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**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

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| BRIAN ZEZULA,<br><br>Plaintiff-Appellee,<br><br>v<br><br>INDEPENDENCE TOWNSHIP,<br><br>Defendant-Appellant,<br><br>and<br><br>NINA BROWN, DTE ENERGY COMPANY, and KALTZ EXCAVATING COMPANY INC,<br><br>Defendants. | MSC 168483<br><br>COA 368261<br><br>LC Case No. 22-197937-NZ<br>(Oakland County Circuit Court)<br>Hon. Cheryl A. Matthews |

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# BRIEF OF *AMICUS CURIAE* GOVERNMENT LAW SECTION OF THE STATE BAR OF MICHIGAN IN SUPPORT OF DEFENDANT-APPELLANT INDEPENDENCE TOWNSHIP

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## STATEMENT OF THE INTEREST[1]

*Amicus Curiae* the Government Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 1200 attorneys who represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to government and municipal law. The Government Law Section provides education, information and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. The Governmental Law Section is committed to promoting the fair and just administration of governmental law. In furtherance of this purpose, the Government Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous *amicus curiae briefs* in state and federal courts.[2] The Section's Council is interested in emphasizing the importance of preserving governmental Immunity under the Governmental Liability for Negligence Act 170 of 1964.

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[1] The Government Law Section certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] The Government Law Section Council, the decision-making body of the Section, is currently comprised of 21 members. The filing of this *Amicus Curiae* Brief was authorized on May 3, 2025 at a regular meeting of the Council held in accordance with the Council's Bylaws. A quorum of the Council was present at the meeting, and the motion passed by 2/3 vote (10-0 with 3 abstentions). The position expressed in this *Amicus Curiae* brief is that of the Government Law Section only and is not the position of the State Bar of Michigan.

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The Government Law Section has a longstanding interest in assuring a clear and correct interpretation of MCL 691.1401 *et seq.* The Governmental Tort Liability Act was enacted by Michigan's Legislature to create strong protections for governmental bodies and their officers, employees, and volunteers. This statute was intended to protect government coffers from ruinous liability given the many unique risks and dangerous activities that they are obligated to undertake in service to the public. For decades, this Court has consistently interpreted and applied the statute to protect government defendants from liability except when the complained-of conduct falls within a narrowly-written exception to the Governmental Tort Liability Act, MCL 691.1401 et seq. And for decades, this Court has decided cases arising under the statute in a clear and cogent way that allows government defendants to invoke the legislatively-provided protections of the statute at an early stage of the proceedings, thus saving the enormous resources that would otherwise be spent on litigation costs and protecting government defendants from the distraction of participating in the defense of litigation against them.

The Government Law Section has a strong interest in assuring that those longstanding protections are preserved. If the scope of governmental immunity under the statute is to be significantly narrowed, this should not be by judicial decision; it should be by legislative act. The Government Law Section is both strongly interested and knowledgeable about the issues presented in this case. The Court of Appeals' 2-1 decision in this case illustrates the confusion surrounding the proper interpretation of the 2014-enacted MCL 691.1407(7) and its interplay with the MISS DIG Act. The 2-1 decision similarly highlights the confusion surrounding the proper interpretation of the sewage disposal system event exception to governmental immunity, MCL 691.1416-1419, and its

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interplay with the MISS DIG Act. Unless the Court of Appeals' opinion is addressed and reversed, numerous cases that would previously have been decided on the basis of a motion for summary disposition will now likely need to proceed to trial. Given the potentially bankrupting outcome of litigation costs and the possibility of run-away jury verdicts after a sympathetic plaintiff presents his or her story at trial, many government defendants with a meritorious defense will be forced to settle cases paying more than their value to avoid the risk of an adverse outcome at trial. While this might be tolerable if the interpretation of governmental immunity was consistent with the statute and this Court's prior decisions, it is not. Review is urgently needed to correct the confusion created by the Court of Appeals' majority opinion in this case.

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## STATEMENT OF BASIS OF JURISDICTION

On May 7, 2025, Defendant-Appellant Independence Township timely filed an application seeking leave to appeal the March 11, 2025 published 2-1 opinion issued by the Court of Appeals. This Court has jurisdiction to consider and grant the application pursuant to MCR 7.303(B)(1). Defendant-Appellant raises highly significant issues arising out of this Court's interpretation the Governmental Tort Liability Act, MLC 691.1401, *et seq*., and the MISS DIG Act, MCL 460.721 *et seq*.

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## STATEMENT OF THE QUESTION PRESENTED

Should this Court grant leave to appeal to provide much-needed guidance to the bench and bar on the proper scope of MCL 691.1401 *et seq*., and on the proper standard by which the trial and appellate courts apply MCL 691.1407(7) and MCL 691.1417-1419 in conjunction with the MISS DIG Act, MCL 460.721 *et seq*.?

Plaintiff-Appellant Brian Zezula answers "No."

Defendant-Appellee Independence Township answers "Yes."

*Amicus Curiae* the Government Law Section of the State Bar of Michigan answers "Yes."

The Oakland County Circuit Court answered "No."

The Court of Appeals answered "No."

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## STATEMENT OF FACTS

*Amicus Curiae* the Government Law Section relies on the Statement of Facts set forth in Defendant-Appellant's Application for Leave to Appeal.

## STANDARD OF REVIEW

Statutory interpretation presents an issue of law that is reviewed de novo. *Renny v Dep't of Trans*, 478 Mich 490, 495; 734 NW2d 518 (2007). Independence Township's entitlement to summary disposition of Plaintiff's tort claim on the basis of immunity is also reviewed de novo. *Id*. at 495.

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## ARGUMENT

### THIS COURT SHOULD GRANT LEAVE TO APPEAL TO PROVIDE MUCH-NEEDED GUIDANCE TO THE BENCH AND BAR ON THE PROPER SCOPE OF MCL 691.1401, *ET SEQ.*, AND ON THE PROPER STANDARD BY WHICH THE TRIAL AND APPELLATE COURTS APPLY MCL 691.1407(7) AND MCL 691.1417-1419 IN CONJUNCTION WITH THE MISS DIG ACT, MCL 460.721 *ET SEQ*

Michigan's broad immunity was enacted to protect governmental parties from the distractions and expenses of defending tort lawsuits filed against them in the same way that the doctrine of sovereign immunity had historically protected the state. See generally *Ross v Consumers Power Co,* 420 Mich 567, 596; 363 NW2d 641 (1984). This Court emphasized that governmental immunity "protects the state not only from liability, but from the great public expense of having to contest a trial." *Odom v Wayne County*, 482 Mich 459, 478; 760 NW2d 217 (2008). The statute also is predicated on the theory that governmental parties engage in a great deal of risky conduct in the course of serving the public, often are seen as deep-pocket defendants, and lawsuits against them may serve to deter useful and socially desirable conduct because of the risk of suit. To guard against this, the Legislature enacted broad protections for governmental parties of all kinds. The statute was intended to protect governmental parties against the burdens of discovery and trial, as well as against the potential for liability. *Odom*, 482 Mich at 479.

The Court of Appeals' majority in this case affirmed a circuit court's denial of summary disposition against a governmental entity, Independence Township. And it did so by jettisoning well-settled principles governing interpretation of MCL 691.1401, *et seq* and longstanding precedent governing the scope of governmental immunity and the breadth of the limited exception to that immunity under the MISS DIG Act, MCL 460.721 *et seq*. Left unreviewed by this Court, the 2-1 Court of Appeals' published opinion exposes

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governmental entities to lawsuits never contemplated by the Legislature when it enacted the MISS DIG Act or amended the Governmental Tort Liability Act. Equally troubling, the Court of Appeals' opinion leaves both the bench and bar without proper guidance as to how the MISS DIG Act should be interpreted and applied. Even amongst the three-judge panel that decided the appeal, a consensus as to how to properly interpret MCL 691.1407(7) in conjunction with the MISS DIG Act could not be reached, exemplifying the need for this Court's guidance.

It has been nearly twenty years since the Court of Appeals addressed the prior version of the MISS DIG Act and its interplay with MCL 691.1407. *State Farm Fire & Cas Co v Corby Energy Services, Inc*, 271 Mich App 480; 722 NW2d 806 (2006). And this Court has never addressed the interplay between the 2014 amendments to the Governmental Tort Liability Act, specifically, the codification of MCL 691.1407(7) and MCL 460.721 *et seq*. This Court's review is necessary now to restore predictability to the rule of law established by the Legislature when it enacted broad governmental immunity with narrowly drawn exceptions, as evidenced by the specific, limited remedies available against governmental entities under the MISS DIG Act.

### A. MICHIGAN'S LEGISLATURE ENACTED BROAD PROTECTION AGAINST TORT LIABILITY SUBJECT TO NARROWLY-DRAWN STATUTORY EXCEPTIONS

Decades ago, the Michigan Legislature acted to protect governmental entities from potentially crushing liability for engaging in activities to serve the public that may lead to tort liability. As time has passed, bench and bar may no longer recall the fraught debate about common law sovereign immunity, the public policy reasons for protecting all governmental entities from tort liability, and the Legislature's definitive enactment of MCL

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691.1401, *et seq* to resolve those questions. But that backdrop set the stage for the Legislature's enactment of broad protections for governmental entities.

The statute remains the departure point for any discussion about the scope of governmental immunity and the limits of the statutory exceptions to immunity. The statute reads as follows:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

MCL 691.1407(1). The statutory language specifically limits exceptions to immunity to those "in this act." MCL 691.1407(1). The current statute can be traced to 1965 when Public Act 1964, No. 170, § 7 was enacted. The language has been amended multiple times but the introductory phrase "Except as in this act otherwise provided," has remained constant since the initial version. See Editor's and Revisor's Historical and Statutory Notes of MCL 691.1407, (Westlaw, Exhibit A, APX 001353a-0001356a). The broad immunity under the statute explicitly bars other common law or court-created exceptions to the act.

In its decision in *Ross v Consumers Power Co*, 420 Mich 567, this Court confirmed Michigan's commitment to the doctrine of governmental immunity. In choosing to ascribe an admittedly broad and liberal definition to the term "governmental function" as found in 1964 PA 170, the *Ross* court embraced the public policy underpinnings by protecting governmental agencies from tort liability whenever they are involved in an activity expressly or impliedly mandated or authorized by constitution, statute, or other law. Since *Ross*, this Court has repeatedly pursued a path evidencing its awareness of the broad grant

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of immunity chosen in *Ross* and codified in MCL 691.1401 *et seq*.[3] And the Legislature responded by enacting broad protections, which it has maintained subject to narrow exceptions for decades. MCL 691.1401 *et seq*.

This Court's jurisprudence over the many years since Michigan's Governmental Tort Liability Act was passed in 1964 has adhered to the text and spirit of the statute. Despite repeated efforts to judicially expand exceptions to immunity, which was intended to provide broad protection against tort liability, this Court has enforced the legislative plan. *Reardon v Dep't of Mental Health*, 430 Mich 398; 424 NW2d 248 (1988); *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 245; 393 NW2d 847 (1986). Short of explicit legislative authorization to do so, courts do not properly burden cities, townships, and villages with more liabilities by allowing claims falling outside the parameters of the narrowly-drawn statutory exception. *See*, e.g., *Yono v Dept of Transportation*, 499 Mich 636; 885 NW2d 445 (2016) (interpreting highway exception to Governmental Tort Liability Act, MCL 691.1402(1), broadly in favor of governmental entity; *Nawrocki v Macomb County Road Com'n*, 463 Mich 143; 615 NW2d 702 (2000) (interpreting highway exception broadly in favor of governmental entity). To do so would be contrary to sound judicial expressions recognizing the legislature's intention to confer immunity upon governmental agencies for most of the activities in which they participate. *See Ross, supra*,

[3] Many times, the Court has instructed that the statutory definition of "governmental function" found at MCLA 691.1407(1); MSA 3.996(107)(1) provides broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function. *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 245; 393 NW2d 847 (1986); *Wade v Dep't of Corrections*, 439 Mich 158, 166; 483 NW2d 26 (1992); and *Peterman v Dep't of Natural Resources*, 446 Mich 177, 203; 521 NW2d 499 (1994). Concomitantly, the exceptions to such a broad grant of immunity are to be narrowly construed. *Bayn v Dep't of Natural Resources,* 202 Mich App 66; 507 NW2d 746 (1993).

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at 620-621 and MCLA 691.1407(1). As specifically observed by the *Ross* court, the consensus which the Court's efforts produced in that case was not to be viewed as the Court's individual or collective determination about what would be the fairest or just, or the best public policy. Rather, the Court's decision reflected the legislature's intention about the nature and scope of governmental immunity. *Ross, supra*, at 596. In upholding the legislative intent established by the Governmental Tort Liability Act, this Court has long expressed its awareness that "[b]ecause immunity necessarily implies that a 'wrong' has occurred, we are cognizant that some tort claims, against a governmental agency, will inevitably go unremedied." *Nawrocki*, 463 Mich 157.

### B. THIS COURT'S GUIDANCE IS NEEDED TO CLARIFY THAT THE 2014 AMENDMENT TO MCL 691.1407 CREATED A LIMITED EXCEPTION ALLOWING FOR COMPLAINTS AGAINST A GOVERNMENTAL AGENCY SEEKING AN ADMINISTRATIVE REMEDY UNDER THE MISS DIG ACT – NOT A TORT CLAIM IN STATE COURT

By statute, the legislature consented to tort liability being imposed on governmental defendants in only six narrowly-construed circumstances, which are colloquially referred to as: (1) the highway defect exception, MCL 691.1402; (2) the motor vehicle negligence exception, MCL 691.1405; (3) the proprietary function exception, MCL 691.1413; (4) the failure to repair or maintain public buildings, MCL 691.1406; (5) the hospital exception, MCL 691.1407; and (6) the sewer disposal event exception, MCL 691.1417.

A complete understanding of the issue before this Court - and its importance – requires some statutory history discussion. In 1974, the original Michigan's Protection of Underground Facilities Act (Act 53 of 1974), MCL 460.701, *et seq*, was enacted "to protect underground facilities during construction activities." *White v City of Ann Arbor*, 406 Mich 554, 564 n 2; 281 NW2d 283 (1979). The Protection of Underground Facilities Act

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established an association, commonly referred to as "MISS-DIG," for the receipt of notification regarding construction activities in areas where public utilities have underground facilities. MCL 460.701(1)(a), repealed by PA 2013, No 174, Eff April 1, 2014. The Protection of Underground Facilities Act expressly precluded excavation and other activities in areas containing underground facilities unless the location of all underground facilities in the area was ascertained, as prescribed in MCL 460.705 or 460.707.

In 2006, some thirty years after its enactment, the Court of Appeals affirmed that the Protection of Underground Facilities Act, while "preserv[ing] intact any civil remedies that a person 'may have' for damage caused by a public utility's negligence in staking its facilities…does not waive or abrogate the immunity provided by the Governmental Tort Liability Act, either expressly or by necessary inference from the statute." *State Farm Fire & Cas Co v Corby Energy Services, Inc*, 271 Mich App 480, 491; 722 NW2d 906 (2006). The *State Farm* Court grounded its ruling in the well-settled principle that the "immunity provided by the Governmental Tort Liability Act is broad and its exceptions are to be narrowly construed[.]" *Id*. at 491. Thus, the *State Farm* Court interpreted MCL 460.714[4]

[4] Until 2014, MCL 460.714, the statute of focus in *State Farm*, provided as follows:

> In a civil action in a court of this state, when it is shown by competent evidence that damage to the underground facilities of a public utility resulted from excavating, tunneling, drilling or boring procedures, or demolishing operations, or the discharge of explosives, as described in section 3, and that the person responsible for giving the notice of intent to excavate, tunnel, demolish, or discharge explosives failed to give the notice, or the person did not employ hand-digging or failed to provide support, the person shall be liable for the resulting damage to the underground facilities, but the liability for damages shall be reduced in proportion to the negligence of the public utility if it fails to comply with section 8.

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not as imposing liability on public entities for a failure to give proper notice under MCL 460.708, but rather imposing liability on a "person" only if underground facilities of a public utility are damaged and simply reducing the public utility's recovery "in proportion to the negligence of the public utility" if the public utility failed to comply with the notice requirements of MCL 460.708. *State Farm*, 271 Mich App at 487.

Here, the Majority Opinion concluded that 2014 amendments to the Governmental Tort Liability Act and the Protection of Underground Facilities Act provided "a broad exception to governmental immunity for alleged violations of the MISS DIG Act." *Zezula v Brown*, --- NW3d --, at *3. But this is an incorrect interpretation of both the Governmental Tort Liability Act and the MISS DIG Act. When writing about the topic of statutory interpretation, Justice Stevens once announced that the "first canon of construction is obvious: 'Read the statute." John Paul Stevens, THE SHAKESPEARE CANON OF STATUTORY CONSTRUCTION, 140 U Pa L Rev 1373, 1374 (1992). He went on to say that "the second canon of statutory construction is much like the first: 'Read the entire statute." *Id*. at 1376. And when multiple statutes are involved, the courts are encouraged to find a harmonious construction of the statutes by regarding "'all statutes upon the same general subject-matter as part of one system...'" *International Business Machines Corp v Department of Treasury*, 496 Mich 642, 652; 852 NW2d 865 (2014), quoting *Rathbun v Michigan*, 284 Mich 521, 544; 280 NW2d 35 (1938)." Further, "[s]tatutes *in pari materia,* although in apparent

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*Michigan Consol. Gas Co. v. Kamphuis Pipeline Co.*, No. 304679, 2013 WL 195521, at *4 (Mich. Ct. App. Jan. 17, 2013), quoting MCL 460.714.

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conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each...." *Id*. As this Court has explained:

> It is a well-established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. In other words, in determining the meaning of a particular statute, resort may be had to the established policy of the legislature as disclosed by a general course of legislation. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions.

*Int'l Bus Machines Corp v Dep't of Treasury,* 496 Mich at 652-53.

In April 2014, the Legislature amended MCL 691.1407 to clarify that "[t]he immunity provided by this act does not apply to liability of a governmental agency under the MISS DIG underground facility damage prevention and safety act." MCL 691.1407(7). The MISS DIG Act was amended at the same time to include a reciprocal provision, which states, "[e]xcept as provided in this section, this act does not affect the liability of a governmental agency for damages for tort or the application of 1964 PA 170, MCL 691.1401 to 691.1419," i.e., the Governmental Tort Liability Act. The legislature used the same phrase in both statutes to emphasize that the remedies in the MISS DIG Act are allowed but no other.

The MISS DIG Act's limitation on the remedies available as against governmental agencies is evident throughout the statutory scheme, beginning with its Preamble:

> AN ACT…to prescribe penalties; to allow the imposition of a fee*; to provide for immunity for certain individuals; to allow claims for damages against certain governmental entities in certain circumstances*; and to repeat acts and parts of acts.

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PA 2013, No 174, Eff April 1, 2014 (emphasis added). Per Section 12 of the MISS DIG Act, the remedy against a governmental agency is limited to an administrative remedy for a civil fine and possibly damages:

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

MCL 460.732(2).

The Majority Opinion in this case, interpreting "liability" in MCL 691.1407(7) to mean "all legal responsibility," concluded that "[o]our statutory interpretation need not go further- the Governmental Tort Liability Act has a broad exception to immunity for violations of MISS DIG." *Zezula*, *supra*, at *3. However, under Justice Stevens' tutelage, the court's inquiry must extend beyond a reading of MCL 691.1407(7) to the MISS DIG Act, and specifically, to MCL 460.732(2). When read together, MCL 691.1407(7) and MCL 460.732(2) make clear that the MISS DIG Act creates liability for governmental agencies who violate the Act through a *single administrative remedy* for fines and damages that may be recoverable by the facility owner or operator. This administrative remedy is not precluded by governmental immunity. But neither statutory scheme permits a facility owner or operator to file a civil lawsuit for an alleged violation of MISS DIG. To read the statutes in this way would essentially eviscerate the broad protections of governmental immunity that this Court has recognized for 40 years and open governmental entities up to civil lawsuits the legislature expressly sought to prevent.

Judge Boonstra's dissent offers a vitally important perspective on this case and perhaps some insight into what has led to the current status of the case. Judge Boonstra cautioned that that it is the role of the legislature, not the court, to expand the limited

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nature of the governmental immunity exception created by MCL 460.732(2) and that "[i]f the Legislature wishes to create a broad exception to governmental immunity in relation to the MISS Dig act, it should say so with clarity." *Zezula*, *supra*, at *9, n 5 (Boonstra, P.J., dissenting). As Judge Boonstra commented, it is not for the courts to distort long-standing legal principles that have resulted in a comprehensive, clear, governmental immunity doctrine in Michigan that effectuates the broad protection afforded by Michigan's legislature. Nor is it the function of the courts to "engraft[] onto the law a broad and all-encompassing exception that our Legislature has not seen fit to adopt." *Id*., at *9. But the majority opinion, in permitting the plaintiff to proceed with a tort claim against Independence Township under the MISS DIG Act, appears to have done just that. The divide amongst the panel that decided this case underscores the need for this Court's intervention to provide the proper interpretation of MCL 691.1407(7) in relation to the MISS Dig Act.

Without this Court's review and reversal, governmental entities should anticipate an influx of lawsuits for violations of the MISS DIG Act, further burdening Michigan's already financially-strapped local governments. Were these lawsuits consistent with MCL 691.1407(7) and the MISS Dig Act, the Government Law Section would not urge for a reversal. However, reading MCL 691.1407(7) in conjunction with the MISS DIG Act leads to the inescapable conclusion that the MISS DIG Act does not abrogate governmental immunity, but rather provides limited, specific avenues for relief against a governmental entity – specifically, for potential fines and damages pursuant to an order of the MPSC. This Court's intervention is therefore necessary to reverse the Court of Appeals' majority opinion and restore predictability to the rule of law as expressed by the legislature.

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### C. THIS COURT'S GUIDANCE IS SIMILARLY NEEDED TO CLARIFY THAT MCL 691.1417, THE SEWAGE DISPOSAL SYSTEM EVENT EXCEPTION TO GOVERNMENTAL IMMUNITY, DOES NOT APPLY TO CLAIMS ALLEGING A FAILURE TO PROPERLY MARK FACILITIES UNDER THE MISS DIG ACT.

Plaintiff's position that the sewage disposal system event exception to governmental immunity is invoked by an alleged failure to properly mark facilities under the MISS DIG Act is the quintessential "square peg, round hole" idiom; it simply does not fit. Michigan's MISS DIG is a resource for preventing underground utility damage and ensuring public safety by providing guidance about underground wires and pipes so that those digging do not inadvertently damage them and create dangerous incidents, like leaks, explosions, fires, and other dangerous situations. The sewage disposal system event exception to governmental immunity was intended to create a narrow exception to immunity for sewer backups created generally by flooding and overflows – not to warn the public about where not to dig. But under the Court of Appeals' majority opinion, the provision of the MISS DIG Act requiring facilities to be marked can provide the basis for a claim under the sewage disposal system event exception to governmental immunity.

This Court's guidance is needed to clarify that an alleged failure to properly mark facilities as required by the MISS DIG Act is not a "defect" in the sewage disposal system and thus the sewage disposal system event exception does not afford a basis for a tort claim. Public Act 222 of 2001, became effective on January 2, 2002, enacting MCL 691.1417 *et seq*, which sets forth the sole remedy and law establishing the governmental immunity exception for overflows or backups of a sewage disposal system and in defining these exceptions to that immunity. Prior to that time, extensive litigation over sewer backups had been brought under a common law exception to governmental immunity generally

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referred to as "trespass nuisance" exception. See, e.g., *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988); *McSwain v Township of Redford*, 173 Mich App 492; 434 NW2d 171 (1988). That line of cases collimated in a rule that created a virtual strict liability standard for municipality holding them liable for any backup. *See, CS&P v City of Midland*, 620 NW2d 7 (2000). That case led to a second Supreme Court matter arising out of regional floods in 2000. In *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), this Court specifically and explicitly overruled the prior cases that form the basis of the trespass nuisance exception.

In response to *Pohutski*, and in order to "afford property owners, individuals and governmental agencies with greater efficiently, certainty, and consistency and the provision of relief from damages or physical injuries caused by a sewage disposal event" the Legislature enacted Public Act 222, or MCL 691.1416-691.1419. This statute defines the liability of a municipality operating a sewage disposal system and dictates the elements that plaintiffs must prove in order to recover damages from a sewage system disposal event. This is the sole means of recovery available to Zezula in this case – but for the reasons set forth below, Zezula cannot avail himself of this exception to governmental immunity.

Specifically, MCL 691.1417 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"[5] and the governmental agency is an

[5] Per MCL 691.1416(k), a "sewage disposal system event" or "event" is defined as "the overflow or backup of a sewage disposal system onto real property. An overflow or backup

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appropriate governmental agency. MCL 691.1417(2). The statute further provides that if a claimant believes that an "event" caused property damage or physical injury, the plaintiff must establish that all of the following existed at the time of the event:

(a) The governmental agency was the 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 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 cause of the event and the property damage or physical injury. MCL 691.1417(3).

MCL 691.1417(2), in combination with MCL 691.1416-1419, provides:

> (2) A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency. Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory.

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is not a sewage disposal system event if any of the following was a substantial proximate cause of the overflow or backup:

(*i*) An obstruction in a service lead that was not caused by a governmental agency.

(*ii*) A connection to the sewage disposal system on the affected property, including, but not limited to, a sump system, building drain, surface drain, gutter, or downspout.

(*iii*) An act of war, whether the war is declared or undeclared, or an act of terrorism."

MCL 691.1416(k)(*i*)-(*iii*).

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Thus, in order for plaintiffs like Zezula to prevail, they must submit sufficient evidence to show that they have suffered a sewage disposal system event as defined by MCL 691.1416(k)(*i*)-(*iii*). But that is just the first hurdle. Even if plaintiffs can show they suffered a sewage disposal system event, they must also show that the sewage disposal system had a "defect." MCL 691.1416(e) defines a "defect" to mean a "construction, design, maintenance, operation, or repair defect."

This Court's intervention and guidance is needed to clarify that a failure to properly mark facilities as required by the MISS DIG Act, MCL 460.727, is not a "defect" in the sewage disposal system as the Governmental Tort Liability Act defines "defect." The trial court in this case was seemingly misdirected by a statement in *State Farm*, 271 Mich App 484, n 2, in which the *State Farm* Court determined that the marking of a water main constituted a "governmental function" under the Governmental Tort Liability Act . There is no meaningful correlation between a "governmental function" under the Governmental Tort Liability Act and a "defect" under the sewage disposal system event exception to governmental immunity. Nor is there any meaningful correlation between an alleged failure to mark and a "defect" as defined under the Governmental Tort Liability Act . Accordingly, permitting amendments to complaints to allege actions which do not fall within the sewage disposal system event exception to governmental immunity is futile and unnecessarily increases litigation costs for government defendants that could otherwise be spent for benefit of the taxpaying public.

Without this Court's intervention and clarification, both the bench and bar will remain confused about how broadly to define "defect" when considering a failure to mark under the MISS DIG Act. This, in turn, creates the potential for liability for governmental

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defendants the legislature sought to prevent. The time is ripe for this Court to step in and provide guidance on the issue.

## RELIEF

WHEREFORE, *Amicus Curiae* the Government Law Section of the State Bar of Michigan respectfully requests this Court to grant leave to appeal.

Respectfully submitted,

PLUNKETT COONEY

By: */s/Mary Massaron*

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Dated: July 2, 2025

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## CERTIFICATE OF COMPLIANCE

STATE OF MICHIGAN )
) SS.
COUNTY OF OAKLAND )

MARY MASSARON, being first duly sworn, certifies and states the following:

1. She is a shareholder with the firm Plunkett Cooney, and is in principal charge of the above-captioned cause for the purpose of preparing the attached brief of the Government Law Section as *amicus curiae*;

2. The brief on appeal prepared by her office complies with the type-volume limitation;

3. Plunkett Cooney relies on the word count of their word processing system used to prepare the brief, using Cambria size 12 font; and

4. The word processing system counts the number of words in the brief as 4,885.

Dated: July 2, 2025

*/s/Mary Massaron*
MARY MASSARON