RECEIVED by MSC 6/24/2025 2:08:57 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

BRIAN ZEZULA,

Plaintiff/Appellee,

-vs-

INDEPENDENCE TOWNSHIP,

Defendant/Appellant.

and

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

Defendants.

Supreme Court No. 168483

COA Docket No. 368261

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

DANIEL A. GROVES LAW PRACTICE
Daniel A. Groves (P74026)
Attorneys for Plaintiff
6725 Daly Rd., #252561
West Bloomfield, MI 48325
(734) 644-4996
danielagroveslaw@gmail.com

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

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

DEFENDANT/APPELLANT INDEPENDENCE TOWNSHIP'S REPLY IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

**** ORAL ARGUMENT REQUESTED ****

RECEIVED by MSC 6/24/2025 2:08:57 PM

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii
ARGUMENT 1
I. Compelling and Exigent Grounds Exist Warranting This Court's Review. 1
II. Again, Plaintiff Fails To Advance Any Legal Support For His Claims. 2
III. Discovery Disputes And The Interpretation of the MDPB Best Practices Are Not Germane To The Actual Issues Presented On Appeal. 2
IV. Any Amendment to the Complaint to Include a Sewage Disposal System Event Claim is Futile. 5
V. Conclusion and Relief Requested 6
CERTIFICATE OF COMPLIANCE 7
CERTIFICATE OF SERVICE 7

RECEIVED by MSC 6/24/2025 2:08:57 PM

INDEX OF AUTHORITIES

Cases

Cantina Enterprises II Inc v Property-Owners Ins Co, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 363105) 4

Statutes

MCL 24.203(7) 3
MCL 460.721 *et seq* 4
MCL 460.732(2) 4
MCL 691.1401 *et seq* 4
MCL 691.1407(7) 4
MCL 691.1416(j) 5
MCL 691.1417 7
MCL 691.1417(1) 5
MCL 691.1419 7

Rules

MCR 2.116(C)(7) 3
MCR 7.305(B)(5)(a) 1
MCR 7.305(B)(5)(b) 1
MCR 7.305(B)(3) 1

Other Authorities

GTLA 4
MDPB Best Practices 3, 4, 5
MISS DIG Act 1, 4, 6

RECEIVED by MSC 6/24/2025 2:08:57 PM

ARGUMENT

I. Compelling and Exigent Grounds Exist Warranting This Court's Review.

Despite Plaintiff's and Kaltz's arguments to the contrary, grounds exist that warrant this Court's review under MCR 7.305(B)(3), (B)(5)(a), and (B)(5)(b). The Court of Appeals' majority opinion erroneously fashions a "new" exception to governmental immunity, and further instructs that this "new" exception should be broadly applied. Both pronouncements are contrary to the Legislature's intent and this Court's jurisprudence; this Court has made it abundantly clear that exceptions to governmental tort liability are to be narrowly construed and that there are only six. Indeed, under Michigan law, it is governmental immunity that is to be broadly applied, not the six statutorily created exceptions. On these bases alone, the Court of Appeals' majority opinion is erroneous, and this Court's review is warranted.

Moreover, resolution of the legal issues raised in the instant Application for Leave to Appeal is imperative, not just as to the litigants in this case, but also for both municipal entities across the state and potential future plaintiffs who may wish to raise claims against them. With respect to alleged violations of the MISS DIG Act, it is crucial for these parties, and potential future parties, to know in which forum they must bring or defend a claim, and whether under the law, the remedy for a successful claim is legal or administrative. The profundity and decisive clarity of this Court is essential to guide the judiciary. The Court of Appeals' majority opinion has muddied the waters, and only this Court can bring intellectual lucidity and finality to these critical legal issues affecting municipal jurisprudence.

For the reasons presented in its Application, and in the instant Reply in Support, Defendant/Appellant Independence Township respectfully requests this Court exercise its

RECEIVED by MSC 6/24/2025 2:08:57 PM

discretionary jurisdiction, grant its Application for Leave to Appeal and consider the legal issues presented therein.

II. Again, Plaintiff Fails To Advance Any Legal Support For His Claims.

Perhaps one of the most bizarre procedural aspects of this case is how Plaintiff/Appellee continues to defer to another party, a co-defendant, to defend the viability of his claims against Independence Township. Plaintiff/Appellee himself, the party bringing suit against the Township, pleaded a Count containing negligence claims, which do not themselves avoid governmental immunity, and then expressed a paucity of reasoning and rationale as to why his Complaint should survive. Indeed, looking all the way back to the summary disposition motion that underlies this entire appeal, Plaintiff/Appellee does not advance any legal arguments in support of why his negligence claims were actionable. Rather, he deferred, and continues to defer to co-Defendant Kaltz Excavating Company, Inc., to defend his claim against Independence Township. Indeed, the only "legal" support for imposing liability on the Township comes from Kaltz's persist skirting of liability for its own active and direct negligence. Plaintiff/Appellee's unwillingness to actively pursue its own claim is telling: not even Plaintiff/Appellee believes that his claims against the Township, resounding in "general negligence and common law negligence" are viable, and this Court should consider these claims as Plaintiff/Appellee pleaded them, not as co-Defendant now self-servingly chooses to characterize them for him.

III. Discovery Disputes And The Interpretation of the MDPB Best Practices Are Not Germane To The Actual Issues Presented On Appeal.

In its Response, Kaltz continues to rehash its version of events relating to discovery disputes, both before and after Independence Township was a party to this case. However, issues related to discovery disputes are not germane to the issues presented on appeal. Rather, these arguments are a red herring, engineered to deflect from the actual legal issues before this Court.

RECEIVED by MSC 6/24/2025 2:08:57 PM

Specifically, whether Plaintiff/Appellee has pleaded a viable claim against Independence Township, and/or whether Independence Township is entitled to summary disposition in its favor under MCR 2.116(C)(7), as Plaintiff/Appellee's negligence variety claims ("general and common law") are barred by governmental immunity.

Moreover, Kaltz's position that Independence Township stonewalled all attempts to uncover discoverable information is directly contradicted by its own admission that Independence Township produced nine categories of documents. A party to litigation, and an entity to whom a subpoena is directed, is legally entitled to advance objections to documents being requested. Simply because Kaltz requested a certain set of documents does not mean that it is automatically entitled to receipt of those documents. Simply because Kaltz was dissatisfied with the discovery response it received from Independence Township does not mean that Independence Township failed to respond to either a subpoena or a request for production of documents in good faith. But more pointedly, Kaltz's satisfaction or dissatisfaction with subpoena responses and discovery production is entirely irrelevant to the issue that was to be decided on summary disposition, that being whether Plaintiff/Appellee (not Kaltz) pleaded claims in avoidance of established statutory exceptions to governmental immunity, which are given narrow interpretation.

Kaltz also tries to distract from the legal issues presented in this appeal by arguing that Independence Township failed to comply with the MDPB Best Practices by failing to mark its appurtenances in response to Kaltz's MISS DIG request, and that there is a question of fact regarding whether the Township should have marked any of its facilities. Again, these arguments are red herrings. First, Kaltz's reliance on the best practices is misplaced, as "[a]dministrative bulletins [like the MDPB Best Practices] are recognized as advisory and 'do[ ] not have the force or effect of law[.]' MCL 24.203(7)." *Cantina Enterprises II Inc v Property-Owners Ins Co*, ___

RECEIVED by MSC 6/24/2025 2:08:57 PM

Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 363105); slip op at 7. Thus, the definition of appurtenance set forth in the MDPB Best Practices is illustrative at best, but clearly not legally binding. The very MDPB bulletin on which Kaltz relies expressly states that it does not purport to have the force of law and thus, guidance should be sought from, and deference given to statutes and local ordinances. Further, the question presented by the Township's Motion for Summary Disposition was whether it was entitled to governmental immunity from Plaintiff's claims, as there is no legal cause of action for alleged violations of the MISS DIG Act, rather, only an administrative remedy. The issue before the trial court was not whether the Township had complied with the statute. Indeed, based on the clear and unambiguous language of MCL 460.732(2), that is a question for the MPSC to resolve, not one for the Oakland County Circuit Court.

This case is not about discovery disputes or the application of best practices. Rather, to the extent that this case can be boiled down to simple terms, what this Court is asked to decide is (1) what is the proper forum for a claim that a municipality has violated the MISS DIG Act, and (2) is the remedy available to the aggrieved party legal or administrative. As is fully detailed in Independence Township's Application, MCL 460.721 *et seq*., and MCL 691.1401 *et seq*. are clear and unambiguous statutory schemes that must be read and considered *in pari material*. When MCL 460.732(2) and MCL 691.1407(7) are read together, it is clear that our Legislature intended for the MISS DIG Act to create liability for governmental agencies who violate the Act. However, the Legislature was explicit that the avenue for pursuing such a claim for a violation of the Act is the MPSC, not our circuit courts. See MCL 460.732(2). Likewise, the remedy is not a legal one, it is administrative, and only the MPSC can award an aggrieved party costs, fees, ***and damages***. *Id*. Moreover, a governmental entity cannot use the GTLA as a shield before the MPSC to avoid

RECEIVED by MSC 6/24/2025 2:08:57 PM

liability. The Court of Appeals has clearly and gravely erred in failing to enforce this clear procedure created by our Legislature. This Court's review is necessary to correct this error.

IV. Any Amendment to the Complaint to Include a Sewage Disposal System Event Claim is Futile.

The Court of Appeals further erred in concluding that Plaintiff/Appellee should be permitted to amend his Complaint to allege a sewage disposal system defect claim. In its Response, Kaltz argues that Court of Appeals was correct in concluding that an amendment is warranted, because the failure to mark an "appurtenance" (relying on the Best Practices definition) is a defect in the operation of the sewage disposal system and thus is arguably compensable.

But, Kaltz ignores that **not every alleged operation failure is compensable** under the Act. MCL 691.1417(1) provides the purpose of the act, stating:

> 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.

And:

> Sec. 16. MCL 691.1416(j) "**Sewage disposal system**" means all interceptor sewers, storm sewers, *sanitary sewers*, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system *under the jurisdiction and control of a governmental agency.*

Kaltz further ignores that for there to be an "event", it must fall within the below definition:

> k) "Sewage disposal system event" or "event" means the ***overflow or backup of a sewage disposal system onto real property.*** An overflow or backup is not a sewage disposal system event if any of the following [which includes an obstruction in service lead, i.e., the broken pipe connection that Kaltz severed] was a substantial proximate cause of the overflow or backup:

RECEIVED by MSC 6/24/2025 2:08:57 PM

There was no sewage disposal system event here, as contemplated by the Act. The sewage disposal system under the jurisdiction and control of the governmental agency, i.e., the sewer main that serves to take Plaintiff/Appellee's sanitary flow away from his house and to a treatment facility, ***did not overflow or backup into his real property.*** Instead, it was Plaintiff/Appellee's private, house lead, containing his own sewage, backed up into his basement. Even assuming that the Township is responsible for a defect in its operations, there is no "event" in this case that is compensable because the ***municipal system*** did not backup. There are no facts under which Plaintiff/Appellee can establish a claim under the Act, and thus, any amendment would be futile. The Court of Appeals erred in concluding otherwise, and this Court's review is thus necessary to correct the error.

V. Conclusion and Relief Requested

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

RECEIVED by MSC 6/24/2025 2:08:57 PM

Complaint to include allegations under MCL 691.1417 is futile, and further, that Plaintiff/Appellee failed to comply with the statutory notice requirements of MCL 691.1419.

Respectfully submitted,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

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

Dated: June 24, 2025

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply in Support of Application for Leave to Appeal contains 1919 words, and otherwise complies with the requirements of MCR 7.212(B).

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

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2025, I electronically filed the foregoing paper with the Clerk of the Court using the Court's efile system, by selecting efile and eserve, which will send notification all attorneys of record.

/s/ Amanda P. Waske