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STATE OF MICHIGAN
IN THE SUPREME COURT

BRIAN ZEZULA,

Plaintiff-Appellee,

v.

INDEPENDENCE TOWNSHIP,

Defendant-Appellant,

and

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

Defendants.

Supreme Court No. 168483

Court of Appeals Docket No. 368261

Oakland County Circuit Court
Case No. 2022-197937-NZ

Amicus Curiae Brief of the Michigan County Road Commission Self-Insurance Pool

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STATEMENT OF JURISDICTION

The Michigan County Road Commission Self-Insurance Pool ("MCRCSIP") adopts Defendant Independence Township's (the "Township's") Statement of Jurisdiction.[1]

[1] Pursuant to MCR 7.312(H)(5), MCRCSIP states that counsel for a party did not author this brief in whole or in part, and no such counsel or party or any other person or entity other than MCRCSIP contributed to the preparation and submission of this brief.

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STATEMENT OF THE QUESTIONS INVOLVED

I. Did the Court of Appeals err when it concluded that the commission-based remedies outlined in MCL 460.732(2) are not the exclusive remedies available against a governmental agency which allegedly violates the provisions of the MISS DIG statute?

Independence Township answers:	Yes.
Plaintiff answers:	No.
The trial court answered:	No.
The Court of Appeals answered:	No.
MCRCSIP answers:	Yes.

II. Did the Court of Appeals err when it found failure to mark a facility under MISS DIG was a "defect" in a sewage disposal system under the GTLA?

Independence Township answers:	Yes.
Plaintiff answers:	No.
The trial court answered:	No.
The Court of Appeals answered:	No.
MCRCSIP answers:	Yes.

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INTRODUCTION

Over 50 years ago the Michigan Legislature recognized the unique liability risks facing all public entities. The result was the Governmental Tort Liability Act (the "GTLA").[2] Under that statutory framework, every governmental agency is immune from tort liability when engaged in a governmental function.[3] There are six statutory exceptions to this broad grant of governmental immunity.[4] And, a person may only seek certain damages against a governmental entity if their claim falls within one of those enumerated statutory exceptions to governmental immunity.[5] That's because, except under rare circumstances, our Legislature intended to shield governmental agencies, their hardworking employees, and the tax dollars that fund them from the pitfalls of civil litigation.

This Court has repeatedly and consistently held that "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed."[6] In 2014, the Governmental Tort Liability Act (GTLA) was amended to include MCL 691.1407(7), which provides:

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[2] MCL 691.1401, *et seq*.

[3] *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

[4] *Lash v Traverse City*, 479 Mich 180, 195 n. 33; 735 NW2d 628 (2007).

[5] *Milot v Department of Transportation*, 318 Mich App 272, 276; 897 NW2d 248 (2016).

[6] *Sunrise Resort Ass'n, Inc v Cheboygan Cnty. Rd Comm*, 511 Mich 325, 334; 999 NW2d 423 (2023), quoting *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) (emphasis in original)

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> 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.

In the underlying case of *Zezula v Brown*, the Court of Appeals has interpreted this exception to be one for all legal responsibility for any violation of the MISS DIG Act.[7] With respect to the appellate court, this interpretation is wrong. It is inconsistent with the plain language of the exception itself and the language of the MISS DIG Act and incongruent with the rules of interpretation regarding exceptions to the GTLA. For these reasons, the Township's application warrants this Court's discretionary review and reversal.

Contrary to the Court of Appeals' decision, this exception is not one for any legal responsibility that may stem from any violation of MISS DIG but is instead for "liability of a governmental agency *under* the MISS DIG" Act. MCL 691.1407(7) (emphasis added). To determine what liability a governmental agency has "under" MISS DIG, it is necessary to look to that Act. And, under MISS DIG, governmental agencies can be held liable through an exclusive set of remedies carried out by filing a complaint with the Michigan Public Service Commission (MPSC). MCL 460.732. MISS DIG also expressly states that, apart from the MPSC-based remedies provided in MCL 460.732, the Act does not disturb immunity for governmental entities as established under the GTLA.

[7] *Zezula v Brown*, ___Mich App ___; ___NW3d ___, (2025) (Docket No. 368261).

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The Court of Appeals conclusion that the commission-based remedies are not exclusive is wrong. To start, MCL 460.732 states that, apart from the commission-based remedies provided in that section, immunity is undisturbed. Moreover, the very section the Court of Appeals relied upon to find otherwise plainly provides that it is inapplicable to governmental entities. See MCL 460.731(2), (3). In other words, even though MCL 460.731(3) provides that "[a] complaint filed under subsection (2) does not limit a person's right to bring a civil action to recover damages that person incurred arising out of a violation of the requirements of this act," subsection (2) is not applicable to governmental entities at all. Thus, while a complaint filed in the MPSC does not limit a person's right to bring a civil action against a nongovernmental entity, MISS DIG does not reserve (or create) this right for any claims against a governmental actor. See MCL 460.732.

If governmental liability were meant to mirror that of private entities, there would be no reason for the MISS DIG Act to include a separate provision addressing governmental liability. But it does, and the MISS DIG exception contained in the GTLA only includes liability as already plainly set forth for governmental entities "under" MISS DIG itself.

The Court of Appeals also incorrectly applied a broad application of the sewage disposal system event (SDSE) exception to the GTLA. In sum, alleged failure to mark under MISS DIG is not part of the "operation" of the sewage system itself.

The Township's application also meets the criteria of MCR 7.305(B) and warrants this Court's discretionary attention and review. Immunity is an inherent

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characteristic of government; the government cannot be sued except where it expressly consents.[8] The Court of Appeals opinion, which pronounces a "broad" exception to governmental immunity, is clearly erroneous and will cause material injustice. It also involves a legal principle of major significance to the state's jurisprudence, and an issue of significant public interest involving a case against a political subdivision of the state. For each of these reasons and as discussed in greater detail below, this Court should grant leave and reverse.

[8] See *Ross v Consumers Power Co*, 420 Mich 567, 601; 363 NW2d 641 (1984); *Anzaldua v Band*, 457 Mich 530, 552; 578 NW2d 306 (1998); *Odom v Wayne Cnty*, 482 Mich 459, 477–479; 760 NW2d 217 (2008).

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STATEMENT OF FACTS

MCRCSIP adopts Independence Township's statement of facts.

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LEGAL STANDARD

MCRCSIP adopts the Township's statement of the legal standard of review.

ARGUMENT

I. MCRCSIP's Interest and Background.

For over 40 years, the Michigan County Road Commission Self-Insurance Pool ("MCRCSIP" or the "Pool") has provided general liability and auto coverage to Road Commissions within the State. Its present Membership includes the Boards of County Road Commissioners for the Counties of Alcona, Alger, Allegan, Alpena, Antrim, Arenac, Baraga, Barry, Bay, Bay County Water & Sewer Department,[9] Benzie, Branch, Cass, Charlevoix, Cheboygan, Chippewa, Clare, Clinton, Crawford, Delta, Dickinson, Eaton, Emmet, Genesee, Gladwin, Gogebic, Grand Traverse, Gratiot, Hillsdale, Houghton, Huron, Iosco, Iron, Isabella, Kalkaska, Kent, Keweenaw, Kalamazoo, Lake, Lapeer, Leelanau, Lenawee, Livingston, Luce, Mackinac, Manistee, Marquette, Mason, Mecosta, Menominee, Midland, Missaukee, Monroe, Montcalm, Montmorency, Muskegon, Newaygo, Oceana, Ogemaw, Ontonagon, Osceola, Oscoda, Otsego, Ottawa, Presque Isle, Roscommon, Saginaw, Sanilac, Schoolcraft, Shiawassee, St. Clair, St. Joseph, Tuscola, Van Buren, Washtenaw, and Wexford. The Pool also insures many water departments under the control of the above-listed Road Commission Boards.

[9] Bay County Water & Sewer Department shares a Board with the Bay County Road Commission and is thus eligible for Membership.

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As permitted under 1951 PA 35, the Pool's main objectives are focused on the unique exposures of its Members, which necessarily includes a particularized interest in any aspect of the law that may impact the day-to-day operations or exposure to liability arising from those operations. Jurisprudence affecting governmental immunity, stare decisis, and consistent construction and application of the Governmental Tort Liability Act ("GTLA") and associated or similar statutes is important to Members of the Pool. Each of these matters also has a direct and tangible daily impact on their operations, as well as the operations of the Pool itself. Ultimately, MCRCSIP advocates for a predictable legal process—one that is consistent with well-established precedent and the plain statutory language—that benefits the Pool's Members and the public they serve.

To that end, it is MCRCSIP's position that the published Court of Appeals Opinion in *Zezula v Brown* is not consistent with either of these tenets. Moreover, this Court's resolution of the issues involved in this appeal will inevitably have an impact on all governmental entities, including, but not limited to, road commissions across the State. In fact, governmental agencies may act both as "excavators" and as "facilities" under the MISS DIG Act, and the Court of Appeals' decision may impose liability on them even beyond that alleged against the Township in this case.[10] As such, the Pool provides a similar yet distinct perspective from the Township's

[10] As expressed in the Township's application, it has fully denied all allegations of wrongdoing and liability.

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Application for Leave regarding a governmental agency's liability under the GTLA and MISS DIG.

II. The Court of Appeals erred when it concluded that the commission-based remedies outlined in MCL 460.732(2) are not the exclusive remedies available against a governmental agency for any alleged violations of the MISS DIG Act.

In sum, the GTLA's MISS DIG exception is a narrow one that limits liability to that found "under the MISS DIG" Act. And, "under" MISS DIG, governmental agencies have well-defined liability that is unambiguously set forth under (and limited to) MCL 460.732, which also reaffirms that MISS DIG does not negate immunity except as contained under that section. The Court of Appeals incorrectly concluded that the exception was one for all liability for any MISS DIG *violation*, not, as MCL 691.1407(7) directs, for the liability proscribed "under" MISS DIG. The Court of Appeals also erroneously applied a section that unambiguously states it is inapplicable to governmental actors. See MCL 460.731. For each of these reasons, this Court should reverse.

This appeal involves interpretation and application of the Governmental Tort Liability Act (GTLA), MCL 691.1401, et seq. Under the GTLA, a governmental agency is immune from tort liability when it is "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). "The act provides several exceptions to this general rule." *Ray v Swager*, 501 Mich 52, 62; 903 NW2d 366 (2017). These statutory exceptions include "the highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception,

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MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3)." *Wesche v Mecosta Cnty Rd Comm'n*, 480 Mich 75, 84 n 10; 746 NW2d 847 (2008). And, of course, the MISS DIG exception, found under MCL 691.1407(7).

This Court has repeatedly and consistently recognized, however, that "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Sunrise Resort Ass'n, Inc v Cheboygan Cnty. Rd Comm*, 511 Mich 325, 334; 999 NW2d 423 (2023), quoting *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) (emphasis in original); see also *Mann v City of Detroit*, ___Mich ___, ___; 21 NW3d 451 (2025). This guiding principle is in addition to the normal rules of statutory construction. See *Sunrise*, 511 Mich at 333-334. To that end, "[w]hen a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id.* at 334.

As explained in greater detail below, the Court of Appeals' error was twofold. First, its interpretation of the MISS DIG Act is not faithful to the plain language of the statutes at issue. Moreover, even assuming for sake of argument that there is some ambiguity (there's not), the Court further erred by applying an interpretation of the MISS DIG exception that was exceedingly broad, contrary to the nuanced language of the MISS DIG Act itself *and* the repeated and consistent instruction from this Court. As such, this Court should grant leave and reverse.

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A. History and specifics of the MISS DIG Act.

The MISS DIG Act, MCL 460.721, et seq., (commonly referred to as MISS DIG) provides a reporting and notification system for underground public utilities to prevent damages to those utilities.[11] Essentially, MISS DIG creates a system for marking these utilities prior to excavation or other potentially damaging construction projects.

And this is how it works: to start, under MISS DIG, an "excavator" is required to give notice to MISS DIG System, Inc., of their intent to excavate or blast in an area.[12] This notice must contain several details and must be provided at least 72 hours (but not more than 14 days) before the proposed excavation or blasting.[13] MCL 460.725. The MISS DIG System then processes the dig notice and transmits it to "facility owners and facility operators" with facilities in the area of the proposed

---

[11] The MISS DIG Underground Facility damage prevention and safety was originally enacted in 1974 and was reenacted in 2014. See 1974 PA 53, superseded by 2013 PA 174.

[12] The MISS DIG System, Inc., is a Michigan nonprofit corporation that carries out the functions of the notification system set forth in MISS DIG. MCL 460.724.

[13] An "excavator" includes a governmental agency who engages in excavating ("moving, removing, or otherwise displacing earth, rock, or other material below existing surface grade with power tools or power equipment") or blasting ("changing the level or grade of land or rendering, tearing, demolishing, moving, or removing earth, rock, buildings, structures, or other masses or materials by seismic blasting or the detonation of dynamite or any other explosive agent"). See MCL 460.723(n), (w), (m), (c).

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excavation or blasting.[14] MCL 460.726(1). Facility owners and operators, in turn, must then mark their facilities in the area of the proposed excavation or blasting using paint, stakes, flags, or the other customary methods. MCL 460.727(1). These markers are color coded based on a system set forth by the American national standards institute. MCL 460.727(2). A governmental entity can be either an "excavator" or a "facility operator" under MISS DIG. MCL 460.723(n), (p), (w).

MISS DIG also provides its own compliance mechanisms and penalties. First, it provides criminal penalties for those who intentionally damage underground facilities and fail to notify the facilities' owner or operator, attempt to conceal damages to underground facilities, or remove or destroy markings. MCL 460.731(1). Further, MISS DIG provides that an individual may file a complaint against a person, **except a governmental agency**, for violations of MISS DIG with the Michigan Public Service Commission (MPSC) under MCL 460.731(2). Under Section 731, the MPSC may order the violator to pay a fine of up to $5,000 for each violation. MCL 460.731(2). Finally, an individual may file a civil action against a non-governmental violator for damages caused by the violation, even if the individual filed a complaint with the Commission. MCL 460.731(3). See also MCL 460.728.

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[14] Facility owners and facility operators are those who own or control the operation of a "facility," which is defined as "an underground or submerged conductor, pipe, or structure, including, but not limited to, a conduit, duct, line, pipe, wire, or other device and its appurtenances used to produce, store, transmit, or distribute a utility service, including communications, data, cable television, electricity, heat, natural or manufactured gas, oil, petroleum products, steam, sewage, video, water, and other similar substances, including environmental contaminates or hazardous waste." MCL 460.723(p), (q), (o).

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But MISS DIG contains a separate section addressing liability under the Act as to governmental entities. MCL 460.732(1). To that end, MISS DIG permits facility owners or operators to file a complaint against governmental agencies with the MPSC only. MCL 460.732(3). After notice and hearing, the MPSC may order a progressively increasing fine against the governmental agency for each violation within a twelve-month period. For the first violation in the twelve-month period, the MPSC may order the governmental agency to pay a civil fine of up to $5,000. MCL 460.732(3)(a). For the second violation in the twelve-month period, the MPSC may order the governmental agency to pay a civil fine of up to $10,000 and/or order the governmental agency to provide, at its expense, underground facility safety training to its personnel. MCL 460.732(3)(b). Finally, for the third violation in the twelve-month period, the MPSC may order the governmental agency to pay a civil fine of up to $15,000 and/or order the governmental agency to pay the owner or operator of the facility the costs of repairing the damaged facilities. MCL 460.732(3)(c). Importantly, except for the Commission-based remedies described above, MISS DIG specifies that it "does not affect the liability of a governmental agency for damages for tort *or the application of [the GTLA].*" MCL 460.732(1) (emphasis added).

B. Liability for a governmental entity "under" MISS DIG is expressly limited to the remedies provided under MCL 460.732.

The GTLA's MISS DIG exception extends only to liability as provided "under" that Act. It does not, contrary to the majority, provide for liability for any alleged violation of the Act. In turn, MISS DIG expressly limits the liability of governmental entities only to MCL 460.732. Otherwise, MISS DIG is clear: it does not alter or

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change the broad grant of immunity that would otherwise apply pursuant to the GTLA. The Court of Appeals unfortunately, but clearly, erred in pronouncing a "broad" exception to the GTLA based on MCL 691.1407(7) and this Court's discretionary intervention is warranted and necessary.[15]

1. Liability under the MISS DIG exception is governed by the MISS DIG Act.

In reading MISS DIG in conjunction with the GTLA, it is clear that liability "under" the MISS DIG exception is limited to MPSC-based remedies contained in MCL 460.732.

To start, the GTLA provides the broad general rule that "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). This same section thereafter provides that:

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

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[15] While not dispositive, the Court of Appeals' use of the phrase "broad exception to immunity" is worrying and, additionally, a complete departure from Michigan's jurisprudence. As this Court has repeatedly instructed, exceptions to governmental immunity must be construed narrowly. See, *e.g.*, *Nawrocki*, 463 Mich at 149; *Yono v Dept of Transp*, 499 Mich 636, 646; 885 NW2d 445 (2016); *Sunrise Resort Ass'n Inc v Cheboygan Co Rd Comm*, 511 Mich 325, 334; 999 NW2d 423 (2023). Thus, there's no such thing as a "broad exception" to governmental immunity and the Court of Appeals is bound by this Court's jurisprudence. See *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191–92; 880 NW2d 765 (2016). Ultimately, however, it's not necessary to quibble with this pronouncement. The issue is that the MISS DIG exception is not broad because MISS DIG itself expressly limits liability.

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The Legislature's use of the phrase "liability of a governmental agency *under the MISS DIG*" Act necessarily implies that any exception to the broad grant of immunity must be limited to the scope of liability specified by the MISS DIG Act. MCL 691.1407(7) (emphasis added).

Judge Boonstra correctly and succinctly addressed why the Legislature's use of the phrase "under the MISS DIG [Act]" necessarily directs the Court to consider the scope of liability according to that Act in order to assess the nature of the exception by examination of and citation to several opinions of this Court considering identical language. As noted in his dissent:

> The GTLA does not define the term "under," so it is appropriate to turn to a dictionary definition of the term. See *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). The most salient definitions of the preposition "under" as used in the phrase "under the MISS DIG [act]" are "subject to the authority or influence of" and "in accordance with." See *Random House Webster's College Dictionary* (2d ed.), p. 1422. Regarding the latter definition, *Random House Webster's College Dictionary* provides the example phrase "under the provisions of the law." *Id.*
>
> Our caselaw is replete with examples of courts assessing whether and when parties are liable "under the provisions of" a law or a contract through analysis of the relevant statute or contractual provision. See, e.g., *Auto Owners Ins. Co. v Seils*, 310 Mich App 132; 871 NW2d 530 (2015) (liability under the dramshop act); *Johnson v Pastoriza*, 491 Mich 417; 818 NW2d 279 (2012) (liability under the fetal wrongful-death statute); *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005) (liability under the Elliot-Larsen civil rights act); *Flanders Indus., Inc v Mich*, 203 Mich App 15; 512 NW2d 328 (1993) (liability under the Michigan Environmental Response Act, now recodified into the Natural Resources and Environmental Protection Act); *Chrysler Corp v Skyline Indus Servs Inc*, 448 Mich 113, 125; 528 NW2d 698 (1995) (rights and liabilities under a contract). It follows then that, in assessing the phrase "liability ... *under the MISS DIG [act]*," MCL 691.1407(7), we must look to the MISS DIG act itself to ascertain whether, or to what extent, it provides for liability of a governmental agency for alleged violations of

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> the MISS DIG act. And, as the majority correctly notes, the MISS DIG act expressly says that it does not affect the existing status of liabilities or immunities "except as provided in [MCL 460.732]." MCL 460.732(1). *Zezula v Brown*, ___Mich App ___, ___; ___NW3d___ 2025 WL 777587, at *7 (Mich Ct App, March 11, 2025) (Boonstra, J., dissenting).

Of course, these are not the only examples. This Court has also referred to "liability under" certain statutes when considering the plain language of those acts. See, e.g., *McClements v Ford Motor Co*, 473 Mich 373, 388; 702 NW2d 166, opinion corrected on reh 474 Mich 1201; 704 NW2d 68 (2005) (discussing "liability under" the PWDCRA). It is presumed that the Legislature knows and understands the law, including how its words have historically been interpreted and applied by the courts. *McNary v Haitian Refugee Ctr, Inc*, 498 US 479, 496; 111 S Ct 888; 112 L Ed 2d 1005 (1991); *People v Cash*, 419 Mich 230, 241; 351 NW2d 822 (1984) ("a general rule of statutory construction is that the Legislature is presumed to know of and legislate in harmony with existing laws.")(cleaned up).

Thus, the plain language of the GTLA exception provides that immunity is only waived as provided "under" MISS DIG itself.[16] MCL 691.1407(7). Indeed, if the Legislature intended for the exception to apply to all hypothetical "violations of the MISS DIG Act" or it could have easily said so. For example, the exception could provide that "[t]he immunity provided by this act does not apply to a governmental

[16] It is also germane to note that *In re Bradley Estate*, 494 Mich 367, 371; 835 NW2d 545 (2013), was considering the scope of governmental immunity—which is applied broadly based on this Court's jurisprudence—not the scope of any exception. In fact, *In re Bradley Estate* is yet another example of the use of the term "under" to consider the application of a particular statute. See *In re Bradley Estate*, 494 Mich at 378-780 (discussing remedies "under MCL 600.1721.").

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agency's liability for damaging underground facilities for violations of the MISS DIG Act." The Legislature also could have added the language to MCL 460.732(2) that is found under MCL 460.731(3), instructing that complaints filed with the MPSC under Section 731 (again, addressing non-governmental entities) do not preclude civil complaints. But that's not what the Legislature did and it's not what the statute provides. Instead, the MISS DIG exception directs courts (and litigants) to the liability as provided "under" the Act itself. Nothing more; nothing less.

2. The MISS DIG Act limits liability to commission-based remedies.

In turn, the MISS DIG Act limits liability of government agencies to Commission-based remedies. Specifically, MCL 460.732—aptly captioned "Liability of governmental agency"—provides unambiguous instruction on the scope of liability "under" the Act. MCL 460.732(1) provides that "[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." Thus, "under" MISS DIG, governmental agencies are liable as set forth in MCL 460.732, but not pursuant to MISS DIG's other sections.[17] See MCL 460.732; MCL 460.731; MCL 460.728.

In other words, the MPSC-based remedies outlined in MCL 460.732 provide the comprehensive (and exclusive) remedies against governmental entities "under" MISS DIG. As set forth in that section, the Commission may order civil fines, training

[17] "Commission" means the Michigan public service commission created in section 1 of 1939 PA 3, MCL 460.1. MCL 460.723(g).

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for the governmental entity, and for the cost of repair to any damaged facilities, if applicable. MCL 460.732 expressly permits the Commission to order the governmental entity—in addition to a civil fine of up to $15,000— to "pay to the owner or operator the cost of repair of the facilities," i.e., tort damages, if the Commission has already issued a fine against the governmental entity two times in the preceding twelve months. MCL 460.732(3)(c)(ii).[18]

The *Zezula* majority addressed this section but concluded that "these commission-based remedies are not the exclusive pathway to relief" because MCL 460.731(3) expressly states that "[a] complaint filed under subsection (2) does not limit a person's right to bring a civil action to recover damages that person incurred arising out of a violation of the requirements of this act." *Zezula*, slip op. at 5, quoting MCL 460.731(3). This analysis is wrong because it ignores the plain language of MCL 460.731(2).[19] In fact, a complaint cannot be filed against a governmental agency under "subsection (2)." Indeed, it's expressly forbidden: "[u]pon complaint filed with the commission or upon the commission's own motion, following notice and hearing, a person, **other than a governmental agency**, who violates any of the provisions of this act may be ordered to pay a civil fine of not more than $5,000.00 for each violation." MCL 460.731(2). Thus, MCL 460.731(3) provides only that a complaint

[18] In other words, and unlike other violators, governmental entities are given "two-strikes" in a calendar year before they may be ordered to pay tort damages.

[19] This Court should presume that each statutory word or phrase has meaning and avoid rendering any part nugatory. *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010).

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filed against an entity other than a governmental agency does not otherwise limit the ability to file a civil action against that non-governmental actor. Put differently, "under" MISS DIG, the civil complaint contemplated under MCL 460.731(2) does not apply to governmental entities. Lest there be any doubt, MCL 460.732(1) expressly reiterates this conclusion by stating that, apart from that section, nothing in MISS DIG impacts the application of immunity under the GTLA. Thus, "under" MISS DIG, MCL 460.731(3) does not apply to governmental agencies, contrary to the Court of Appeals' opinion.

3. The Court of Appeals' interpretation ignores accepted and applicable canons of interpretation and would render language in MCL 460.731 and the entirety of MCL 460.732 nugatory.

Moreover, MCL 460.732 does not include language similar to that quoted by the Court of Appeals as found in MCL 460.731(3) regarding a complaint with the MPSC not being the exclusive remedy against a governmental agency. Put differently, MISS DIG's section on governmental liability ***unambiguously omits*** any language suggesting that a MPSC complaint filed under MCL 460.732 "does not limit a person's right to bring a civil action to recover damages that person incurred arising out of a violation of the requirements of this act." "The express mention of one thing in a statute implies the exclusion of other similar things." *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999). Here, the Court is not left to guess whether the exclusion was intentional, either, because the Legislature already plainly said as much in proclaiming that MCL 460.732 did not alter the broad grant of immunity except as expressly contained in that subpart. MCL 460.732(1). Because

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MCL 460.732 is exclusive by its very terms and does not include the ability to file a civil complaint beyond the MPSC-based remedies provided therein, there is no avenue for filing a civil complaint against a governmental agency "under" MISS DIG.[20]

In fact, the Court of Appeals' decision essentially renders MCL 460.732 and the Commission-based system it creates nugatory. If an individual can simply bring a separate civil suit against a governmental agency for damages caused by any MISS DIG violation, it would be illogical for the Legislature to also implement the "three-strikes" rule. Similarly, if the Legislature intended for governmental entities and nongovernmental entities to be treated *identically* for alleged violations of MISS DIG, there would be no need for a separate section entitled "Liability of governmental agencies." But instead of treating them the same, the Legislature created a distinct progressive discipline system for governmental entities that does not exist for nongovernmental entities.

Moreover, to the extent that the exception under the GTLA could be interpreted in conflict with the specific instructions regarding governmental liability in the MISS DIG Act, the more detailed statute should control. "This Court has often stated—in accord with courts throughout the country—that when statutes conflict,

[20] Further, if governmental liability "under" MISS DIG was meant to mirror that of private entities, there would be little reason for the Act to include a separate provision addressing governmental liability. Notably, the Act states: "Except as provided in this section, this act does not affect the liability of a governmental agency for damages for tort…" This language implies that governmental liability is confined to what is specifically set forth within the Act—namely, the provisions of MCL 460.732.

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the more specific provision governs over the more general one." *Milne v Robinson*, 513 Mich 1, 12; 6 NW3d 40 (2024). Application of this principle here is consistent with the rationale behind the rule, as recently explained by this Court in *Milne:*

> "To apply a canon [of statutory interpretation] properly one must understand its rationale." One rationale behind this interpretative maxim is that, if the general provision were given effect over the specific one, the more specific provision would be rendered nugatory and ineffectual. Another frequently cited rationale is "the quite reasonable assumption that the legislature's attention was probably focused more directly on the subject matter of the specific than on only one aspect of a much broader subject matter." Under both rationales, the general/specific analysis is most likely to be probative of legislative intent when (1) two statutes "relate to the same subject" or "share a common purpose" such that they should be read together *in pari materia*, and/or (2) one statute addresses a broader topic while the other statute addresses a subset of situations within that broader topic. In such circumstances, courts generally presume that the Legislature gave more deliberate consideration to the specific issue when enacting the more specific statute and therefore treat this provision as "an exception to the general act or provision" that would otherwise govern to avoid rendering the more specific provision nugatory. [*Milne*, 513 Mich at 13–15 (cleaned up).]

In the plain language of the MISS DIG Act, the Legislature clearly set forth what liability a governmental agency can incur "under" that Act. Compare MCL 460.731 and MCL 460.732. And the Legislature plainly intended for liability "under" the Act to be limited to MCL 460.732. Thus, to the extent that the exception found under MCL 691.1407(7) could be read more broadly, the specific instructions under MISS DIG itself control.

In reality, however, these statutes don't conflict. The majority reached its conclusion by (1) applying a "broad" definition of liability from a case considering the

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scope of immunity and (2) by failing to apply or consider critical language of MCL 691.1407(7), MCL 460.731, and MCL 460.732. Unfortunately, this led to a result that is contrary to the GTLA and MISS DIG. Under MISS DIG, the liability of a governmental agency is limited to the MPSC-based remedies outlined in MCL 460.732, which include liability in the form of civil fines, required training, and damages. The Court of Appeals' conclusion to the contrary violates the GTLA, MISS DIG, and decades of Michigan's jurisprudence. It also disregards the plain language of MISS DIG and impermissibly expands the scope of liability beyond what MISS DIG's plain language allows. Contrary to the Court of Appeals' conclusion, MCL 691.1407(7) does not create blanket liability for "all violations of" the MISS DIG Act. Instead, it only permits liability as directed "under" MISS DIG itself. Indeed, if the Legislature had intended the former interpretation, it would have said so. But, instead, the Legislature chose to specifically "pull back" governmental immunity for the narrow "liability of a governmental agency" outlined in MISS DIG. For each of these reasons, and those raised in Judge Boonstra's dissent, this Court should grant leave and reverse.

III. The Court of Appeals erred when it found failure to mark a facility under MISS DIG was a "defect" in a sewage disposal system under the GTLA

This Court should also conclude that an alleged failure to mark under the MISS DIG Act is not a "defect" under the sewage disposal system event (SDSE) exception to the GTLA. "In 2002, the Legislature passed the SDSE exception to the GTLA. MCL 691.1416 through MCL 691.1419." *Sunrise Resort Ass'n, Inc v*

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Cheboygan Cnty. Rd Comm, 511 Mich 325, 334; 999 NW2d 423 (2023). Under that exception, 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 691.1417(2). In order to prevail under this exception, a plaintiff must "show[ ] 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. [*Id.*]

A "[d]efect" means "a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). And a "[s]ewage disposal system" is defined as "all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency." MCL 691.1416(j). This Court has again explained that, in the context of the SDSE exception, "the immunity conferred upon

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governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Sunrise Resort Ass'n, Inc*, 511 Mich at 334.

In sum, the alleged failure to mark under MISS DIG is not a defect in the "operation" of the system itself. The case cited by the majority, *State Farm Fire & Cas Co v Corby Energy Servs., Inc*, 271 Mich App 480, 484; 722 NW2d 906 (2006), merely concluded that "prevention of accidental damage to the City's water system through notification is within the scope of the water department's operations." It did not consider the definitions in or scope of the SDSE exception.

Moreover, even accepting for the sake of argument that marking under MISS DIG is an "operation" of a governmental entity, the SDSE exception does not waive immunity for all "operations," but only for the "operation" of the "sewage disposal system." To hold otherwise, is again to employ an exceedingly broad interpretation of this exception, contrary to this Court's clear and repeated instruction.[21] This Court should grant leave and reverse.

[21] As discussed in the Township's application, it also has led to the governmental entity being held responsible for events and occurrences outside of its control with regard to what are apparently private facilities.

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CONCLUSION AND RELIEF REQUESTED

For the above reasons, as well as those articulated by Defendant-Appellant Independence Township's Application and in Judge Boonstra's dissenting opinion, the Michigan County Road Commission Self-Insurance Pool respectfully requests that this Court grant leave and reverse the opinion of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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