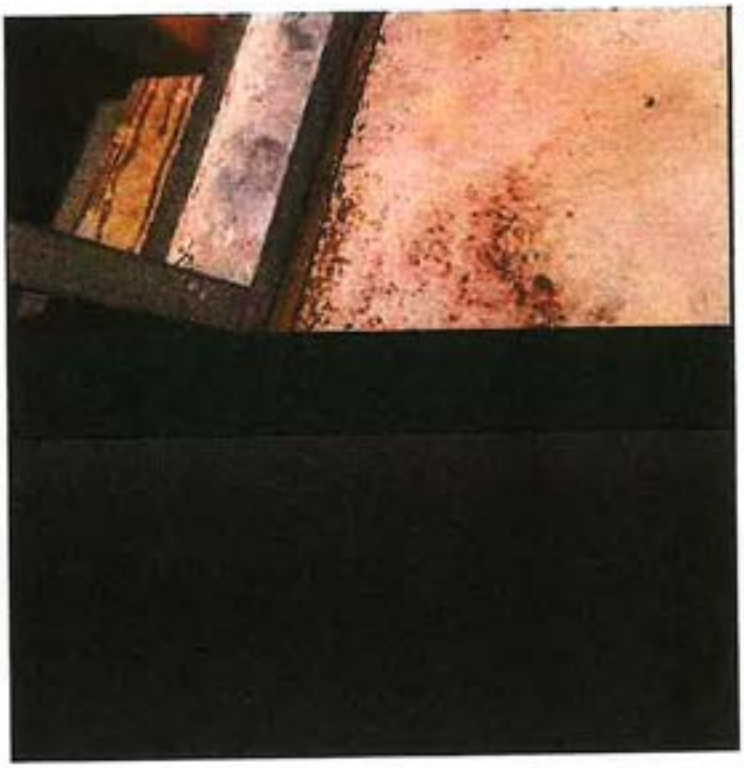
IMG_1100.JPG



IMG_1100.JPG

IMG_1065.JPG

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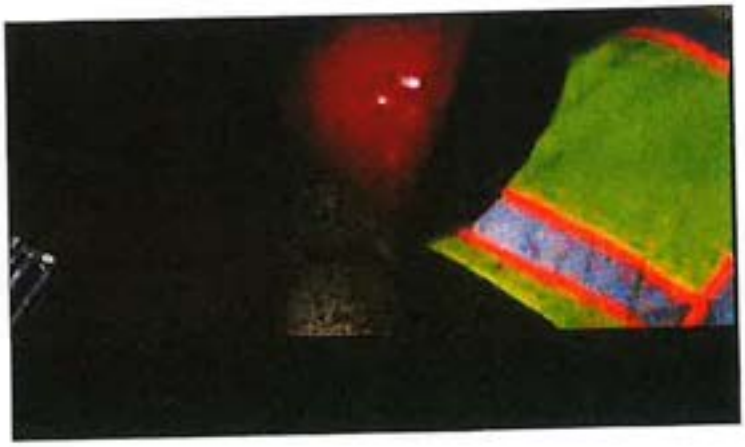
IMG_1065.JPG

And the top pic of them all:

IMG_1091.JPG



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IMG_1091.JPG

Thanks,

Brian

Brian Zezula Cell 248.894.1963

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Suzette Page

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

Dave

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

Thanks!

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

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

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

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

Independence Township
DEPARTMENT
PUBLIC WORKS

RECEIVED by MSC 6/3/2025 11:20:12 AM

Suzette Page

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

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

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

Independence Township
DEPARTMENT
PUBLIC WORKS

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THE KELLY FIRM

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

December 30, 2020

Kaltz Excavating
1030 Featherstone St.
Pontiac, MI. 48342

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

To Whom It May Concern,

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

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

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

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

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

Sincerely,

THE KELLY FIRM, PLC

Daniel J. Kelly

Daniel J. Kelly

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RECEIVED by MSC 6/3/2025 11:20:12 AM

THE KELLY FIRM

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

December 30, 2020

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

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

To Whom It May Concern,

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

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

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

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

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

Sincerely,

THE KELLY FIRM, PLC

Daniel J. Kelly

Daniel J. Kelly

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Hi Brian,

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

Section 48-84 of the Township ordinance states:

> All new **sanitary sewer systems**, except individual building sewers, connected directly or indirectly into the intercepting sewer or sewers of the county **shall be owned, operated and maintained by the governing community.** This includes, but is not necessarily limited to, on-site sewer systems serving condominiums, apartment projects, shopping centers and mobile home parks.

"Sewer" is defined as follows:

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

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

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

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

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

Ann Langschied | Sr. Claims Specialist

AMERISURE™

26777 Halsted Road
Farmington Hills, MI 48331

248.442.6525 (office) | 248.615.8602 (fax)

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

Report a Claim | Connect on LinkedIn

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RECEIVED by MSC 6/3/2025 11:20:12 AM

Warm Regards,

Brian Zezula
24.894.1963

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

Hi Brian,

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Ann Langschied | Sr. Claims Specialist

AMERISURE

26777 Halsted Road
Farmington Hills, MI 48331

248.442.6525 (office) | 248.615.8602 (fax)

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

Report a Claim | Connect on LinkedIn

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RECEIVED by MSC 6/3/2025 11:20:12 AM

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>

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

Ann Langschied | Sr. Claims Specialist

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

248.442.6525 (office) | 248.615.8602 (fax)

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

Report a Claim | Connect on LinkedIn

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RECEIVED by MSC 6/3/2025 11:20:12 AM

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 6/3/2025 11:20:12 AM

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 6/3/2025 11:20:12 AM

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

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

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APPENDIX 7

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

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

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

vs.

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

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

Defendants.

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

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

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

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

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

b. Failing and refusing to mark its facilities.

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

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

e. Ignored its own ordinances and definitions of its own facilities including Chapter 48 Utilities Section 48-53, definitions of a sewer, building sewer, intercepting sewer and lateral sewer, Section 48-82 regarding building sewers and Section 48-84 regarding ownership, operations and maintenance responsibility for all new sanitary sewer systems, except individual building sewers, connected directly or indirectly into the intercepting sewer or sewers of the county shall be owned, operated and maintained by the governing community.

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

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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

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing pleading(s) has been electronically filed with the Clerk of the Court via the Electronic Case Filing system on the date shown below, which will send notice of filing to all attorneys of record.

/s/Cheryl A. Pinter
Legal Assistant, Harvey Kruse, PC

DATED: April 28, 2023

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

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APPENDIX 8

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

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

BRIAN ZEZULA

Plaintiff,

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

v

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

Defendants.

LIONEL E. BASHORE (P58599)
DANIEL A. GROVES (P74026)
Bashore Green Law Group
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BRIAN A. CATRINAR (P76320)
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MICHAEL F. SCHMIDT (P25213)
Harvey Kruse, PC
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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)

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SECOND AMENDED COMPLAINT BY RIGHT

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

COMMON ALLEGATIONS, JUSIDICTION AND VENUE

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

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

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

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

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

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

COUNT I

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO NINA BROWN

7. Plaintiff incorporates by reference paragraphs 1 through 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT II

GENERAL NEGLIGENCE AND COMMON LAW NEGLIGENCE AS TO DTE ENERGY COMPANY

18. Plaintiff incorporates by reference paragraphs 1 through 16.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT III

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

30. Plaintiff incorporates by reference paragraphs 1 through 28.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT IV

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

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

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

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

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

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

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

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

Dated: June 08, 2023

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APPENDIX 9

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

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

Defendants.

CA: 22-197937-NZ

HON: CHERYL A. MATTHEWS

/

BASHORE GREEN LAW GROUP
Lionel E. Bashore (P58599)
Daniel A. Groves (P74026)
Attorneys for Plaintiff
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KAUFMAN PAYTON & CHAPA, PC
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THE KELLY FIRM, PC
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ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC
BY: Margaret T. Debler (P43905)
Attorney for Independence Twp.
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
mdebler@rsjalaw.com

/

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

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

on 7/5/2023

PRESENT: HONORABLE Cheryl A. Matthews
CIRCUIT COURT JUDGE

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

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

IT IS HEREBY ORDERED.

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

kn

Stipulated and Agreed to by:

/s/ Margaret T. Debler
Attorney for Independence Twp.
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
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/s/ Daniel A. Groves (w/consent)
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APPENDIX 10

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

vs.

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

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

Defendants.

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

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

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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.

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

p. Any and all trunk sewers or trunk lines.

q. Any and all facilities, including underground facilities.

r. Any and all appurtenances to any facilities, including stubs, taps, sewer taps, and/or sewer stubs.

s. Any and all connections between the sewer main and sewer leads or sewer laterals.

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

ANSWER:

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

ANSWER:

3. Any and all records, including drawings, sketches, photos, plans, permits, and/or inspection reports for construction or installation of any sewer laterals, building sewers, stubs, or connections for the properties on Forrest View Road from West View Road to the end point of Forrest View Road, including for any and all lots on the north or south side of Forrest View Road from West View Road to the end point of Forrest View Road including but not limited to 5260, 5134, 5128, 5122, 5312, 5290, 5166 Forrest View Road.

ANSWER:

4. Any and all records, including photos, regarding the response by or on behalf of Independence Township and/or its agents to the Miss Dig request by Kaltz Excavating of 12/01/2020.

5. Any and all records, including reports, correspondence, demand letters, emails, videos, and photos, regarding any damage claims, sewer backup claims, or injury claims regarding Brian Zezula and/or 5116 Forrest View Road.

ANSWER:

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing pleading(s) has been electronically filed with the Clerk of the Court via the Electronic Case Filing system on the date shown below, which will send notice of filing to all attorneys of record.

/s/Cheryl A. Pinter
Legal Assistant, Harvey Kruse, PC

DATED: August 1, 2023

Respectfully submitted,
HARVEY KRUSE, P.C.

BY:/s/Michael F. Schmidt
Michael F. Schmidt P25213
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APPENDIX 11

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

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

Defendants.

CA: 22-197937-NZ

HON: CHERYL A. MATTHEWS

/

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/

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

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

1. Any and all records pertaining to the area of Forrest View Road from West View Road to the end point of Forrest View Road, including for any and all lots on the north or south side of Forrest View Road from West View Road to the end point of Forrest View Road including but not limited to 5260,5134, 5128, 5122, 5312, 5290, 5166 Forrest View Road for the following items:

a. Any and all easements whatsoever.
b. Any and all utility rights of way.
c. Any and all road rights of way, dedications, or easements.
d. Any and all surveys.
e. Any and all water mains.
f. Any and all sewer mains.
g. Any and all lateral sewers.
h. Any and all intercepting sewers or interceptor sewers.
i. Any and all building sewers.
j. Any and all combined sewers.
k. Any and all common sewers.
l. Any and all county sewers.
m. Any and all municipal sewers.
n. Any and all public sewers.
o. Any and all sanitary sewers.
p. Any and all trunk sewers or trunk lines.
q. Any and all facilities, including underground facilities;
r. Any and all appurtenances to any facilities, including stubs, taps, sewer taps, and/or sewer stubs.
s. Any and all connections between the sere main and sewer leads or sewer laterals.
t. Any and all building sewers, sewer laterals, and/or sewer connections.

RESPONSE:

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

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

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

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

RESPONSE:

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

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

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3. Any and all records, including drawings, sketches, photos, plans, permits, and/or inspection reports for construction or installation of any sewer laterals, building sewers, stubs, or connections for the properties on Forrest View Road form West View Road to the end point of Forrest View Road, including for any and all lots on the north or south side of Forrest View Road from West View Road to the end point of Forrest view Road including but not limited to 5260, 5134, 5128, 5122, 5312, 5290, 5166 Forrest View Road.

RESPONSE:

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

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

4. Any and all records, including photos, regarding the response by or on behalf of Independence Township and/or its agents to the Miss Dig request by Kaltz Excavating of 12/01/2020.

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RESPONSE:

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

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

5. Any and all record, including reports, correspondence, demand letters, emails, videos and photos, regarding any damage claims, sewer backup claims, or injury claims regarding Brian Zezula and/or 5116 Forrest View Road.

RESPONSE:

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

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

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

AS TO OBJECTIONS ONLY:

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

/s/ Margaret T. Debler (P43905)
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DATED: August 29, 2023

PROOF OF SERVICE

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

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

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APPENDIX 12

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

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

Defendants.

/

CA: 22-197937-NZ

HON: CHERYL A. MATTHEWS

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/

DEFENDANT INDEPENDENCE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITSION

FEE

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

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

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

Respectfully submitted,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

/s/ Margaret T. Debler

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DATED: August 16, 2023

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

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

Defendants.

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

/

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/

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

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STATEMENT OF FACTS

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

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

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

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

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

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

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

> *All new sanitary sewer systems,* ***except individual building sewers,*** *connected directly or indirectly into the intercepting sewer or sewers of the county shall be owned, operated and maintained by the governing community.* This includes, but is not necessarily limited to, on-site sewer systems serving condominiums, apartment projects, shopping centers and mobile home parks. (emphasis added.) (**Ex. 3,** selected Ordinance provisions).

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

STANDARD OF REVIEW

I. MCR 2.116(C)(8)

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

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II. MCR 2.116(C)(7)

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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RELIEF

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

Respectfully submitted,

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& AMTSBUECHLER PC

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DATED: August 16, 2023

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

-vs-

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

Defendants.

/

CA: 22-197937-NZ

HON: CHERYL A. MATTHEWS

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/

NOTICE OF HEARING

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TO: All Counsel of Record

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

Respectfully submitted,

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& AMTSBUECHLER PC

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DATED: August 16, 2023

CERTIFICATE OF SERVICE

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

/s/Paula M. Rosenthal

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APPENDIX 13

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

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ZEZULA,

Plaintiff,

vs.

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

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

Defendants.

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

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

STATEMENT OF FACTS

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

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

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

As will be pointed out hereafter:

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Once again, this is false.

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

> (3) If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:
>
> (a) The governmental agency was an appropriate governmental agency.
>
> (b) ***The sewage disposal system had a defect.***
>
> (c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.
>
> (d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
>
> (e) The defect was a substantial proximate cause of the event and the property damage or physical injury. (emphasis added).

MCL 691.1416 defines "defect" as:

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

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

> We reject State Farm's contention that the marking of the water main, as required by MCL 460.708, did not constitute operation or maintenance of the water line . . . .We conclude that the prevention of accidental damage to the City's water system through notification is within the scope of the water department's operations. . . (271 Mich App at 484, n2)

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

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

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

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

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

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

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

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

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

> (1) A facility owner or facility operator shall respond to a ticket by the start date and time for the excavation or blasting under section 5(1) by marking its facilities in the area of the proposed excavation or blasting in a manner that permits the excavator to employ soft excavation to establish the precise location of the facilities.
>
> (2) A facility owner or facility operator shall mark the location of each facility with paint, stakes, flags, or other customary methods using the uniform color code of the American national standards institute as follows:
>
> . . . .
>
> (h) Green — sewers and drain lines.

The statute, MCL 460.723(o) defines a "facility" as:

> (o) 'Facility' or 'underground facility' means an underground or submerged conductor, pipe, or structure, including, but not limited to, a conduit, duct, line, pipe, wire, or other device ***and its appurtenances*** used to produce, store, transmit, or distribute a utility service, including communications, data, cable television, electricity, heat, natural or manufactured gas, oil, petroleum products, steam, sewage, video, water, and other similar substances, including environmental contaminates or hazardous waste. (emphasis added).

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

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

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

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

It states that "appurtenances" is defined by Webster's New College Dictionary as:

> Appurtenances - as defined by Webster's New College Dictionary
>
> 1: an incidental right (as a right-of-way) attached to a principal property right and passing in possession with it
> 2: a subordinate part or adjunct
> 3: plural: accessory objects: apparatus (Exhibit C)

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

The Best Practice states a municipal sewer system consists of a main in a public right-of-way and sewer leads on private property. It further states that the connection between the main and leads (the stub) would be considered an appurtenance to the sewer main and would fall under the responsibilities of the owner-operator of the main. Further, any leads up to the edge of the public right-of-way are also considered owned or operated by the municipality and are subject to the requirements of the Miss Dig Act:

> For example, most municipal sewer systems consist of a main in public right of way and sewer leads on private property. The main and the leads are separate facilities as defined in 460.723(o). The connection between the main and leads, the stub, would be

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> considered an appurtenance to the sewer main and would fall under the responsibilities of the owner/operator of the main. Further, any leads up to the edge of the public right of way are considered owned or operated by the municipality and are subject to the requirements of PA 174. (See Exhibit C)

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

> ***All new sanitary sewer systems, except individual building sewers, connected directly or indirectly into the intercepting sewer or sewers of the county shall be owned, operated and maintained by the governing community.*** This includes, but is not necessarily limited to, on-site sewer systems serving condominiums, apartment projects, shopping centers and mobile home parks. (emphasis added.)

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

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

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

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

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

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

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

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

Independence Township's response to Kaltz' discovery requests is a direct violation of MCL 2.313(A)(4) which provides:

> (4) *Evasive or Incomplete Disclosure, Answer or Response.* For purposes of this subrule an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

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

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

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

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

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

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

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

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

Independence Township is clearly in violation of the court rules.

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

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

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

RELIEF REQUESTED

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

Respectfully submitted,
HARVEY KRUSE, P.C.

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

DATED: September 8, 2023

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing pleading(s) has been electronically filed with the Clerk of the Court via the Electronic Case Filing system on the date shown below, which will send notice of filing to all attorneys of record.

/s/Cheryl A. Pinter
Legal Assistant, Harvey Kruse, PC

DATED: September 8, 2023

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

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APPENDIX 14

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STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

BRIAN ZEZULA

Plaintiff,

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

-vs-

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

Defendants,

And

DTE ENERGY COMPANY,

Cross-Plaintiff,

-vs-

KALTZ EXCAVATING COMPANY, INC.,

Cross-Defendant.

/

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

10/18/2023
DATE

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

kn

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APPENDIX 15

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Michigan Damage Prevention Board
Best Practice 2015-03

Facilities and Appurtenances

MDPB Best Practice

Facility owners/operators are subject to the requirements of PA 174, specifically sections 460.724 and 460.727. An appurtenance to a facility is subject to the same requirements of that facility. For example, most municipal sewer systems consist of a main in public right of way and sewer leads on private property. The main and the leads are separate facilities as defined in 460.723(o). The connection between the main and leads, the stub, would be considered an appurtenance to the sewer main and would fall under the responsibilities of the owner/operator of the main. Further, any leads up to the edge of the public right of way are considered owned or operated by the municipality and are subject to the requirements of PA 174.

Public Act 174 References

Section 3 (o)

"Facility" or "underground facility" means an underground or submerged conductor, pipe, or structure, including, but not limited to, a conduit, duct, line, pipe, wire, or other device and its appurtenances used to produce, store, transmit, or distribute a utility service, including communications, data, cable television, electricity, heat, natural or manufactured gas, oil, petroleum products, steam, sewage, video, water, and other similar substances, including environmental contaminates or hazardous waste.

Appurtenances – as defined by Webster's New College Dictionary

1: an incidental right (as a right-of-way) attached to a principal property right and passing in possession with it

2: a subordinate part or adjunct

3: plural : accessory objects : apparatus

Discussion

Unmarked appurtenances are a threat to safety because the excavator is not aware of the presence of the facility or does not have enough information to define a caution zone for safe excavation. Excavation activity can lead to damage to the unmarked appurtenance. In the case of sewer leads, the excavator might be unaware of the damage, resulting in a cross bore through the sewer lead. Efforts to remove the subsequent blockage from the sewer can result in serious safety incidents when gas, electric or other utility lines are damaged during the clean out process.

Submission Date 4/22/15

Adoption Date 5/28/15

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

Revision 2 Date _____

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

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APPENDIX 16

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

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Senate Bills 539 and 540 (as enacted)
Sponsor: Senator Mike Nofs
Senate Committee: Energy and Technology
House Committee: Energy and Technology

PUBLIC ACTS 173 & 174 of 2014

Date Completed: 1-26-15

CONTENT

Senate Bill 540 repealed Public Act 53 of 1974 (which governed the protection of public utility underground facilities), and created the "MISS DIG Underground Facility Damage Prevention and Safety Act" to do the following:

- **Require owners and operators of utility underground facilities to continue to operate and be members of MISS DIG (the "notification system"), and pay any applicable fees.**
- **Require an excavator to provide a dig notice to the notification system before any blasting or excavation.**
- **Require an excavator to notify the notification system and request additional assistance, under certain circumstances.**
- **Require an excavator to notify the owner or operator immediately after damaging a facility, and take certain actions if the damage endangers life, health, or property.**
- **Require an excavator to notify the notification system promptly for any proposed excavation or blasting in an emergency.**
- **Require the notification system to receive dig notices and transmit tickets to facility owners and operators notifying them of the proposed activity.**
- **Require a facility owner or operator to respond to a ticket by marking the location of its facilities in the area before a proposed excavation or blasting.**
- **Require an owner or operator to respond to a request for additional assistance or an emergency notice within three hours, and dispatch personnel upon notice that a facility has been damaged.**
- **Require the notification system to establish procedures for notification to facility owners and operators of requests for project design or planning services during the planning and design stage of a construction or demolition project.**
- **Allow farm operation property owners to becoming nonvoting members of the notification system for free in order to receive notice of proposed excavation and blasting activities.**
- **Require the notification system to administer a positive response system and maintain records of its notification activity for six years.**
- **Require new facilities to be constructed in a manner that allows their detection when in use.**
- **Provide that the Act does not limit a person's right to seek legal relief and recovery of damages in a civil action.**
- **Provide immunity to the notification system and its officers, agents, or employees.**
- **Provide that an excavator or farmer who complies with the Act is not responsible for damage to facilities that are not marked as required or determined to be within a safe zone.**
- **Provide immunity to a farm owner who complies with the Act with regard to facilities damaged outside the public right-of-way, unless the owner intentionally damages the facility or acts with wanton disregard or recklessness.**

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-- **Make it a misdemeanor to damage an underground facility and act to conceal the damage; or fail to notify the owner or operator or willfully remove or destroy the markings indicating the location of an underground facility.**
-- **Authorize the Public Service Commission (PSC) to impose a civil fine of up to $5,000 on a person who violates the Act.**
-- **Authorize the PSC to impose a civil fine of up to $15,000 on a governmental agency that violates the Act, and order that the agency's personnel undergo additional training.**
-- **Require an individual engaged in a farming operation on a farm to comply with the Act beginning May 1, 2014.**
-- **Require the PSC, by October 1, 2014, to establish requirements for reporting incidents involving damage to underground facilities.**
-- **Require the PSC to make the reported information available on its website, beginning April 1, 2015.**

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.

The bills took effect on April 1, 2014.

Senate Bill 540

Notification System

The bill requires facility owners and operators to continue to operate and be members of MISS DIG Systems, Inc., which has all the duties and must undertake the responsibilities of the notification system under the Act on and after its effective date. Those responsibilities and duties do not include the physical marking of facilities, which is the responsibility of a facility owner or operator upon notification, as described below.

(The Act defines "facility" or "underground facility" as an underground or submerged conductor, pipe, or structure, including 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.

"Notification system" means MISS DIG System, Inc., a Michigan nonprofit corporation formed and operated by each facility owner and operator to administer a one-call system for the location of facilities, or any successor to this corporation.)

The notification system and its procedures must be governed by its board of directors and in accordance with its articles of incorporation and bylaws as of the Act's effective date, with any future changes made in accordance with the Nonprofit Corporation Act and the notification system's articles, bylaws, and board procedures. The notification system must request input regarding its policies from all interested people, including facility owners and operators, excavators, marking service providers, and governmental agencies.

The notification system must establish funding for operations, including through fees based on a reasonable assessment of operating costs among facility owners and operators. A facility owner or operator may not charge a fee to excavators for marking facilities.

Facility owners and operators must be members of and participate in the notification system and pay the fees levied by it. This obligation and the Act's requirements for owners and operators do not apply to a person who owns or operates a facility located on real property the person owns or occupies if the facility is operated solely for that person's benefit.

("Person" means an individual, firm, joint venture, partnership, corporation, association, governmental body, department or agency, utility cooperative, or joint stock association, including any trustee, receiver, assignee, or personal representative of the individual or entity.)

An owner of real property on which there is a farm operation as defined in the Michigan Right to Farm Act may become a nonvoting member of the notification system, known as a farm member, upon providing the system with the information necessary to send the farm member a ticket for purposes of notification of proposed excavation and blasting activities (as described below). A farm member is not subject to any fees levied by the system.

(Under the Right to Farm Act, "farm operation" means the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products.)

The system is exempt from taxes collected under the General Property Tax Act.

Dig Notice

An excavator must give the notification system a dig notice at least 72 hours, but not more than 14 calendar days, before the start of any blasting or excavation. The 72-hour period must be measured as described in the Act, depending on the time of day notice is given and whether it is given on a business or nonbusiness day. If there are multiple excavators on the same site, each one must provide its own dig notice.

At a minimum, a dig notice must contain all of the following information:

-- The name, address, and telephone number of the excavator.
-- A description of the proposed area of blasting or excavation, including the street address and a property description.
-- The specific type of work to be performed.
-- The start date and time of blasting or excavation.
-- Whether the proposed blasting or excavation will be completed within 21 days after the start date.

An excavator must comply with the notification system procedures and all requirements of the Act.

"Excavator" means any person performing excavation or blasting. "Excavation" means moving, removing, or otherwise displacing earth, rock, or other material below existing surface grade with power tools or power equipment; and wrecking, razing, rending, moving, or removing a structure or mass of material. Excavation also excludes replacing a fence post, sign post, or guardrail in its existing location; and any excavation performed at a grave site in a cemetery or within a landfill unit during its active life or postclosure period. The term also excludes any of the following activities performed in the course of farming operations, if they are not performed within six feet of any aboveground structure that is part of a facility:

-- Any farming operation performed in the public right-of-way to a maximum depth of 12 inches below the existing surface grade.
-- Any farming operation performed outside a public right-of-way and within 25 yards of an existing petroleum or natural gas pipeline to a maximum depth of 18 inches below the existing surface grade.
-- Any farming operation performed outside a public right-of-way and not within 25 yards of an existing petroleum or natural gas pipeline.

"Farming operations" means plowing, cultivating, planting, harvesting, and similar operations routine to most farms and that are performed on a farm. The term does not include installation of drainage tile or underground irrigation lines, or the drilling of a well.

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Additionally, "excavation" excludes any of the following activities conducted by railroad employees or contractors that are carried out with reasonable care to protect any installed facilities placed in the railroad right-of-way by agreement with the railroad:

-- Any routine railroad maintenance activities performed in the public right-of-way as described below.
-- Any routine railroad maintenance activities performed to a maximum depth of 18 inches below the flow line of a ditch or the ground surface in the railroad right-of-way, excluding the public right-of-way, if the activity is not performed within six feet of any aboveground structure that is part of a facility that is not owned or operated by that railroad.
-- Routine or preventative maintenance as those terms are defined in Public Act 51 of 1951, the Michigan Transportation Fund law, to a maximum depth of 12 inches below the roadway and any shoulder of a street, county road, or highway.

"Blasting" means changing the level or grade of land or rendering, tearing, demolishing, moving, or removing earth, rock, buildings, structures, or other masses or materials by the detonation of dynamite or any other explosive agent.

Excavator Duties

Except as otherwise provided, before blasting or excavating in a caution zone, an excavator must expose all marked facilities in the zone by soft excavation. If conditions make complete exposure of the facility impractical, an excavator must consult with the owner or operator to reach agreement on how to protect the facility. For excavations in a caution zone parallel to a facility, an excavator must use soft excavation at intervals as often as reasonably necessary to establish the facility's precise location. An excavator may use power tools and power equipment in a caution zone only after the facilities are exposed or their precise location is established.

("Caution zone" means the area within 60 inches of either side of the facility marks provided by a facility owner or operator.

"Mark", "marks", or "marking" means the temporary identification on the surface grade of the location of a facility in response to a ticket as required under the Act.

"Ticket" means a communication from the notification system to a facility owner or operator requesting the marking of underground facilities, based on information provided by an excavator in a dig notice.

"Soft excavation" means a method and technique designed to prevent contact damage to underground facilities, including hand-digging, cautious digging with nonmechanical tools, vacuum excavation methods, or use of pneumatic hand tools.

"Damage" means any impact upon or exposure of an underground facility requiring its repair or replacement due to weakening, partial destruction, or complete destruction of the facility, including the protective coating, lateral support, cathodic protection, or housing of the facility.)

An excavator must provide support or bracing of facilities or excavation walls in an excavation or blasting area that are reasonably necessary for protection of the facilities.

An excavator also must notify the notification system if facility markings are destroyed or covered by excavation or blasting activities, or if a ticket expires before excavation begins. If a ticket expires before excavation begins, an excavator must provide a new dig notice to the notification system in compliance with the Act's prescribed time frames.

An excavator must notify the notification system requesting additional assistance if the location of a marked facility within the approximate location cannot be determined. ("Approximate location" means a strip of land at least 36 inches wide, but not wider than the width of the marked facility plus 18 inches on either side of the facility marks.)

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In addition, an excavator must provide immediate additional notice to the notification system and stop excavation in the immediate vicinity if the excavator has reason to suspect the presence of an unmarked facility due to any of the following:

-- Visible evidence of a facility with no marks visible.
-- Lack of a positive response to a ticket.
-- A positive response from a facility owner or operator indicating the presence of a facility with no marks visible.

If an excavator contacts or damages a facility, the excavator immediately must notify the facility owner or operator. If the damage results in the escape of any flammable, toxic, or corrosive gas or liquid, or endangers life, health, or property, the excavator must call 9-1-1 and provide immediate notice to the facility owner or operator. The excavator also must take reasonable measures to protect the excavator, those in immediate danger, the general public, and the environment, until the owner or operator, or emergency first responders, arrive and take control of the site.

An excavator must give prompt emergency notice to the notification system for any proposed excavation or blasting in an emergency. Blasting or excavation required to address the conditions of the emergency may be performed as reasonably required, subject to the Act's provisions for emergency notice and marking facilities in response to such a notice.

("Emergency" means a sudden or unforeseen occurrence, including a government-declared emergency, involving a clear and imminent danger to health, life, the environment, or property, that requires immediate correction in order to restore or to prevent the interruption of essential governmental or utility services or blockage of public transportation that requires immediate excavation or blasting. "Emergency notice" means a communication to the notification system to alert the facility owners or operators of the urgent need for marking the location of a facility due to an emergency.)

If the location of a proposed excavation or blasting cannot be described sufficiently to enable the facility owner or operator to ascertain the precise tract or parcel involved, an excavator must provide white lining before submitting a ticket or additional assistance to the owner or operator on reasonable request to identify the area of the proposed excavation or blasting. ("White lining" means the marking by an excavator of the area of a proposed excavation or blasting, with white paint and/or flags, before giving notice to the notification system.)

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.

Except as otherwise provided, an excavator may conduct excavation in a safe zone using power equipment without establishing the precise location of any facilities. ("Safe zone" means an area at least 48 inches from either side of the facility marks provided by a facility owner or operator.)

Notification System Duties

The notification system must receive dig notice of proposed excavation and blasting activities and promptly transmit a ticket to owners or operators of facilities in the area of the proposed excavation or blasting. A ticket is valid for 21 days from the start date of the excavation or blasting as identified by the excavator, or for 180 days from the start date if the dig notice indicates that the proposed excavation or blasting will not be completed within 21 days.

The notification system must provide alternative means of access and notification to the system. Except for shutdowns caused by acts of nature, war, or terrorism, the system must be available 24 hours per day, seven days per week.

The notification system must administer a positive response system to allow excavators to determine whether all of the facility owners or operators in the area have responded to a ticket and whether a particular owner or operator does not have facilities in the area of a proposed

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excavation or blasting. ("Positive response" means the procedure administered by the notification system to allow excavators to determine whether all facility owners or operators contacted under a ticket have responded in accordance with the Act.)

The notification system must maintain adequate records of its notification activity for six years after the date of the notice, including voice recordings of calls. The system must provide copies of the records to any interested person upon written request and payment of a reasonable charge for reproduction and handling as determined by the system.

The notification system also must expedite the processing of any emergency notice it receives.

Design Tickets

The notification system must receive design tickets under the procedures described below and transmit them to facility owners and operators. "Design ticket" means a communication to the notification system in which a request for information regarding underground facilities for predesign, design, or advance planning purposes, but not marking for excavation or blasting, is made under the procedures prescribed in the Act.

The notification system must establish reasonable procedures, including marking response times, for design ticket notification to facility owners or operators of requests for project design or planning services to determine the type, size, and general location of facilities during the planning and design stage of a construction or demolition project. Owners or operators may charge the person making the request separate fees for the services.

The procedures do not affect or alter the obligation of excavators to give notice of blasting or excavation.

The response to a design ticket is to provide general information regarding the location of underground facilities, not to mark any facilities. If an owner or operator, however, does not have drawings or records showing a facility's location, the owner or operator must mark it under the procedures described below. A design ticket or information provided in response to one does not satisfy the Act's requirement for excavation or blasting notice to the system or marking the approximate location of facilities for blasting or excavation.

Facility Owner/Operator Duties

A facility owner or operator must be a member of and participate in the notification system, including the positive response system, and pay any applicable fees. An owner or operator may not charge a fee to excavators for locating and marking facilities as required.

A facility owner or operator must comply with the notification system procedures and the Act's other requirements.

An owner or operator also must comply with the requirements described below; the requirements, however, do not apply to the Michigan Department of Transportation or to the marking of a county or intercounty drain by a county drain commissioner's office or drainage board.

A facility owner or operator must respond to a ticket by the start date and time for the excavation and blasting by marking the approximate location of its facilities in the affected area in a manner that permits the excavator to employ soft excavation to establish the facilities' precise location. An owner or operator must mark the approximate location of each facility with paint, stakes, flags, or other customary methods using the uniform color code of the American National Standards Institute, as prescribed in the Act.

A facility owner or operator must provide notice to the notification system using positive response.

Upon receiving a notification during business hours from an excavator through the notification system that previous marks were covered or destroyed, an owner or operator must mark the approximate location of a facility within 24 hours, excluding all hours on nonbusiness days.

If a facility owner or operator receives a request from an excavator regarding the location of a marked facility or the presence of an unmarked facility, the owner or operator must provide additional assistance to the excavator within three hours of a request made during business hours. An excavator and an owner or operator may agree to an extension of this time period. If a request is made when additional assistance cannot be provided during normal business hours, or assistance is required at a remote rural location, the response time must be within three hours after the start of the next business day or a time based on mutual agreement.

If a facility owner or operator receives notice that a facility has been damaged, the owner or operator promptly must dispatch personnel to the area.

An owner or operator must respond to an emergency notice within three hours, or, if the start day and time is more than three hours from the time of notice, before that start day and time.

New facilities built after the effective date of the Act must be constructed in a manner that allows their detection when in use.

Civil Action & Immunity

The Act does not limit the right of an excavator or facility owner or 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 Act's requirements, or to enforce the Act's provisions. In addition, the Act does not determine the level of damages or injunctive relief in a civil action. These provisions do not affect or limit the availability of any contractual or legal remedy available to an excavator or facility owner or operator arising under any contract to which that person may be a party.

The notification system and its officers, agents, or employees are not liable for any damages, including damages for injuries or death to people or damage to property, caused by its acts or omissions in carrying out the Act's provisions. The notification system is not responsible for assuring performance by a facility owner or operator of its obligation to participate in the system.

An excavator or farmer engaged in farming operations who complies with the Act is not responsible for damage that occurs to a facility that is improperly marked, not marked, or determined to be within the safe zone.

A farm owner who complies with the Act is not liable for any damage to a facility that occurred in the course of farming operations, except on land within the public right-of-way, unless the owner intentionally damaged the underground facility or acted with wanton disregard or recklessness in damaging it. For the purposes of this provision, "owner" includes a family member, employee, or tenant of the owner.

Local Permit Requirements

The Act does not authorize, affect, or impair local ordinances, charters, or other provisions of law requiring permits to be obtained before excavating or tunneling in a public street or highway or to construct or demolish buildings or other structures on private property. A permit issued by a governmental agency does not relieve a person from the responsibility of complying with the Act. The failure of any person who is granted a permit to comply with the Act does not impose any liability upon the governmental agency issuing the permit.

Criminal Penalty

A person who does any of the following is guilty of a misdemeanor punishable by imprisonment for up to one year and/or a maximum fine of $5,000:

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-- Knowingly damages an underground facility and fails to promptly notify the owner or operator.
-- Knowingly damages an underground facility and backfills the excavation or otherwise acts to conceal the damage.
-- Willfully removes or otherwise destroys stakes or other physical markings used to mark the approximate location of underground facilities, unless the removal or destruction occurs after the excavation or blasting is completed or as an expected consequence of an excavation or blasting activity.

Administrative Sanctions

Nongovernment Violator. Upon complaint filed with the Public Service Commission or upon the PSC's own motion, following notice and hearing, a person, other than a governmental agency, who violates any of the Act's provisions may be ordered to pay a maximum civil fine of $5,000 for each violation. In addition to or instead of a fine, the PSC may require the person to obtain reasonable training to assure future compliance with the Act. In determining the amount of a fine, the PSC must consider all of the following:

-- The ability of the person charged to pay or continue in business.
-- The nature, circumstances, and gravity of the violation.
-- Good-faith efforts by the person charged to comply with the Act.
-- The degree of culpability of the person charged and of the complainant.
-- The history of previous violations of the person charged.

Before filing a complaint, a person must attempt to settle the dispute with the adverse party or parties using any reasonable means of attempted resolution acceptable to the involved parties.

A PSC determination may not be used against a party in any action or proceeding before any court. A complaint does not limit a person's right to bring a civil action to recover damages the person incurred arising out of a violation of the Act's requirements.

The PSC must develop forms with instructions and promulgate administrative rules for processing complaints under the Act.

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.

After notice and a hearing on a complaint against a governmental agency, the PSC may order the following, as applicable:

-- A civil fine of up to $5,000, if the Commission has not issued an order against the governmental agency within the preceding 12 months.
-- If the Commission has issued an order against the governmental agency within the preceding 12 months, a maximum civil fine of $10,000 and that the agency provide underground facility safety training to all its personnel involved in underground utility work or excavating.
-- For an order issued by the PSC within 12 months after the second one, a maximum civil fine of $15,000 and, if the governmental agency's violation damaged the owner's or operator's facilities, that the agency pay the owner or operator the cost of repair.

In determining the amount of a fine, the PSC must consider the same factors it must consider in determining a civil fine against any other violator. Any Commission-ordered training must be provided at the governmental agency's expense.

A finding by the PSC is not admissible in any other proceeding or action.

These provisions do not apply if the violation is a result of action taken in response to an emergency.

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Other Provisions. Each day that a violation occurs is separate offense.

A civil fine must be paid to the PSC and used for underground facilities safety education and training.

A party to a complaint may appeal a PSC order to the Ingham County Circuit Court.

Reports of Damage

The Act required the PSC, by October 1, 2014, to establish requirements for reporting incidents involving damage to underground facilities. Beginning April 1, 2015, the PSC must maintain reported information on damaged facilities, including any damage that occurs during excavation, digging, or blasting, that is excluded from the definition of excavation. The Commission must make the information publicly available on its website.

Repealed Statute

The bill repealed Public Act 53 of 1974, which required public utilities having underground facilities to form and operate an association (MISS DIG) providing for the mutual receipt of notification of construction activities. A utility owned by a public agency had to participate in and receive the services furnished by MISS DIG and pay its share of the costs and services, but did not have to become a MISS DIG member.

Public Act 53 required a person or public agency to ascertain the location of a public utility's underground facilities before conducting certain blasting, excavation, and demolition activities. In addition, the Act did the following:

-- Required a public utility having underground facilities to file with the county clerk a list of those facilities and their locations within the county.
-- Required a person or public agency to notify MISS DIG at least three full working days before commencing excavation, blasting, or demolition.
-- Required a public utility, within one business day before proposed construction, to notify a person or public agency performing excavation, blasting, or demolition of the approximate location of the utility's underground facilities, in a manner that allowed the person or public agency to establish their precise location.
-- Required immediate notification of a public utility when any contact with or damage to an underground facility occurred, and required the utility to dispatch personnel to the location to effect temporary or permanent repair.
-- Allowed for excavation, maintenance, or repairs, or the discharge of explosives, outside of the notice requirements in an emergency.

The Act also included language pertaining to local permit requirements for excavation, blasting, and demolition activities, and liability for damages in a civil action.

In addition, under Public Act 53, a person who damaged a public utility's facilities on more than three occasions on any one construction location because of the person's failure to comply with the statute could be enjoined from engaging in further activities except under terms and conditions prescribed by the court to ensure public safety. For violation of the injunctive order, a court could prescribe a penalty of up to $5,000 per violation. Also, a person who willfully removed or destroyed the stakes or other physical markings used by a utility to mark its facilities was guilty of a misdemeanor punishable by up to one year in prison and/or a maximum fine of $5,000 for each offense.

Senate Bill 539

The governmental immunity law specifies that, except as otherwise provided, a governmental agency is immune from tort liability if it is engaged in the exercise or discharge of a governmental function. 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.

(The law defines "governmental agency" as the State or a political subdivision. "Political subdivision" means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority, or at least two of these when acting jointly; a district or authority authorized by law or formed by at least one political subdivision; or an agency, department, court, board, or council of a political subdivision. "Municipal corporation" means a city, village, or township, or a combination of at least two of those when acting jointly. "Governmental function" means an activity that is expressly or impliedly mandated by constitution, statute, local charter or ordinance, or other law.)

MCL 691.1407 (S.B. 539)
460.721-460.733 (S.B. 540)

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

Senate Bill 540

The new misdemeanor will apply more broadly than the misdemeanor under former Public Act 53 of 1974, which the bill repealed, although the penalty is the same. There are no data to indicate how many people will be convicted of the new misdemeanor. To the extent that people are charged and convicted, local units of government will see increased incarceration costs and/or increased costs of community supervision. Penal fine revenue of up to $5,000 per violation will benefit public libraries.

The bill also will result in additional costs and revenue for the Public Service Commission, which must develop forms, rules for processing complaints, and requirements for reporting incidents, and is responsible for processing and investigating complaints made under the bill. These additional responsibilities will result in indeterminate costs for the PSC, which will be borne by existing resources. New revenue will come from civil fines levied against those found to be in violation of the bill. These fines will range from $5,000 to $15,000 and be paid to the PSC and used for underground facility safety education and training. It is unknown how much the PSC will collect in fines each year, or how much the new requirements will cost to implement, so the fiscal impact on the PSC is indeterminate.

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.

Fiscal Analyst: John Maxwell
Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

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APPENDIX 17

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Legislative Analysis

Mary Ann Cleary, Director
Phone: (517) 373-8080
http://www.house.mi.gov/hfa

MISS DIG UNDERGROUND FACILITY DAMAGE PREVENTION AND SAFETY ACT

Senate Bill 539 without amendment
Senate Bill 540 (Substitute S-1)
Sponsor: Sen. Mike Nofs
House Committee: Energy and Technology
Senate Committee: Energy and Technology

Complete to 10-14-13

A SUMMARY OF SENATE BILLS 539 AND 540 AS PASSED BY THE SENATE 10-8-13

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.)

Senate Bill 540 would repeal the current "Miss Dig Act"–Protection of Underground Facilities, Public Act 53 of 1974–and replace it with the Miss Dig Underground Facility Damage Prevention and Safety Act.

According to the Miss Dig System website, "One toll free call to 800-482-7171 or 811 reaches the MISS DIG System. The MISS DIG System processes calls from individuals planning to dig and notifies its member utilities about these excavations. The member utilities then mark the dig site, indicating the approximate location of their underground public utility lines (MISS DIG does not mark). The MISS DIG System promotes safety on the job site and assists the utilities in providing safe and efficient service to millions of customers, thus helping to preserve the environment and ensuring the quality of life for all Michigan residents."

Senate Bill 540 would, among other things:

- Require utility underground facility owners and operators to continue to operate and be a part of Miss Dig Systems, Inc.
- Require an excavator to provide a dig notice to the notification system at least 72 hours, but not more than 14 days, before the start of any blasting or excavation.
- Establish funding for the notification system operations through fees assessed on facility owners and operators.
- Prescribe the information to be on a dig notice.
- Require excavators to comply with the notification system procedures and all requirements of the act.

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- Require an excavator to provide additional notice to the Miss Dig System and stop excavation if there is reason to suspect the presence of an unmarked facility.
- Require an excavator to provide immediate notice to the facility owner or operator if a facility is contacted or damaged.
- Require the excavator to call 9-1-1 if a facility is damaged resulting in the escape of flammable, toxic, or corrosive gas or liquid, or endangering life, health, or property, and to provide notice to the facility owner or operator.
- Require an excavator to provide prompt emergency notice to the notification system for proposed excavation or blasting in an emergency. Emergency notices would have to be expedited by the notification system.
- Allow an excavator to conduct excavation in a safe zone with power equipment without establishing the location of any facilities.
- Require the notification system to promptly transmit a ticket to facility owners or operators in the area of the proposed activity.
- Require the notification system to be available 24 hours a day, seven days per week.
- Require the notification system to keep adequate records of its notification activity for six years after the date of a notice, including voice recordings of calls. Copies would have to be provided to interested parties upon written request and payment of a reasonable charge for reproduction and handling costs.
- Require the facility owner or operator to mark the location of each facility with paint, stakes, flags, or other customary methods using the color code of the American National Standards Institute.
- Specify the act would not affect local permitting laws or ordinances for activity in public streets or to construct or demolish buildings on private property. A permit would not relieve a person from complying with the act's provisions.
- Require the Michigan Public Service Commission to develop forms and promulgate administrative rules for processing complaints under the bill.
- Require the PSC to establish requirements for reporting incidents involving damages to underground facilities no later than October 1, 2014.

The bill is tie-barred to Senate Bill 539 and would take effect 90 days after enactment into law. However, an individual engaged in a farming operation on a farm would not have to comply with the act until May 1, 2014.

Exemptions.

The bill would:

- Provide exemption from certain provisions to the Michigan Department of Transportation and to markings of a county or intercounty drain by a county drain commissioner's office or drainage board.
- Exempt facility owners and operators who own or operate a facility located on their own property from the act's requirements if the facility operates solely for their own benefit.
- Exempt the notification system and its officers, agents, or employees from liability for any damages caused by its acts or omissions in carrying out the

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provisions of the act. The notification system would not be responsible for assuring performance by a facility owner or operator of its obligation to participate in the notification system and pay fees levied by the notification system to support the notification system operations.

- Exempt an excavator or farmer engaged in farming operations that complies with the act from responsibility for damages that occur to a facility that is improperly marked, not marked, or determined to be within the safe zone.
- Exempt an owner of a farm who complies with the act from liability for damages to a facility if the damage occurred in the course of farming operations. Intentional acts or wanton disregard or reckless acts that damaged the facility would not be exempted.
- Prohibit a governmental agency issuing a permit for various construction projects from imposing liability upon the agency.
- With some exceptions, specify the act would not affect the liability of a governmental agency for damages for tort or the application of the Governmental Immunity Act.

Penalties and civil actions.

The bill would:

- Specify that the act does not limit the right of an excavator, or a facility owner or operator, to seek legal relief and recovery of actual damages and equitable relief in a civil action arising out of a violation of the requirements of the act, or to enforce the provisions of the act. The act would not determine the level of damages or injunctive relief in any such civil action.
- Specify that certain prohibited conduct, such as knowingly damaging an underground facility and failing to properly notify the facility owner or operator, would be a misdemeanor punishable by imprisonment for not more than one year and/or a fine of $5,000.
- Allow the Michigan Public Service Commission to, after a complaint was filed and a hearing conducted, order a person other than a governmental agency who violated any provisions of the act to pay a civil fine of not more than $5,000 for each violation. The PSC could also order, in addition to or in lieu of a fine, reasonable training to assure future compliance with the act.
- Require a person to attempt to settle a dispute with another party prior to filing a complaint.
- Specify the criteria for the PSC to use in determining the amount of a fine.
- Allow a facility owner or operator to file a complaint with the PSC seeking a civil fine and damages from a governmental agency for any violation of the act. A civil fine imposed on a governmental agency would be capped at $5,000 for a sole offense within 12 months. A fine not to exceed $10,000 could be imposed for a second offense if a first offense had been committed within the preceding 12 months. A third or subsequent violation when the most recent offense had been committed in the prevous12 months would subject the agency to a fine of not more than $15,000 and the cost to repair the facilities. This provision would not apply if the violation was a result of action taken in response to an emergency. A

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civil fine ordered under this provision would be paid to the PSC and used for underground facilities safety education and training. Each day upon which a violation occurs is a separate offense.

FISCAL IMPACT:

Senate Bill 540 would have an indeterminate, yet likely but nominally negative, fiscal impact on the Michigan Public Service Commission (PSC) to the extent that it would engender administrative costs for the PSC to develop appropriate forms and instructions, establish requirements for reporting incidents, promulgate rules for processing complaints, notify interested parties of complaints, administer Commission hearings and issue orders, and determine and collect civil fines. These administrative costs would be supported by annual assessments on public utilities under to the Costs of Regulating Public Utilities Act of 1972; assessments are equivalent to the annual appropriation attributable to the regulation of public utilities, derived from a statutory formula. The revenue generated by civil fines ordered under SB 540 would be restricted to support expenditures pertaining to underground facilities safety education and training.

Senate Bill 540 would have an indeterminate fiscal impact on local units of government regarding criminal violations. Information is not available on the number of persons that might be convicted of the proposed misdemeanor. Misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. Penal fine revenue of up to $5,000 per violation would benefit local libraries, which are the constitutionally-designated recipients of those revenues.

Senate Bills 539 and 540 would have indeterminate, but negative, fiscal impact on government agencies. The provisions of the bills would expose a government agency to liability for any violations of the proposed act. The overall fiscal impact to any government agency would depend on the number and extent of the violations committed. No statewide data exists on the number and type of violations committed by government agencies, therefore a monetary impact cannot be estimated.

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.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Paul Holland
Robin Risko
Ben Gielczyk

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

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APPENDIX 18

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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
>
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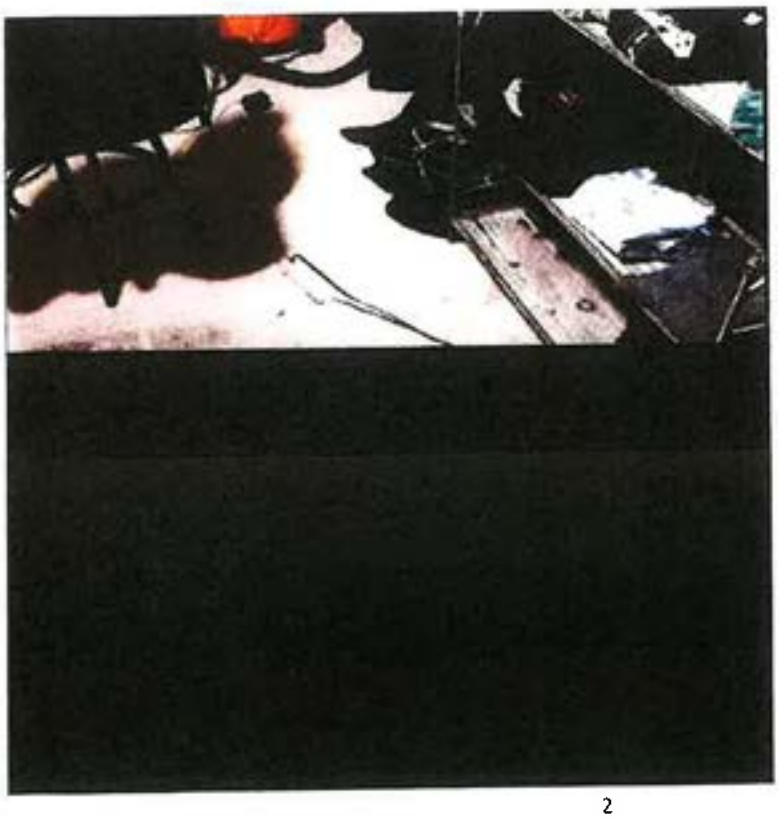

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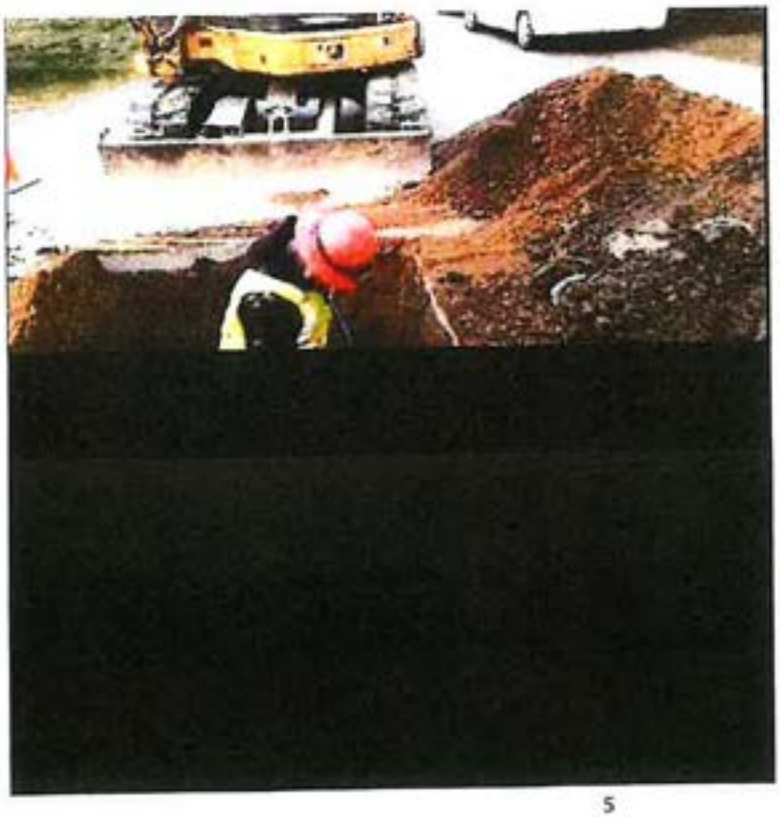

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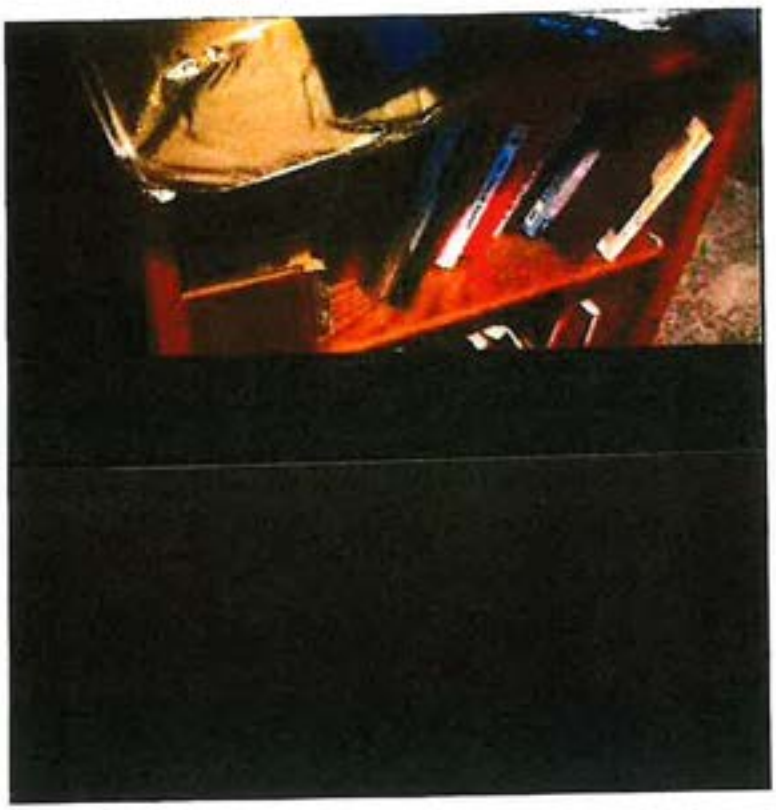

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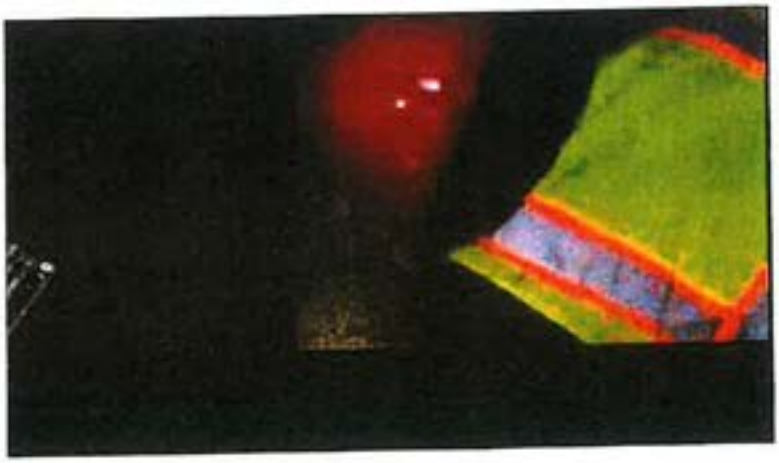
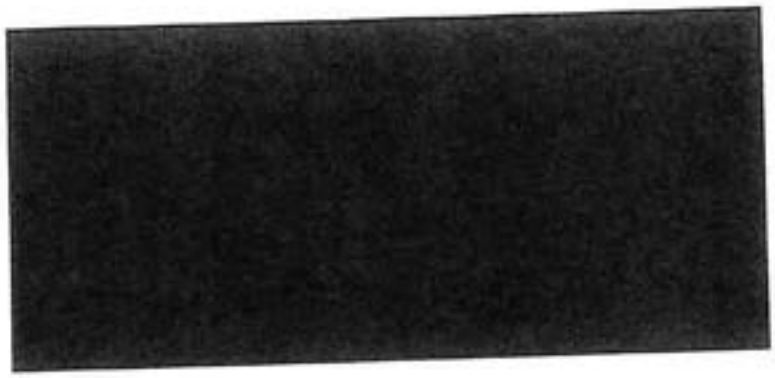
And the top pic of them all:

IMG_1091.JPG





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Thanks,

Brian

Brian Zezula Cell 248.894.1963

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Suzette Page

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

Dave

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

Thanks!

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

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

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

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

Independence Township
DEPARTMENT
PUBLIC WORKS

RECEIVED by MSC 6/3/2025 11:20:12 AM

Suzette Page

From: David Ziegler
Sent: Monday, December 28, 2020 11:06 AM
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Independence Township DPW
Phone: 1.248.625.8222 ext. 204
Fax: 1.248.625.4393
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Independence Township
DEPARTMENT
PUBLIC WORKS

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THE KELLY FIRM

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

December 30, 2020

Kaltz Excavating
1030 Featherstone St.
Pontiac, MI. 48342

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

To Whom It May Concern,

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

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

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

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

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

Sincerely,

THE KELLY FIRM, PLC

Daniel J. Kelly

Daniel J. Kelly

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THE KELLY FIRM

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

December 30, 2020

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

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

To Whom It May Concern,

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

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

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

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

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

Sincerely,

THE KELLY FIRM, PLC

Daniel J. Kelly

Daniel J. Kelly

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APPENDIX 19

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Neutral
As of: April 4, 2024 2:09 PM Z

Wheeler v. City of Livonia

Court of Appeals of Michigan

November 27, 2018, Decided

No. 338704

Reporter
2018 Mich. App. LEXIS 3525 *; 2018 WL 6184930

FREDERICK R. WHEELER and MARILYN WHEELER, Plaintiffs-Appellees, v CITY OF LIVONIA, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Motion granted by *Wheeler v. City of Livonia, 921 N.W.2d 543, 2019 Mich. LEXIS 55 (Mich., Jan. 25, 2019)*

Leave to appeal denied by *Wheeler v. City of Livonia, 2019 Mich. LEXIS 2394 (Mich., Dec. 23, 2019)*

Prior History: [*1] Wayne Circuit Court. LC No. 15-009025-NZ.

Core Terms

sewer, plaintiffs', notice, government agency, repair, requirement of notice, sewage disposal, claimant, backup, pipe, governmental immunity, sewer system, sewage, summary disposition, disconnected, sinking, sewer line, notified, sediment, front, failure to comply, contractor, blockages, contacting, physical injury, trial court, overflow, damages, proximate cause, manhole

Judges: Before: SHAPIRO, P.J., and CAVANAGH and K. F. KELLY, JJ. K. F. KELLY (dissenting).

Opinion

PER CURIAM.

Defendant appeals as of right an order denying its motion for summary disposition of this case arising under the sewage disposal system event exception to governmental immunity, *MCL 691.1416 et seq.* We affirm.

On September 23, 2014, plaintiffs discovered water coming up through a basement floor drain while doing laundry in their house located at 15643 Edgewood Drive in Livonia. They contacted plumbing contractor Roto-Rooter, but several attempts to remedy the problem were unsuccessful.[1] On September 30, 2014, plaintiffs hired Horton Plumbing to diagnose and repair the issue. Horton discovered that a joint between two sewage pipes located under plaintiffs' driveway had come apart causing the home to become disconnected from the city sewer system. The plumber from Horton noted that the joint had not been properly supported with crushed rock or compacted sand at install; rather, a single brick was under the joint. Defendant's inspector, Jeff Michaels, was on the site at the time of this discovery and photographed the problematic joint. Horton was able to repair this disconnection, **[*2]** which solved the sewage-backup problem at that time.

On October 16, 2014, defendant, though its city engineer Todd Zilincik, sent a letter to residents of Edgewood Drive stating that its contractor would be relining the sanitary sewer main on Edgewood Drive along the west right-of-way, from 15611 to 15939 Edgewood, and that a repair would be occurring at a sewer main in front of 15939 Edgewood.

On October 31, 2014, Zilincik sent a letter to plaintiffs stating that he was in receipt of plaintiffs' letter dated October 17, 2014, which detailed their problem with the sewer line. The letter briefly referenced an enclosed "City of Livonia Claims Form" for plaintiffs' to fill out, stating to "provide detailed information and expenses that you believe that the City of Livonia may be

[1] Although plaintiffs have indicated at various times during these proceedings that this first sewer-backup incident occurred in "October of 2014," there is extensive evidence that this first incident occurred on September 23, 2014.

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responsible for related to your sanitary sewer lead, including the various quotes obtained for the repair." The letter fails to mention any time requirement with respect to the submission of this Claims Form. The letter refers to plaintiffs' sanitary sewer repair made by Horton on October 2, 2014, and the permit obtained in that regard, Permit No. 14-387. It appears that plaintiffs submitted the completed Claims **[*3]** Form to defendant on November 12, 2014.

By letter dated April 6, 2015, plaintiffs were advised by defendant's insurance claims adjuster, Michigan Municipal Risk Management Authority (MMRMA), that defendant was offering to pay for the costs of plaintiffs' driveway repair and irrigation system repair.

On April 11, 2015, plaintiffs had a second sewer-backup incident. Like the first, it involved water backing up into their basement through a floor drain. Plaintiffs again hired Horton, who obtained a necessary permit from defendant, and Horton re-excavated the site of their previous repair, disconnected it, and found no problems. After further excavation, it was discovered that the sewer main was disconnected from plaintiffs' sewer lead, allegedly as a result of the sewer main sinking. Defendant's inspector and other employees were on the site. This repair took about 40 days to accomplish and required extensive excavation to reach the sewer main that was over 20 feet down, prolonged dewatering of the site, and rerouting of the gas service line during the repair. Defendants' employees were on-site numerous times during this protracted repair project, participated in meetings as to how to resolve **[*4]** the several related problems, and were involved in the decision to reroute plaintiffs' sewer line to tap into the manhole in front of plaintiffs' house to resolve the problem. In other words, defendant was extensively involved in the repair by plaintiffs' contractor—a repair for which plaintiffs were billed well over $100,000. Subsequently, plaintiffs' counsel sent a letter in May and a letter in June to MMRMA regarding the expenses incurred for the repair.

By letter dated May 14, 2015, plaintiffs' counsel advised defendant of his legal representation of plaintiffs and provided a detailed list of the expenses plaintiffs incurred from the excavation and repair work to make their property habitable. It was requested that plaintiffs' initial claim, which had been already been accepted, be amended to include these additional damages.

On July 9, 2015, plaintiffs sued defendant alleging that defendant improperly constructed and maintained the city sewer system which caused the sewage backup into their home in April 2015. Plaintiffs averred that defendant was on notice of the issues concerning the sewer system for several years but failed to make the necessary repairs. In Count I, plaintiffs **[*5]** alleged a claim for a sewage disposal system event under MCL 691.1416 et seq., stating that plaintiffs' sewer line was disconnected from the sewer main as a result of the sewer main sinking, i.e., there was a construction, design, maintenance, operation, or repair defect in the sewer main which defendant knew about or should have known about and failed to remedy causing plaintiffs' damages. Numerous exhibits were attached to plaintiffs' complaint, including the above-referenced letters.

On February 15, 2017, plaintiffs moved for partial summary disposition under MCR 2.116(C)(8) and (10), arguing that there was no genuine issue of material fact that defendant was liable under MCL 691.1416 et seq. and the only issue that remained was the amount of plaintiffs' damages. In particular, defendant's engineers, Todd Zilincik and William Yee, testified that the sewer main in front of plaintiffs' home did not have enough flow or slope which caused sediment to build up and created blockages. Further, defendant had knowledge and notice of the serious sewer issues on Edgewood Drive, including the sinking of the sewer main which caused blockages, backups, and pipe disconnections. The problems with the sewer main in front of plaintiffs' home was confirmed **[*6]** by defendant's contractor's camera inspection which revealed the blockages, causing the camera to be improperly submerged in fluids. The excess sediments and fluids caused the sewer main to sink. The only way plaintiffs could overcome the numerous problems with the sewer main was to relocate their connection point from the sewer main and tap into the manhole in front of their house. In fact, of the three connections attached to the sewer main, two had been previously abandoned leaving only plaintiffs' connection before these sewer backup incidents, i.e., sewer disposal system events. Accordingly, plaintiffs argued, they were entitled to summary disposition on the issue of liability. Numerous exhibits were attached to plaintiffs' motion.

On March 31, 2017, defendant moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiffs' claim is barred by governmental immunity. Defendant argued that the claim is barred because (1) plaintiffs failed to comply with the 45-day notice requirement of MCL 691.1419, and (2) neither[2]

[2] Although defendant refers to both sewer events, plaintiffs' complaint only refers to the second event in April 2015.

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occurrence alleged by plaintiffs constituted a "sewage disposal system event" in that (a) plaintiffs were responsible to maintain their sewer lead; (b) it was their laundry water that backed **[*7]** up into their basement, not sewage from the sewer main; (c) defendant had no knowledge of any alleged defect in the sewer main, including that it was sinking; and (d) any alleged defect in the sewer main was not a substantial proximate cause of plaintiffs' damages. Numerous exhibits were attached to the motion.

On May 2, 2017, plaintiffs filed a motion to amend their complaint which sought to include the September 2014 sewage-backup incident. Defendant opposed the motion as futile.

On May 12, 2017, plaintiffs filed a response to defendant's motion for summary disposition. Plaintiffs argued that defendant knew that the sewer system that serviced plaintiffs' property was defective and had known of the defects for years. The sewer system had design, maintenance, operation, and/or repair defects in that the sewer main was sunken or shifted and did not have enough slope and flow which caused sediment to build up, blockages, and sewer line disconnects. Defendant was aware of the numerous sewer problems on Edgewood Drive, even after most of the sewer disposal system had been replaced because it was sinking in 1996. In 2011 the sewer system was blocked with sediment or grease and, in 2014, portions **[*8]** of the sewer main on Edgewood upstream from plaintiffs had to be relined because of settlement and pipe separations. Further, in December 2015 when defendant had the sewer system in front of plaintiffs' home inspected by United Resource via a camera, a blockage was immediately found and it was unable to get through the sewer line. It also showed that several serious problems existed, including the failure of the sewer main lining. The only way to overcome the sewer main problems was to reroute plaintiffs' sewer line to tap into the manhole in front of plaintiffs' house.

Plaintiffs further argued that defendant did not comply with the notice requirements of MCL 691.1419(2), including that it did not provide plaintiffs with a "sufficiently detailed explanation of the notice requirements of *subsection (1)* to allow a claimant to comply with the requirements." Nevertheless, plaintiffs provided defendant with the proper notice and any failure to comply resulted from defendant's failure to comply as set forth in MCL 691.1419(3). And there was no problem with plaintiffs' house sewer lead; rather, the problem was with the sewer service lead that directly connected to the sewer main which was located in defendant's right-of-way and was **[*9]** defendant's responsibility. Plaintiffs provided the affidavits of their professional engineer expert, Gary Wuerfel, and their survey technician, Mark Dawdy, who stated that a city maintains the service lead from the sewer main to the property line, and it is located in the city's right-of-way. The house sewer lead extends from the house to that service lead. And in this case, it was the service lead that separated from the sewer main—due to the fact that the sewer main was sinking; thus, it was defendant's responsibility. Further, plaintiffs argued, defendant knew about the sewer defects before plaintiffs' sewage backups but failed to fix them and such defects were the substantial proximate cause of plaintiffs' damages. Thus, plaintiffs argued that defendant was not entitled to governmental immunity because plaintiffs can establish all of the elements required under MCL 691.1417(3).

On June 5, 2017, following oral arguments on the cross-motions for summary disposition, the trial court issued its opinion and order denying both motions.[3] The trial court concluded that plaintiffs' claim was not barred by governmental immunity because it satisfied all requirements set forth in MCL 691.1417(3) of the sewage disposal event **[*10]** exception. Further, defendant had sufficient notice of both of plaintiffs' occurrences, as well as of the ongoing problems with this sewer system, and defendant did accept the first claim as evidenced by the letter plaintiffs received from defendant's insurance provider—a claim that was subsequently amended after the second occurrence. Moreover, contrary to defendant's argument, sufficient evidence supported plaintiffs' claim that it was the sinking of the sewer main that caused plaintiffs' sewer lead to become disconnected from the sewer system rather than a failure of the lead itself. Accordingly, questions of fact precluded summary disposition in favor of either party and both motions were denied. This appeal followed.

Defendant first argues that plaintiffs' claim is barred for failure to provide proper notice. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Walsh v Taylor, 263 Mich App 618, 621; 689 NW2d 506 (2004)*. Defendant's

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[3] As with several other pending motions, the trial court adjourned oral argument on plaintiffs' motion to amend their complaint pending the outcome of its decision on the cross motions for summary disposition.

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motion was filed under MCR 2.116(C)(7) which tests whether a claim is barred by immunity granted by law. Herman v Detroit, 261 Mich App 141, 143; 680 NW2d 71 (2004) (citation omitted). With regard to a motion under MCR 2.116(C)(7), "a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, **[*11]** 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 NW2d 645 (2015); see also Herman, 261 Mich App at 143-144. The plaintiff must allege facts sufficient to warrant the application of an exception to governmental immunity to survive a motion under MCR 2.116(C)(7). Plunkett v Dep't of Transp, 286 Mich App 168, 180; 779 NW2d 263 (2009). If no relevant facts are in dispute, and if reasonable minds could not differ on the legal effect of those facts, it is a question of law for the court whether a plaintiff's claim is barred by governmental immunity. Milot v Dep't of Transp, 318 Mich App 272, 275; 897 NW2d 248 (2016); Snead v John Carlo, Inc, 294 Mich App 343, 354; 813 NW2d 294 (2011). If a relevant factual dispute exists, summary disposition may not be granted. *Id.* An issue of statutory interpretation is reviewed de novo as a question of law. McGoldrick v Holiday Amusements, Inc, 242 Mich App 286, 292; 618 NW2d 98 (2000).

Although the governmental tort liability act (GTLA) affords governmental agencies engaged in a governmental function with broad immunity from tort claims, there are six statutory exceptions including the sewage disposal system event exception at issue here, MCL 691.1416 through MCL 691.1419. See Nawrocki v Macomb Co Rd Comm, 463 Mich 143, 158; 615 NW2d 702 (2000); Willett v Waterford Twp, 271 Mich App 38, 46; 718 NW2d 386 (2006). In relevant part, MCL 691.1417(2) provides that 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." MCL 691.1416(k) defines a "sewage disposal **[*12]** system event" or "event" as:

> 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. . . .

MCL 691.1417(1) also provides that "[t]o 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." Relevant for our purposes here is the procedure set forth in section 19. Under MCL 691.1419, claimants under this exception and the responsible governmental agency have reciprocal notice responsibilities:

> (1) Except as provided in subsections (3) and (7), a claimant is not entitled to compensation under [MCL 691.1417] 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. **[*13]** . . . To facilitate compliance with this section, a governmental agency owning or operating a sewage disposal system shall make available public information about the provision of notice under this section.
>
> (2) If a person who owns or occupies affected property notifies a contacting agency orally or in writing of an event before providing a 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 a claimant to comply with the requirements.
>
> * * *
>
> (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 a 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 requirements of subsection (1) resulted from the contacting agency's failure to comply with subsection (2).

In this case, plaintiffs' complaint only pertains to the

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sewage backup event that occurred in April 2015; thus, that is the event at issue for [*14] purposes of the notice requirement. See MCR 2.111(B)(1). It is undisputed that before plaintiffs' contractor could do any significant work in determining and remedying the cause of plaintiffs' sewage backup event, a permit from defendant was required. It is also undisputed that defendant's inspector and other employees were on the site numerous times during this 40-day repair project, participated in several meetings as to how to resolve problems that arose, and were involved in the decisions that ultimately resolved the problem. It is clear, then, that the appropriate "contacting agency" for defendant was notified of this sewage backup event, as required under MCL 691.1419(2), which triggered defendant's duty to provide plaintiffs with information, in writing, as to the notice requirement of subsection (1) for submitting a claim. See Dybata v Wayne Co, 287 Mich App 635, 646; 791 NW2d 499 (2010). And although plaintiffs have repeatedly argued that defendant failed to comply with its statutory duty of providing them with information regarding the notice requirement, defendant failed to refute plaintiffs' argument in that regard with any evidence to the contrary. Thus, to the extent that plaintiffs failed to comply with the notice requirement of subsection (1), their claim is not barred because defendant [*15] was in fact notified almost immediately of the sewage extent that plaintiffs failed to comply with the notice requirement of subsection (1), their claim is not barred because defendant [*16] was in fact notified almost immediately of the sewage backup event and failed to apprise plaintiffs 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 the 2014 sewer backup event. See MCL 691.1419(3). Accordingly, the trial court properly denied, but for the wrong reasons, defendant's motion for summary disposition premised on the argument that plaintiffs' claim was barred for failure to provide proper notice.

Next, defendant argues that the sewage backup events did not fall within the category of compensable events per the exception to governmental immunity. However, because plaintiffs' complaint only raised a claim regarding the April 2015 sewer backup event we will not consider whether the September 2014 event was compensable. See MCR 2.111(B)(1). And we conclude that a genuine issue of material fact exists as to whether the April 2015 sewer backup event was compensable.

As discussed above, a governmental agency is not immune from tort liability for the overflow or backup caused by a sewage disposal system event. MCL 691.1417(2). And a "sewage disposal system event" is an overflow or [*17] backup of a sewage disposal system unless the substantial proximate cause of it was an obstruction in a service lead not caused by a governmental agency, another connection, or an act of war. MCL 691.1416(k). A "service lead" is "an instrumentality that connects an affected property . . . to the sewage disposal system and that is neither owned nor maintained by a governmental agency." MCL 691.1416(i). And a "sewage disposal system" means "all interceptor sewers, storm sewers, sanitary sewers . . . and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage . . . under the jurisdiction and control of a governmental agency." MCL 691.1416(j). Under MCL 691.1417(3), if a claimant believes that a sewage disposal system event caused property damage, the claimant may seek compensation if the claimant can show 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 [*18] 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.

Defendant first appears to argue that because it was plaintiffs own sewage that backed up into their basement their claim is not actionable. This argument, however, is not supported by any citation to supporting authority and we cannot follow its logic; thus, it is deemed abandoned. See Peterson Novelties, Inc v Berkley, 259 Mich App 1, 14; 672 NW2d 351 (2003). Further, to the extent that defendant is arguing that the April 2015 incident was not a "sewage disposal system event," we disagree. This incident involved a backup of sewage that plaintiffs' allege was caused by the sewer main sinking and becoming separated from their lead. It did not involve an obstruction in the service lead, another connection to the sewage disposal system, or an act of war. See MCL 691.1416(k)(i)-(iii).

Next, defendant argues that plaintiffs cannot establish

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the elements of MCL 691.1417(3), although defendant concedes that it was the appropriate governmental agency relative to the sewer main. Plaintiffs have argued that defendant was on notice of problems with the sewer system on Edgewood Drive for years but failed **[*19]** to make the necessary repairs before the sewer main became disconnected from plaintiffs' house sewer lead. In particular, plaintiffs argued that the sewage disposal system was defective because it did not have sufficient slope or flow which caused buildup, blockages, and excess fluid which led to the sewer main sinking and the disconnection of plaintiffs' sewer lead. In support of their arguments, plaintiffs relied in part on testimony from defendant's employees, the contractors who performed plaintiffs' repair, plaintiffs' expert, and a survey technician.

Defendant's civil engineer of over 30 years, William Yee, testified that he knew there was a problem with the sanitary sewer on Edgewood Drive in that it did not have enough slope and did not have enough flow which causes sediment buildup and blockages, and defendant did nothing to rectify the issue. Yee agreed that sediment in the pipe could cause a blockage and lead to having higher levels of fluid in the pipe and such conditions could lead to problems similar to what plaintiffs experienced. Yee recalled that in 2014, defendant relined a portion of the sewer main north (upstream) of plaintiffs' location because the sewer main had **[*20]** settled causing displacements of pipe, i.e., gaps in the sewer line. Yee believed that the incident upstream of plaintiffs' property caused additional sediment to flow through the pipe, and possibly more fluid to flow through the pipe, which may have caused additional sediment to accumulate directly in front of plaintiffs' home. He also testified that "if the extra sediment had caused the main to settle at that time, it could cause the disconnection of a sewer lead." Yee further testified that, in 2011, the sewer line in front of plaintiffs' home was blocked with either sediment or grease. In 2015, defendant had a contractor place a camera in the manhole in front of plaintiffs' house to view the line but there was a blockage so they could not get through the line until they used a machine to jet the line. That indicated to Yee that there was a problem in that segment of the sewer which could have been a buildup of debris and, to his knowledge, it was not repaired. A video report done by defendant's contractor, United Resource, in December 2015 indicated that the lining in the sewer main that serviced plaintiffs' house was failing in that it was starting to come apart which could cause **[*21]** infiltration of the sewer which means groundwater gets into the sewer. In light of these findings, Yee believed that repairs were needed to this portion of the sewer line and that the sewer should be relined. Yee testified that a sewer main full of water increases the weight in the sewer main and the extra weight could cause settlement and settlement of the main could cause a sewer lead connection to fall off. And according to the survey drawing that was done with regard to the sewer main that serviced plaintiffs' house, it appeared to Yee that the sewer main had settled which could have caused plaintiffs' sewer lead connection to fall off. Further, although there had originally been three taps on the same sewer line that serviced plaintiffs, two of those lines had been abandoned which left only plaintiffs' line before it was rerouted to the manhole.

Defendant's city engineer, Todd Zilincik, testified that the sewer main pipe that serviced plaintiffs' home had a downstream pipe that was slightly elevated compared to the upstream pipe and typically they should be at the same elevation or the downstream pipe should be slightly below because it is a gravity system. If a pipe is at the **[*22]** wrong elevation, there could be a potential for more fluid in the pipe and the system is set up to handle a certain flow. Zilincik also testified that originally there had been three leads connected to the sewer main that serviced plaintiffs, but it appeared that two of those lines had been abandoned which left only plaintiffs' line before it was rerouted to the manhole.

One of the contractors who performed plaintiffs' repair, Doug Spuck, testified that the "sewer lead" is the first couple of sections of pipe coming off of the sewer main towards the residential house or commercial building. Spuck was involved in the excavation to reach the sewer main and actually uncovered plaintiffs' sewer lead by hand-digging. He immediately saw that the sewer main was disconnected from the sewer lead; the lead was pulled away. He testified: "The last piece going into the main there was about a three-inch gap between the six-inch clay pipe and where it ties on to the 18-inch concrete main."

Another contractor involved in plaintiffs' repair, Jeffrey Horton, testified that a "sewer lead" is the pipe that goes from the city sewer to the property line and a "house sewer" is the pipe that goes from the **[*23]** house to the sewer lead. The sewer lead is in the right-of-way. And these designations are stated as such in the plumbing code.

Plaintiffs also relied on the testimony of their expert, Gary Wuerfel, who averred in his affidavit that the

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sinking of the sewer main caused the disconnection of the sewer main from plaintiffs' sewer lead. In his deposition, Wuerfel testified that it was obvious that the 18-inch sewer main pipe had settled. And plaintiff relied on the testimony of Mark Dawdy, a survey technician, who performed a survey at plaintiffs' property and averred in his affidavit that he observed and surveyed sinking of the sewer main which caused plaintiffs' lead to become separated from the sewer main.

Considering the record evidence, we disagree with defendant's argument that plaintiffs cannot establish the elements of MCL 691.1417(3). Defendant is the appropriate governmental agency and there are, at minimum, genuine issues of material fact as to whether the sewage disposal system had a defect (including a sinking sewer main) that defendant knew or should have known about yet failed to take reasonable steps in a reasonable amount of time to repair or correct, and the defect was a substantial proximate **[*24]** cause of the event (which occurred when the sewer main became separated from plaintiffs' sewer lead) and plaintiffs' property damage.[4] Therefore, the trial court properly denied defendant's motion for summary disposition under MCR 2.116(C)(7).

Further, we reject defendant's argument that the trial court must conduct an evidentiary hearing on the threshold issue whether defendant is entitled to immunity. Plaintiffs have established that defendant is not entitled to governmental immunity as a matter of law, i.e., they have established that the sewer system disposal event exception to governmental immunity is applicable. It is for the trier of fact to determine whether plaintiffs have established that they are entitled to compensation under MCL 691.1417(3).

Affirmed. Plaintiffs are entitled to costs as the prevailing parties. MCR 7.219(A).

/s/ Douglas B. Shapiro

/s/ Mark J. Cavanagh

Dissent by: Kirsten Frank Kelly

[4] Defendant's expert, Vyto Kaunelis, opined in his affidavit that a problem with the sewer main would have caused other residents to have sewage backups when plaintiffs' backup occurred. However, defendants employees, Yee and Zitincik, both agreed that, although three lines were originally tapped into this sewer main, two had been abandoned which left only plaintiffs' line when this event occurred.

Dissent

K. F. KELLY (*dissenting*).

I respectfully dissent. I would hold that defendant was entitled to summary disposition on the basis that plaintiffs' claims are barred by governmental immunity.

"[A] claimant is not entitled to compensation . . . unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, **[*25]** 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(1). "The written notice under this subsection shall contain the content required by subsection (2)(c) and shall be sent to the individual within the governmental agency designated in subsection (2)(b)." *Id.* MCL 691.1419(2)(c) provides that a notice must contain "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)(b) requires the governmental entity in question to determine "[t]he name and address of the individual within the governmental agency to whom a claimant must send written notice . . . ."

Here, plaintiffs contend their notice with respect to the first incident was timely because they insist the first sewer incident and their discovery of damage to their property occurred at some indeterminate date in October 2014. The record has no evidence beyond the statement appended to plaintiffs' notice that supports a finding that the sewer incident occurred in October. There is, however, a plethora of evidence showing that it occurred September 23, 2014, **[*26]** including invoices, interrogatory answers, plaintiff Frederick Wheeler's deposition testimony, and even an email from plaintiffs' counsel to their expert directing him what to write about "the Sewer System Events which occurred . . . on or about September 23, 2014 . . . ." Their notice, filed November 12, 2014, was untimely because it was filed more than 45 days after the first sewer incident.

Our Supreme Court held that a plaintiff's failure to comply with the notice requirement of the "highway exception" to governmental immunity, MCL 691.1404, is fatal to a plaintiff's attempt to pursue a lawsuit under the "highway exception." Rowland v Washtenaw Co Rd Comm, 477 Mich 197, 219; 731 NW2d 41 (2007). In so holding, the Court overruled previous precedent that

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had required a governmental agency to show actual prejudice from a failure to provide proper notice. *Id. at 213-214*. Explaining that "*MCL 691.1404* is straightforward, clear, unambiguous, and not constitutionally suspect," the Court "conclude[d] that it must be enforced as written." *Id. at 219*. The Court later "clarif[ied] that *Rowland* applies to all such statutory notice or filing provisions . . . ." *McCahan v Brennan, 492 Mich 730, 733; 822 NW2d 747 (2012)*. "[W]hen the plain language of a statute requires particular notice as a condition for recovery, 'no "saving construction" [is] necessary or allowed. **[*27]** Thus, the engrafting of [a] prejudice requirement onto the statute [is] entirely indefensible.'" *McCahan, 492 at 743-744*, quoting *Rowland, 477 Mich at 211*. In other words, when a statute provides a notice requirement, that notice requirement must be adhered to strictly or a plaintiff may not avoid governmental immunity.

Significantly, in *Rowland*, the failure to timely file a required statutory notice was fatal to the plaintiff's attempt to avoid governmental immunity, notwithstanding any failure of the governmental entity to show "prejudice" by the late notice. *Rowland, 477 Mich at 219*.

Plaintiffs argue that they are excused from any failure to comply with the notice requirement by *MCL 691.1419(3)*., which provides that a plaintiff can be excused from the notice requirement only if the governmental agency in question did not provide the information required by *MCL 691.1419(2)* *and* that failure was the reason the plaintiff did not comply:

> (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 a 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 **[*28]** failure to comply with the notice requirements of *subsection (1)* resulted from the contacting agency's failure to comply with *subsection (2)*.

Here, defendant provided a claim form that elicited all of the information required by *MCL 691.1419(2)(c)* and provided the contact information required by *MCL 691.1419(2)(b)*, but there is no evidence that defendant provided written notification of the time requirement. However, similarly, there is no evidence that plaintiffs would have timely filed their notice had they received that information, as is required by *MCL 691.1419(3)(b)*. Accordingly, the statute does not excuse plaintiffs' failure to timely file their notice with the city.

This Court strictly enforces statutory notice requirements. In *Wigfall v Detroit, 322 Mich App 36, 42; 910 NW2d 730 (2017)*, for example, the plaintiff sent the notice required under the "highway exception" to the "City of Detroit Law Department," whereas the statute required individual service on the mayor, city clerk, or city attorney. Because the notice was not served on one of those individuals, but rather generally to the "law department," this Court held that the plaintiff failed to comply with the notice requirement; this was so even though there, as here, the defendant city acknowledged receipt of the claim. *Id.*

In *McLean, 302 Mich App 68; 836 N.W.2d 916*, this Court held that the plain **[*29]** language of *MCL 691.1404* and *MCR 2.105(G)(2)* required service of notice on a city's mayor, city clerk, or city attorney, unless some other person "was authorized by *written appointment* or *law* to accept service on behalf of" the city. *Id. at 80*, citing *MCR 2.105(H)(1)*. In *McLean*, the plaintiff sued the defendant city of Dearborn under the highway exception. But she served the notice required by *MCL 691.1404* on a third-party administrator Dearborn had contracted with to handle claims against the city. The plaintiff in *McLean*, much like plaintiffs do here, relied on the fact that the city's third-party administrator responded to her notice as evidence that the claim was properly served. *Id. at 79*. However, this Court rejected that argument, concluding that there was no evidence that Dearborn had made a written appointment or law authorizing the third-party administrator to act as Dearborn's agent for the acceptance of service of process. *Id. at 80-81*.

The trial court ruled that defendant allegedly already knew about generalized defects in its sewer system, thus somehow satisfying the notice requirement of *MCL 691.1419*. But nothing in the statute excuses a plaintiff from providing notice of a specific sewage-related event even if the city knows generally of some defect in the sewer **[*30]** system.

With respect to the second sewage incident, plaintiffs simply did not provide notice. The first of two letters from plaintiffs' counsel to defendant's outsider adjuster

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purports to amend *the first notice* and makes *no mention* of a second event. The second letter claims to "amend and correct" the first letter by, for the first time, informing of a second event on April 13, 2015 (contrary to Frederick Wheeler's testimony that the second event was April 11, 2015). But the second letter, which is the first one that informs of the second event, was dated June 18, 2015, well beyond the 45-day notice limit. With respect to the second incident, plaintiffs did not comply with the notice requirement at all, and even if they did, the notice providing the date and informing of a second incident was filed about 66 to 68 days after the second incident.

Because plaintiffs did not comply with MCL 691.1419's notice requirement, they did not properly avail themselves of the sewer-disposal-system-event exception to governmental immunity. I would hold that defendant was entitled to summary disposition on the basis that plaintiffs' claims are barred by governmental immunity.

/s/ Kirsten Frank Kelly

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APPENDIX 20

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Detroit Invest Corp. v. Detroit Water & Sewage Dep't

Court of Appeals of Michigan

October 22, 2020, Decided

No. 348675

Reporter
2020 Mich. App. LEXIS 7069 *; 2020 WL 6230717

DETROIT INVEST CORPORATION, doing business as DETROIT INVEST, INC., Plaintiff/Counterdefendant-Appellee, v DETROIT WATER AND SEWAGE DEPARTMENT, Defendant/Counterplaintiff-Appellant, and DORE AND ASSOCIATES CONTRACTING, INC., Defendant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: **[*1]** Wayne Circuit Court. LC No. 18-003729-CZ.

Core Terms

sewer, backups, apartment building, flooding, government agency, sewage disposal, sewer line, claimant, notified, debris, summary disposition, written notice, demolition, blockage, damages, notice, crew, written claim, obstruction, contacting, sewage

Counsel: For DETROIT INVEST CORP, Plaintiff?-Counter Defendant?-Appellee: JAMES E ROACH.

For DETROIT WATER AND SEWERAGE DEPARTMENT, Defendant-Counter Plaintiff-Appellant: BAHRI JACOB.

For DORE AND ASSOCIATES CONTRACTING INC, Defendant: DAVID R STECHOW.

Judges: Before: METER, P.J., and SHAPIRO and RIORDAN, JJ.

Opinion

PER CURIAM.

Defendant Detroit Water and Sewage Department appeals by right the trial court's order denying its motion for summary disposition under MCR 2.116(C)(7) (governmental immunity). For the reasons stated in this opinion, we affirm.

I. BACKGROUND

Plaintiff is the owner of an apartment building located at 18230 Weaver Street, Detroit. At the City of Detroit's request, in September and October 2015, defendant Dore and Associates Contracting, Inc. (Dore), demolished two apartment buildings on an adjacent parcel known as 18110 Weaver Street. The sewer main servicing plaintiff's apartment building runs through the 18110 parcel, which is now a vacant lot. According to plaintiff's property manager, there were a number of small sewer backups following the demolition. Plaintiff hired a private plumber who determined that there was no obstruction in the service lead connecting the **[*2]** apartment building to the sewer line.

The first major flooding occurred on November 29, 2016, when what plaintiff described as a "massive backup of raw sewage" flooded the ground floor of the apartment building. Plaintiff immediately notified defendant, who sent a vacuum truck to clear out the two catch basins near the apartment building that were full. Defendant returned on December 6, 2016 to run a "jetter" through the catch basins, which according to plaintiff are connected to the service lead. However, defendant's efforts failed to permanently rectify the problem and backups in the building continued.

On January 11, 2017, plaintiff filed a written claim with defendant for damages resulting from the November 2016 incident. After investigation, on August 31, 2017, defendant denied plaintiff's claim on the basis that the alleged damages were not caused by any defect in the sewer system but rather by a defect in the private service lead.

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The next major flooding for which plaintiff seeks damages occurred on October 13, 2017. Plaintiff notified defendant of wastewater backing up in the apartment's ground floor and insisted that there must be a blockage somewhere in the main sewer line that **[*3]** was causing the repeated backups. Defendant did not immediately dispatch a crew, and plaintiff rented a high capacity pump to pump the water out of the ground floor, as it did on several occasions. On November 6, 2017, defendant dispatched a crew to jet and vacuum the catch basins. Plaintiff removed its tenants from the apartment building in November 2017 because of the unsanitary conditions.

After a local TV station reported on the wastewater in plaintiff's apartment building, defendant again sent a crew to address the problem and also engaged contractor Inland Waters Pollution Control (IWPC) for assistance. On January 24, 2018, both defendant and IWPC performed work on the main sewer line and manholes. The leader of defendant's crew reported assisting the "manhole cleaning crew" and the vacuum truck cleaning the sewer line. It is undisputed that debris was removed from a sewer main manhole and that the wastewater in the apartment building receded. IWPC communicated its findings to defendant in a January 25, 2018 e-mail, stating: "The adjacent sewer appeared to be surcharged [, i.e., overflowing,] and our crews were able to clear the line."

In April 2018, plaintiff filed its complaint **[*4]** against defendant and later filed an amended complaint adding Dore as a defendant. Plaintiff alleges that Dore's demolition of the buildings in the adjacent lot caused construction debris to enter the sewer, which led to the blockage and the backups in the apartment building.

Before discovery was completed, defendant moved for summary disposition of plaintiff's complaint under *MCR 2.116(C)(7)*.[1] Defendant's primary argument was that it vacated the sewer line at issue in 1967 and so no longer owned it. Defendant also argued that the blockage causing the flooding was in the service lead, not the main sewer line. Finally, defendant contended that plaintiff was barred from seeking recovery for damages relating to the October 13, 2017 flooding because it did not file a written claim for that event.

In response, plaintiff argued that defendant had retained ownership of the sewer system despite vacating portions of the surrounding streets and that there was a material question of fact whether the blockage was caused by an obstruction in the sewer main as opposed to the service lead. Plaintiff also argued that it was not required to file a written claim for the October 2017 flooding after filing one in November **[*5]** 2016 because defendant was aware of the ongoing backups and never advised plaintiff that it needed to file an additional claim.

The trial court held a hearing on defendant's motion on April 11, 2019. On April 29, 2019, the court entered an order denying the motion "for the reasons set forth on the record." This appeal followed.[2]

II. DISCUSSION

One exception to the immunity provided by the governmental tort liability act, *MCL 691.1401, et seq.*, is the "sewage-disposal-system-event exception." *Margaris v Genesee Co, 324 Mich App 111, 125 n 3; 919 NW2d 659 (2018)* (quotation marks and citation omitted). Under this exception, "[a] governmental agency is immune from tort liability **[*6]** 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." *MCL 691.1417(2)*. A "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

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[1] Defendant also moved for summary disposition under *MCR 2.116(C)(8)* (failure to state a claim), but it appeals only the denial of governmental immunity under *MCR 2.116(C)(7)*.

[2] We review de novo a trial court's decision to grant or deny summary disposition. *Galea v FCA US LLC, 323 Mich App 360, 368; 917 NW2d 694 (2018)*. Summary disposition may be granted under *MCR 2.116(C)(7)* for an "immunity granted by law." In *RDM Holdings, Ltd v Continental Plastics Co, 281 Mich App 678, 687; 762 NW2d 529 (2008)*, we summarized the standards for analyzing a motion brought under that subrule:

> [T]his Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in *MCR 2.116(C)(7)* is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]

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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 691.1417(j). A "sewage disposal system event" is defined as "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k).

To begin, we address the fact that defendant, as the appellant in this case, failed to produce the transcript of the trial court's hearing on the motion for summary disposition. "The appellant must provide this Court with the lower court record, and this includes the filing of all transcripts in the lower court file." Thompson v Thompson, 261 Mich App 353, 359 n 1; 683 NW2d 250 (2004). Under MCR 7.210(B)(1)(a), defendant was required to "order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial [*7] court or tribunal." In its claim of appeal, defendant asserted that the "complete transcript" had been ordered. Yet, while defendant eventually obtained some of the lower court transcripts, it failed to produce the transcript of the April 11, 2019 hearing on defendant's motion for summary disposition. Further, defendant did not pursue any of the options available to appellants that do not wish to, or are unable to, produce the complete transcript of the lower court proceedings. That is, defendant did not file a motion to request that less than the full transcript could be produced, MCR 7.210(B)(1)(c); it did not seek a stipulation from plaintiff that less than the full transcript could be produced, MCR 7.210(B)(1)(d); and the parties did not agree to file an agreed-on statement of facts, MCR 7.210(B)(1)(e). Instead, despite repeated requests from this Court for the missing summary-disposition transcript, defendant has simply chosen to not produce it.

Generally, "this Court will refuse to consider issues for which the appellant failed to produce the transcript." PT Today, Inc v Com'r of Office of Fin & Ins Servs, 270 Mich App 110, 151-152; 715 NW2d 398 (2006). See also Hoffenblum v Hoffenblum, 308 Mich App 102, 118; 863 NW2d 352 (2014). In this case, the trial court's written order denying defendant's motion for summary disposition relies on "the reasons set forth on the record" as the basis for denial. [*8] Thus, in the absence of the relevant transcript, we are unable to review the trial court's reasoning for the contested ruling. See PT Today, Inc, 270 Mich App at 152. While it is clear that the trial court found a question of fact whether the sewer system had a defect and that plaintiff was not required to file a separate claim for the October 2017 flooding, we are denied the underlying reasoning for the court's rulings. It is of no moment that defendant is appealing a ruling that we review de novo. De novo review is still review, and there is no exception in the court rule for the producing summary-disposition transcripts. Although not entitled to deference, the trial court's reasoning in granting or denying summary disposition will often be found persuasive on appeal. Accordingly, we conclude that defendant has effectively abandoned its appeal for failure to comply with MCR 7.210. See Kern v Kern-Koskela, 320 Mich App 212, 229-230; 905 NW2d 453 (2017); Waterford Sand & Gravel Co v Oakland Disposal, Inc, 194 Mich App 571, 572; 487 NW2d 511 (1992).

Even if defendant had not abandoned the preserved issues raised in its appeal,[3] we would conclude the trial court did not err when it determined that there was an issue of fact whether the sewer system had a defect and that plaintiff was not required to file a separate claim for the October 2017 flooding event.

A plaintiff seeking compensation [*9] for damage caused by a sewage disposal system event, must show, among other requirements, that the "[t]he sewage disposal system had a defect." MCL 691.1417(3)(b). A "defect" is defined as "a construction, design, maintenance, operation, or repair defect," MCL 691.1416(e). An obstruction of the sewer by a foreign object constitutes a defect. Willet v Charter Twp of Waterford, 271 Mich App 38, 52; 718 NW2d 386 (2006).

Viewing the evidence in a light most favorable to the nonvmoving party, there is ample evidentiary support for plaintiff's allegation that the sewage system had a defect. After a year of defendant insisting that the backups were caused by an obstruction in the service lead, in January 2018 extensive work was done on the main sewer line after which wastewater in the apartment building receded and water in the sewer main flowed freely. According to plaintiff, there have been no backups in the apartment building since. Defendant

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[3] "An issue must have been raised before and addressed and decided by the trial court to be deemed preserved for appellate review." Lenawee Co v Wagley, 301 Mich App 134, 164; 836 NW2d 193 (2013). Defendant did not argue before the trial court, as it does on appeal, that any defect did not cause 50% or more of the damage claimed by plaintiff and that defendant did not know of the defect despite its reasonable diligence. Defendant waived these arguments on appeal by failing to raise them below. See Johnson Family Ltd Partnership v White Pine Wireless, LLC, 281 Mich App 364, 377; 761 NW2d 353 (2008).

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does not dispute that there was debris removed from the sewer, and, tellingly, it no longer asserts that the defect was in the service lead.[4] Instead, defendant now argues that the debris removed from the sewer line "was not the same debris that allegedly entered the system during the demolition." In other words, defendant argues that, although plaintiff **[*10]** has identified a defect in the system, its claim nonetheless fails because it has not identified the cause of that defect.

First, based on the record before us, there is at least a question of fact whether the debris was the result of the demolitions conducted at the City's behest in September and October 2015. Plaintiff's property manager explained that small backups began after the demolition, with the first major flooding occurring in November 2016. Plaintiff's theory that the debris from demolition accumulated over time until a major blockage was formed is reasonable, and defendant has neither produced evidence to the contrary nor offered any alternative theory consistent with the evidence.

More important, defendant does not identify any support for its position that plaintiff's claim fails if it cannot identify the source of the debris causing the blockage. Defendant's reliance on *Willet* is misplaced. There, we merely affirmed summary disposition for the defendant on the grounds that it took reasonable steps within a reasonable time to remedy the defect, *Willet, 271 Mich App at 55*; we did not hold that government agencies are not liable for obstructions caused by unknown third parties. While plaintiff must **[*11]** prove multiple elements under the sewage-disposal-system event exception, the source of the defect is not one of them. See *Cannon Twp v Rockford Pub Sch, 311 Mich App 403, 415-416; 875 NW2d 242 (2015)*.

As to the lack of a written claim relating to the October 2017 flooding, *MCL 691.1419* provides the notice requirements for the sewer-disposal-system-event exception. Subsection (1) requires the plaintiff to give written notice of a claim:

> (1) Except as provided in subsections (3) and (7), a claimant is not entitled to compensation under [*MCL 691.1417*] 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. The written notice under this subsection shall contain the content required by subsection (2)(c) and shall be sent to the individual within the governmental agency designated in subsection (2)(b). To facilitate compliance with this section, a governmental agency owning or operating a sewage disposal system shall make available public information about the provision of notice under this section. [*MCL 691.1419(1)*.]

However, under subsection (2), the contacting agency must inform a person notifying the agency of an event how to file written notice:

> (2) If a person who owns or occupies affected **[*12]** property notifies a contacting agency orally or in writing of an event before providing a 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 a 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. [*MCL 691.1419(2)*.]

Under subsection (3), a claimant who did not file a written notice of the claim is not barred from brining suit if the governmental agency was notified of the event per subsection (2), and both of the following are true:

> (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 requirements of subsection (1) resulted from the contacting agency's failure to comply with subsection (2). [*MCL 691.1419(3)*.]

Plaintiff immediately notified **[*13]** 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

[4] Nor does defendant pursue its argument that the City vacated this portion of the sewer system.

2017 event pursuant to MCL 691.1419(3). See Dybata v Wayne Co, 287 Mich App 635, 646-647; 791 NW2d 499 (2010) (holding that the plaintiffs were not barred from bringing suit when the county received a list of properties affected by sewer backups and failed to provide the property owners the information required MCL 691.1419(2)).

Affirmed. As the prevailing party, plaintiff may tax costs. MCR 7.219(A).

/s/ Patrick M. Meter

/s/ Douglas B. Shapiro

/s/ Michael J. Riordan

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