STATE OF MICHIGAN

COURT OF APPEALS

SBC,

Plaintiff-Appellant,

v

J. T. CRAWFORD, INC.,

Defendant-Appellee,

and

HENKELS & MCCOY,

Defendant.

FOR PUBLICATION
November 27, 2007
9:05 a.m.

No. 275334
Oakland Circuit Court
LC No. 2005-067918-NZ

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting summary disposition in favor of defendant, J. T. Crawford, Inc. We reverse and remand.

This matter arises out of an excavation project that resulted in damage to underground SBC utility lines. Consumers Energy contracted with Henkels & McCoy to repair several of its gas transmission lines in Troy, Michigan. Because the repairs required excavation in the median of Coolidge Highway, Henkels contacted MISS-DIG for the location of underground utility lines in the median. Sometime thereafter, Crawford, through a subcontract with Henkels, began pile-driving operations in the median to prepare the area for excavation. During the pile driving, Crawford transected several SBC cables.

Plaintiff initiated this lawsuit against Crawford and Henkels to recover the repair costs incurred for the damage to the SBC cables. In the complaint, plaintiff asserted that both Crawford and Henkels were negligent and that both defendants were strictly liable for the damage to the cables, having violated the Protection of Underground Facilities act (MCL 460.701 *et seq.)*. The parties ultimately stipulated to the dismissal of Henkels as a party.

Crawford moved for summary disposition pursuant to MCR 2.116(C)(10) and plaintiff filed a counter-motion for summary disposition. In a November 30, 2006 order, the trial court

granted Crawford's motion for summary disposition and denied plaintiff's motion. Plaintiff now appeals from that order.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties, in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Plaintiff first contends that the Protection of Underground Facilities act (also referred to as the "MISS DIG" act) applies to pile driving, such that Crawford was required to request locating of utility lines in the area to be pile driven. Crawford, however, counters that the MISS DIG act does not apply to pile driving and it therefore had no obligations under, and could not be liable for, a breach of the act. The trial court did not make a specific finding on this issue, and whether pile driving is considered an activity subject to the requirements of the MISS DIG act appears to be an issue of first impression in Michigan.

Statutory interpretation is a question of law which this Court reviews de novo on appeal. *People v Stone Transport, Inc*, 241 Mich App 49, 50; 613 NW2d 737 (2000). The primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). If the plain and ordinary meaning of the statute is clear, judicial construction is not permitted. *Id.*

Relevant to the instant matter, MCL 460.703 provides:

> A person or public agency shall not discharge explosives, excavate, or tunnel in a street, highway, public place, a private easement of a public utility, or near the location of a public utility facility owned, maintained, or installed on a customer's premises, or demolish a building containing a public utility facility without having first ascertained in the manner prescribed in sections 5 or 7 the location of all underground facilities of a public utility in the proposed area of excavation, discharging of explosives, tunneling, or demolition.

As seen above, pile driving is not explicitly mentioned in the statute as one of those activities subject to the requirement of utility locating prior to its commencement. At issue, however, is whether the pile driving was *part* of the excavating process itself, such that the MISS DIG act implicitly includes pile driving. We believe that pile driving is included in the MISS DIG act.

Pursuant to the MISS-DIG act, "an association of public utilities is created for mutual receipt of notification of certain types of construction activities that may affect underground facilities." See MCL 460.707; see also MCL 460.701(a) (defining "association" to mean "the

MISS-DIG utilities communications programs"). *State Farm Fire & Cas Co v Corby Energy Services, Inc*, 271 Mich App 480, 485-486; 722 NW2d 906 (2006). The stated purpose of the MISS DIG act is "to protect the public safety by providing for notices to public utilities by persons or public agencies engaged in certain construction related activities near underground facilities or demolishing buildings containing utility facilities. . ."

Pile driving refers to the process of driving a heavy beam of timber, concrete or steel into the earth as a foundation or support for a structure. See *The American Heritage Dictionary* (2006). A pile driver is a "machine that drives a pile by raising a weight between guideposts and dropping it on the head of the pile." *Id.* By definition, pile driving consists of forcibly thrusting a hard, heavy object below the surface of the earth. It requires no stretch of the imagination to conclude that pile driving, then, much like tunneling or digging, could easily (and did in this matter) cause the transaction of subterranean utility lines and threaten public safety. Moreover, the pile driving was preliminary to and part of the service of excavating.

"Excavation" is not defined in the MISS DIG act. Other states, however, have enacted laws similar to the MISS DIG act and have included pile driving within the definition of excavation for purposes of the relevant laws. New Jersey, for example, enacted NJSA 48:2-74, *et seq*:

> The Legislature finds and declares that damage to underground facilities caused by excavation and the discharge of explosives poses a significant risk to the public safety; that such damage to underground natural gas facilities poses a substantial risk to the public safety; and that the implementation of a comprehensive One-Call Damage Prevention System can substantially reduce the frequency of damage caused by these activities.
>
> The Legislature therefore determines that it is in the public interest for the State to require all operators of underground facilities to participate in a One-Call Damage Prevention System and to require all excavators to notify the One-Call Damage Prevention System prior to excavation or demolition.
>
> The New Jersey Legislature defined "excavation" as:
>
> any operation in which earth, rock, or other material in the ground is moved, removed, or otherwise displaced by means of any tools, equipment, or explosive, and includes but is not limited to drilling, grading, boring, milling to a depth greater than six inches, trenching, tunneling, scraping, tree and root removal, cable or pipe plowing, fence post or pile driving, and wrecking, razing, rending, or removing any structure or mass material. . .
> NJSA 48:2-75

New York has similarly established rules to "establish procedures for the protection of underground facilities in order to assure public safety and to prevent damage to public and private property, as required by General Business Law, article 36 and Public Service Law, section 119-b." 16 NY ADC 753-1.1. Like New Jersey, New York has defined excavation, for purposes of their applicable act and rules to include pile driving. See 16 NY ADC 753-1.2.

We find guidance in the definitions provided in our sister states' similar acts and hold that because pile driving forcibly invades the subsurface and is frequently part and parcel of excavating, pile driving is one of the construction related activities governed by the MISS DIG act.

Plaintiff next argues that the MISS DIG act does not allow Crawford to rely upon the locating request submitted by Henkels. On this issue the trial court opined that the clear, unambiguous language of the MISS DIG act required only the excavator, Henkels, to contact MISS DIG, which it did.

MCL 460.705(1) provides:

> Except as provided in sections 7 and 9, a person or public agency responsible for excavating or tunneling operations, drilling or boring procedures, or discharge of explosives in a street, highway, other public place, a private easement for a public utility, or near the location of utility facilities on a customer's property, or demolition of a building containing a utility facility, shall give written or telephone notice to the association as required in section 7 of intent to excavate, tunnel, discharge explosives, or demolish. . .

There is no dispute that Consumers Energy hired Henkels as the contractor to provide excavation work. Henkels, then, was the agency *responsible* for excavating and, as such, was required to give notice under MISS DIG of its intent to excavate. While Henkels subcontracted with Crawford to perform pile driving, Crawford incurred no responsibility for notification either by the explicit language of the MISS DIG act or through any language in the Henkels-Crawford subcontract.

While appellant directs this Court to *Amoco Pipeline Co v Herman Drainage Systems, Inc*, 212 F Supp 2d 710 (Mich, 2002) as authority that Crawford, rather than Henkels, was required to notify MISS DIG, we find that case dissimilar to the instant matter. In *Amoco Pipeline Co,* a property owner hired an excavator to dig in an area where oil pipelines were located. Amoco argued that the provisions of the MISS DIG act were broad enough to impose responsibility for notifying MISS-DIG upon property owners. The court disagreed, finding that the statute applied only to the person actually responsible for performing the excavation work and that the property owner was not the "responsible person" required to contact MISS DIG within the meaning of the act. As noted by the *Amoco Pipeline Co* court, "An owner who hires a contractor to perform excavation work is responsible only in the sense that he or she has decided to have the work done."

Here, on the other hand, Consumer's Energy hired Henkels to perform excavation services. As the excavator, Henkels is in the best position to provide the necessary information to MISS DIG. Thus, Henkels was responsible for contacting MISS DIG.

Plaintiff next asserts that even if Crawford could rely on Henkel's locate request to MISS DIG, the ticket issued by MISS DIG had expired by the time the excavation work actually began. We agree.

MCL 460.705(1) requires that written or telephone notice of an intent to excavate be given to the association at least three full working days, but not more than 21 calendar days, "before commencing the excavating, demolishing, discharging of explosives, tunneling operations, or drilling or boring procedures." MCL 460.714 provides:

> 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.

The MISS DIG act does not, however, "affect any civil remedies for damage to public utility facilities and does not affect any civil remedies a person may have for actual damage to the person's property caused by a public utility's negligence in staking its facilities. . . " MCL 460.713.

The MISS DIG ticket requested by Henkels was issued on September 29, 2003. While Henkels began removing curbs and pavement on October 18, 2003 and placed its equipment at and began preparing the job site on October 20, 2003, no actual pile driving began until October 21, 2003. At issue, then, is when excavating/pile driving procedures are considered to have "commenced" for purposes of the statute.

True, no definition for "commence" can be found within the MISS DIG statute. The plain, ordinary definition, however, is "to begin; start." *The American Heritage Dictionary* (4th Ed. 2006). "Begin" is defined as "to take the first step in performing an action." *Id*. While Crawford would urge otherwise, we believe the first step in performing the action of pile driving occurs when a pile enters the ground. This is the most rational interpretation, given that the purpose of the act is to protect the public safety and prevent damage to underground utilities. There is no suggestion that moving curbs or placing machinery at the job site creates the risk the MISS DIG statute was intended to protect against. It is not until the specific activity itself begins, not simply the preparation for the activity, that the risk of damage to underground utilities appears. We thus conclude that excavation work (including pile driving) "commences" under the statute when machinery or equipment intended for such work breaks the ground.

Because Crawford did not commence pile driving until 22 days after the MISS DIG request was made, the MISS DIG ticket had expired. As MCL 460.714 provides for liability if underground utilities are damaged and the damaging party failed to give the required notice, or the person did not employ hand-digging or failed to provide support, Crawford can be held responsible for the resulting damage to the underground facilities. We reject Crawford's contention that because notice was given (albeit more than 21 days prior to the pile driving activities) it is not subject to liability under the MISS DIG statute. The statute specifically states that a party may be liable if it failed to give "the" notice—not simply "notice." "The" required notice was that notice that must have been made no more than 21 days prior to the pile driving

activity. To interpret the necessary notice as Crawford would urge us to do would allow contractors to escape liability so long as they provided notice at any time prior to commencing excavation, even if it were a year. This interpretation is not consistent with the purpose of specific language of the MISS DIG act and would render the 21-day period in the act meaningless. Clearly, the statute intended to create liability if the damaging party did not comply with the strict terms of the notice requirement. As a result, if it is shown by competent evidence that damage to the SBC lines resulted from Crawford's pile driving activities, Crawford is liable under the MISS DIG statute for damages it caused to the SBC lines.

If competent evidence is/was shown as required, however, does not mean that Crawford is necessarily liable for the entirety of the damages. MCL 460.714 states "the liability for damages shall be reduced in proportion to the negligence of the public utility if it fails to comply with section 8." Section 8 (MCL 460.708) is the MISS DIG provision requiring utilities, when served with the requisite notice, to inform the person or public agency of "the approximate location of the underground facilities owned or operated by the public utility in the proposed area of excavation. . .in a manner that enables the person or public agency to employ hand dug test holes or other similar means of establishing the precise location of the underground facilities using reasonable care to establish the precise location of the underground facilities in advance of construction." It does not appear that the trial court considered or determined whether SBC complied with section 8. Remand is therefore necessary for an explicit finding of whether competent evidence demonstrated that the damages at issue were caused by Crawford's pile driving activities, whether SBC complied with section 8, and for an ultimate determination of the amount of damages, if any, for which Crawford is liable.

Finally, plaintiff asserts that apart from Crawford's statutory violation, it was liable to SBC under a negligence theory. On this issue, the trial court found that plaintiff did not provide evidence to support its assertion that Crawford was negligent for relying on the representations of Henkels that the utilities had been marked under the MISS DIG request. SBC contends, however, that it presented sufficient evidence to raise a question of fact as to whether Crawford was negligent so that summary disposition was inappropriate.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and, (4) damages. *Henry v Dow Chemical Co,* 473 Mich 63, 71-72; 701 NW2d 684 (2005). "Duty" is a legally recognized obligation to conform to a particular standard of conduct toward another. *Riddle v McLouth Steel Products Corp,* 440 Mich 85, 96; 485 NW2d 676 (1992). "[A] negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Graves v Warner Bros,* 253 Mich App 486, 492; 656 NW2d 195 (2002). Whether a duty exists is a question of law for the court to decide. *Id.* Reasonable care or ordinary care is "general standard of care" in negligence cases. *Case v Consumers Power Co,* 463 Mich 1, 6-7; 615 NW2d 17 (2000). "Ordinary care means the care that a reasonably careful person would use under the circumstances." *Id.* at 7.

In support of its general negligence argument, SBC provided photographs of the job site showing faded marks, in line with a manhole, on the curb located on the west side of Coolidge from prior locations efforts.[1] According to SBC, those marks should have put Crawford on notice that utilities ran under the road at that location, regardless of whether SBC location flags were present at the specific location. SBC also asserts that Crawford could and should have opened the manholes in the area and, if it did so, would have easily seen the lines that ran beneath the road. While SBC makes blanket statements about what Crawford should have done, it has directed this Court to no authority suggesting that Crawford had a duty, after a locating request was made to MISS DIG and the utility companies flagged the locations of their underground lines, to perform an independent investigation to locate utility lines, nor has it demonstrated that Crawford was negligent in relying on the utility companies location markers for their utilities. This Court will not elaborate a party's arguments for him or search for authority either to sustain or reject his position. *Wilson v Taylor,* 457 Mich 232, 243; 577 NW2d 100 (1998).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ David H. Sawyer

[1] SBC also relies upon deposition testimony of Marshall Farley, the job superintendent for Consumer's Energy on the project. However, the referenced portions of Mr. Farley's deposition testimony are not attached to SBC's appeal brief, nor were they attached as an exhibit to its counter-motion for summary disposition.

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Before: Servitto, P.J., and Sawyer and Murray, JJ.

MURRAY, J., (*concurring*).

The trial court held that there is no statutory requirement for more than one person at the same excavation site to give notice under the statute, and that the one provided by the excavator (Henkels & McCoy) satisfied the statutory requirements. In my view, the trial court accurately read the statute, and the majority opinion properly affirms that part of its decision. I therefore join in the majority's decision, but offer additional reasoning for my position.

As the emphasized portions of section MCL 460.705(1) reveal, the statute places a duty upon the person responsible for excavating "operations" to give written notice of the intent to excavate:

> (1) Except as provided in sections 7 and 9, *a person* or public agency *responsible for excavating* or tunneling *operations*, drilling or boring procedures, or discharge of explosives in a street, highway, other public place, a private easement for a public utility, or near the location of utility facilities on a customer's property, or demolition of a building containing a utility facility, *shall give written or telephone notice to the association* as required in section 7 *of intent to excavate*, tunnel, discharge explosives, or demolish at least 2 full working days, excluding Saturdays, Sundays, and holidays, but not more than 21 calendar days, before commencing the excavating, demolishing, discharging of explosives, tunneling operations, or drilling or boring procedures. Beginning on October 1, 1990, the

> notice required in this subsection shall be given at least 3 full working days, excluding Saturdays, Sundays, and holidays, but not more than 21 calendar days, before commencing the excavating, demolishing, discharging of explosives, tunneling operations, or drilling or boring procedures.

Section 5(2), in turn, contemplates that the person giving notice may not be the same person performing the actual excavation, as it provides that the notice shall contain certain information about both the person placing the notice, *and* the person performing the excavation:

> (2) The written or telephone notice of intent shall contain the name, address, and telephone number of the person or public agency filing the notice of intent, the name of the person or public agency performing the excavation, discharging of explosives, tunneling, or demolition, the date and type of excavating, discharging of explosives, demolishing, drilling or boring procedure, or tunneling operation to be conducted, and the location of the excavation, tunneling, discharging of explosives, drilling, boring, or demolition.

In giving effect to all the words contained in these sections, *Ross v Michigan,* 255 Mich App 51, 55; 662 NW2d 36 (2003), it appears that the person required to give notice is the person responsible for excavating "operations". The Legislature did not define the word "operations", and not surprisingly, it has many different definitions. The one closest to how it is used in the statute refers to the planning and operating functions of a business. Webster's New Collegiate Dictionary (1980 ed). Under this view, the person responsible for the overall excavation operations is required to give notice under the Act. Then, under section 5(2), that person must identify who will be performing the actual excavation, which may or may not be the same person.

In the only reported decision discussing who is a person "responsible for excavating" operations, *Amoco Pipeline Co v Herman Drainage Systems, Inc,* 212 F Supp 2d 710 (WD Mich, 2002), the court was presented with the question of whether a farmer who hired the excavator, the excavator, or both, were responsible for the excavating, and thus required to give notice. Not surprisingly, the court held that the farmer, who had nothing to do with the excavation except to hire the excavator, did not have a duty under the statute to give notice, as the statute places that duty upon the one who is responsible for the excavation:

> This Court concludes that the phrase "a person ... responsible for excavating" is limited to the person or persons actually responsible for performing the work. An owner who hires a contractor to perform excavation work is responsible only in the sense that he or she has decided to have the work done. *The responsibility for ensuring that the excavation work is done correctly and according to workmanlike standards, such that it does not interfere with underground facilities, is on the contractor. Such a construction makes sense because generally, the contractor is in the best (although perhaps not the only) position to provide the necessary information to MISS-DIG, and the contractor, who is on-site, can verify whether the marked underground facilities are in the area where the work is to be performed.* Requiring the person actually performing the excavation to notify MISS-DIG thus provides certainty because there can be no question among

> several possible parties about who should give the notice. [*Id.,* at 718 9 (emphasis added).]

The court therefore differentiated between someone who had no involvement in the actual excavation (the farmer), and the company responsible for the excavation operations, i.e., the on-site contractor who is responsible for ensuring that the excavation work is properly and safely performed.

Here, it is undisputed that Henkels, the company contracted to perform the excavation operations, i.e., the one responsible "for ensuring that the excavation work is done correctly and according to workmanlike standards", *Amoco Pipeline Inc, supra*, hired Crawford to perform the pile driving. As amicus curiae noted, pile driving is a precursor to, but also a necessary *part* of, the excavation process. See *Tillson v Consumers Power Co*, 269 Mich 53, 60; 256 NW 801 (1934). Thus, as the majority correctly concludes, Crawford had the responsibility for pile driving, but Henkels had the responsibility to perform the excavation operations, and to therefore provide the notice under the statute. MCL 460.705(1).

Under SBC's interpretation of the statute, because Henkel's was responsible for the entire excavation operation, and Crawford performed one part of it, both Henkels and Crawford would have to provide notice of intent to excavate the same project. But as the trial court noted, none of the statutory provisions require anything of the sort, and we should not imply such an obligation on our own. *Hesse v Ashland Oil Co.,* 466 Mich 21, 30-31; 642 NW2d 330 (2002).

Finally, I would not utilize the statutory laws of New York or New Jersey to interpret our statute, as those other state legislatures utilized different, and more specific language than utilized by our legislature in crafting the act at issue here, MCL 460.701 *et seq*. *Frankenmuth Mut Ins Co v Marlette Homes, Inc,* 219 Mich App 165, 169; 555 NW2d 510 (1996), rev'd on other grounds, 456 Mich 511; 573 NW2d 611 (1998).

/s/ Christopher M. Murray