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Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 06-22-010
PHILIP G. URRY, CLERK
BY: GH

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

SALT RIVER PROJECT AGRICULTURAL) 1 CA-CV 09-0275
IMPROVEMENT AND POWER DISTRICT, a)
political subdivision of the) DEPARTMENT C
State of Arizona,)
) **MEMORANDUM DECISION**
Plaintiff/Appellee/)
Cross-Appellant,) (Not for Publication -
) Rule 28, Arizona Rules of
v.) Civil Appellate Procedure)
)
CHARLES E. VARK, JR. and SALLY A.)
VARK, husband and wife,)
)
Defendants/Appellants/)
Cross-Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2005-051190

The Honorable Eddward P. Ballinger, Judge

REVERSED AND REMANDED

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I R V I N E, Presiding Judge

¶1 Defendants/Appellants/Cross-Appellees Charles and Sally Vark (the "Varks") appeal from the trial court's judgment awarding damages and attorneys' fees to Plaintiff/Appellee/Cross-Appellant Salt River Project Agricultural Improvement and Power District ("SRP"). SRP had sued the Varks under Arizona's Underground Facilities Act, Arizona Revised Statutes ("A.R.S.") sections 40-360.21 to 40-360.32 (2001),¹ for damage Charles Vark ("Vark") did to an underground electric line while excavating his yard. The Varks contend that comparative fault applies to the statute, that the court erred in granting summary judgment where the Varks had evidence that SRP was at fault, and that the court's interpretation of the statute rendered it unconstitutional. The Varks also contend that the court violated the "law of the case" doctrine by reversing an earlier denial of summary judgment and abused its discretion by dismissing a second count of SRP's complaint. The Varks challenge the trial court's award of fees to SRP, and SRP cross-appeals the court's reduction in the amount of fees it awarded. For the following reasons, we reverse and remand for further proceedings.

¹ We cite the version of the statute in effect at the time the act was committed that formed the basis of the complaint.

FACTS AND PROCEDURAL HISTORY

¶12 On July 14, 2004, Vark called Arizona Blue Stake Center and requested that an area in the front yard of his home be marked for underground facilities. On July 16, 2004, a locator from SRP located and marked SRP's underground facilities pursuant to the request. By statute, the markings were "valid" for fifteen days and so expired on August 6, 2004. A.R.S. § 40-360.22(G).

¶13 On September 4, 2004, Vark and a neighbor were excavating in the Varks' front yard to repair a sewer line when the neighbor struck and damaged a SRP underground sewer line. SRP repaired the utility line and, on November 18, 2004, billed the Varks a total of \$7,475.98.

¶14 In June 2005, SRP filed a two-count complaint against the Varks seeking payment of the amount billed on the grounds that Vark violated A.R.S. §§ 40-360.21 to -360.29 by excavating after the markings had expired and that he was negligent in striking the underground facilities.

¶15 An arbitration hearing was held on July 25 and August 14, 2006, at which SRP sought damages in the amount of \$4,989.32. The arbitrator ruled in favor of SRP and on December 1, 2006, issued a ruling finding SRP to be the prevailing party and awarding SRP damages in the amount of \$4,115.23, costs in the amount of \$1,668.05, and attorneys' fees in the amount of

\$30,000. The Varks appealed from the arbitrator's award to the trial court.

¶16 On March 22, 2007, SRP filed a motion for partial summary judgment on the Varks' liability. SRP argued that, because Vark excavated well after the blue stake markings had expired and had not requested a remarking, he in effect excavated without any valid blue stake marking, making the Varks liable for any resulting damage to SRP's facilities.

¶17 The Varks argued that SRP's motion should be denied, asserting that the principles of comparative fault applied, which required submission of the case to the jury under Article 18, Section 5 of the Arizona Constitution.² The Varks contended that SRP mismarked the location of its underground facilities by never marking the location of the line that was damaged. They noted that evidence had been presented through their own testimony that the blue stake marks were clear on the day they were made and they observed no blue stake marks in the area they eventually dug. They also noted that neighbors who assisted in the excavation testified that the blue stake lines were still visible and none existed where they excavated. They argued that,

² Article 18, Section 5 states: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." Ariz. Const. art. 18, § 5.

from the testimony, a jury could conclude that both parties were negligent or that SRP's own negligence caused the damage.

¶18 SRP argued that whether SRP failed to mark the correct area was irrelevant under the statute. SRP noted, however, that the SRP locator testified that he had marked the Varks' entire front yard, including the area where Vark dug.

¶19 After oral argument, the trial court, Judge Jones, denied the motion for partial summary judgment. The court stated in part:

I think that statute sets forth an affirmative duty on the part of SRP, and I think in this case there are clear issues of fact as to whether or not SRP breeched [sic] its duty and whether or not SRP has been partially at fault as the result of . . . the excavation in this case by Mr. Vark in his yard.

. . . .

[L]et me just state as a matter of law, I do believe that principles of comparative fault are applicable to this case and at this point in time I believe procludedly [sic] because of the disputes from entering judgment as a matter of law.

¶10 In March 2008, SRP filed several motions in limine, one of which sought to preclude evidence and argument on SRP's alleged comparative fault. The motion acknowledged the court's prior denial of SRP's motion for partial summary judgment and asked the court to reverse that prior ruling.

¶11 With trial set for August 18, 2008, the court (Judge Ballinger now presiding) held a status conference on August 7. The court noted that the statute appeared to make the Varks liable for the damage because they failed to excavate within the fifteen-day expiration period. The Varks asserted the prior ruling denying SRP's motion for partial summary judgment was law of the case and also applied to the motion in limine. The court, however, advised the parties: "I'm not trying a case on a principle of law that I disagree with, so . . . we're going to have to sort this out." The court set the issue for oral argument. SRP advised the court of its intent to dismiss its negligence claim; the Varks refused to stipulate to the dismissal.

¶12 On August 11, SRP filed a motion to voluntarily dismiss without prejudice its claim for negligence as well as a motion to reconsider its prior motion for partial summary judgment regarding the applicability of the defense of comparative fault to liability under the underground facilities statute. The Varks reiterated their assertion that comparative fault applied and argued that the prior ruling was law of the case and that SRP's motion constituted an improper horizontal appeal.

¶13 At the oral argument, the court treated the matter as an argument on the motion in limine, expressing the view that,

the question was not whether comparative fault applied but whether the court would admit evidence of the invalid blue staking. The court indicated its belief that comparative fault did apply but that, by statute, the Varks could not rely on the blue stake markings after fifteen days and so any evidence of improper marking was not admissible. The court also indicated the belief that, by treating the issue as a motion in limine rather than reconsideration of a motion for partial summary judgment, the court avoided the issue of whether it could revisit the prior ruling or whether the prior ruling was law of the case. The court questioned whether evidence that SRP mismarked the property was proper where under the statute, any marking was invalid long before the Varks excavated. The court asked the Varks if they had any evidence of comparative fault other than the improper blue stake marking or whether precluding that evidence would effectively be granting summary judgment to SRP, noting that if that were the case, the Varks might simply want to appeal rather than proceed with the trial. With respect to SRP's motion to dismiss the negligence count, the Varks argued that SRP was moving to dismiss to preclude their comparative negligence defense and asserted that they had spent significant attorneys' fees defending on that basis, such that dismissal would be prejudicial. The Varks agreed that an award of attorneys' fees to them based on the dismissal would remedy

the problem, but argued that even if the court dismissed the negligence claim they should still be permitted to present evidence of comparative fault.

¶14 The court granted SRP's motion in limine precluding the Varks from introducing "evidence of [SRP's] effort in providing 'Blue Stake' markings as part of [the Varks'] comparative negligence claims." The court noted that the Varks agreed they had no other evidence of comparative negligence and so the court granted SRP's motion to dismiss the negligence claim without prejudice to either party filing for an award of costs or fees.

¶15 At a status conference on November 13, 2008, the Varks acknowledged that little of the case remained to be tried. At the court's suggestion, the parties filed a stipulated statement of facts, SRP filed a motion for summary judgment, and the Varks filed a technical opposition to SRP's motion. The Varks explained that, because of the court's rulings, no issue of material fact existed that precluded summary judgment, but that they were not waiving their arguments that the rulings were erroneous. The court granted SRP's motion for summary judgment.

¶16 SRP requested an award of attorneys' fees in the total amount of \$90,521.50 pursuant to A.R.S. § 40-360.27. SRP argued that it was the prevailing party and that, despite SRP's efforts, the Varks refused to settle the case or even negotiate.

SRP also argued that it was entitled to fees as a sanction under Rule 76(f) of the Arizona Rules of Civil Procedure because the Varks did not obtain a judgment on appeal to the trial court that was twenty-five percent more favorable than the arbitration award. The Varks objected to SRP's request for fees.

¶17 The court found SRP to be the prevailing party and entitled to an award of fees, but also found:

[The Varks] raise a valid issue when they point to the differing views of the law held by the current trial judge and the originally assigned judge. The court also believes it needs to make allowances for the fact that [SRP's] contributory negligence claim was voluntarily dismissed after all discovery was completed.

The court entered judgment in favor of SRP in the amount of \$4,115.23 in damages, \$1,688.05 in costs, and \$50,000 in attorneys' fees. The Varks filed a timely notice of appeal, and SRP filed a cross-appeal challenging the trial court's reduction of the amount of attorneys' fees awarded.

DISCUSSION

¶18 Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Ariz.R.Civ.P. 56(c). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v.*

City of Tucson, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We review the decision on the record made in the trial court. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). We consider legal questions de novo. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1993).

¶19 The Varks contend that the Uniform Contribution Among Tortfeasors Act ("UCATA"), A.R.S. §§ 12-2501 to -2509 (2003), applies to the Underground Facilities Act, A.R.S. §§ 40-360.21 to -360.32, requiring the application of comparative fault. They further contend that the court's failure to apply comparative fault and grant of summary judgment violated Article 18, Section 5 of the Arizona Constitution, which provides, "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." Ariz. Const. Art. 18, § 5; A.R.S. § 12-2505(A) (stating that, upon a finding of contributory negligence or assumption of risk, full damages shall be reduced in proportion to the relative degree of fault). The Underground Facilities Act in effect at the time Vark excavated on his

property in September 2004, precluded a person from excavating on any express or implied private property utility easement without first determining the location of underground facilities. A.R.S. § 40-360.22(A). Once a blue stake request was submitted, the owner of the facilities had no more than two working days to mark the facility "with stakes, paint or in some customary manner." A.R.S. § 40-360.22(B). The marking was "valid for fifteen days from the date of the marking, excluding Saturdays, Sundays and other legal holidays." A.R.S. § 40-360.21(G). If the excavation was to continue past the validity period, the excavator was required to notify the facility owner at least two days before the end of the validity period. *Id.* The Act further provided:

B. If a violation of this article results in physical contact with an underground facility, the violator is liable to the owner of the facility for all damages to the facilities and costs, expenses and damages to third parties incurred by the owner of the facility as a result of the contact.

C. If the owner or operator fails to locate or incorrectly locates the underground facility . . . the owner or operator becomes liable for resulting damages, costs and expenses to the injured party.

A.R.S. § 40-360.28 (B), (C). A person was also liable to the owner for the cost of the repair to the facility if that person failed to excavate in a careful and prudent manner; however, a

person was not liable for damage to the underground facility if that person was in compliance with § 40-360.22. A.R.S. § 40-360.26.

¶20 The Varks contend that *Gunnell v. Arizona Public Service Co.*, 202 Ariz. 388, 46 P.3d 399 (2002), is directly on point and found that comparative fault applies where an excavator and a utility owner both violated the Underground Facilities Act. In *Gunnell*, the sole proprietor of an excavation business (Gunnell), was excavating for the installation of a sewer line. *Id.* at 389, ¶ 2, 46 P.3d at 400. He called the Blue Stake Center to mark the area of the excavation, and APS staked its lines. *Id.* at ¶ 3. While excavating, Gunnell uncovered an unmarked steel pipe, which he believed was part of a local water system. *Id.*³ After contacting two water companies who denied ownership, Gunnell concluded that the pipe was an abandoned water line and had Knox, a subcontractor or employee, cut into the pipe. *Id.* at 389, ¶ 3, 46 P.3d at 400. The pipe encased a live, high-voltage APS electric wire that exploded, resulting in injury to both Gunnell and Knox. *Id.*

¶21 Gunnell sued APS for his injuries. *Id.* at 390, ¶ 5, 46 P.3d at 401. APS counterclaimed for damages to its facility and for indemnification for a separate action against it filed by

³ The Underground Facilities Act required that an excavator, upon encountering an unmarked line, notify the owner of the unmarked facility. *Id.* at 390, ¶ 7, 46 P.3d at 401.

Knox. *Id.* The trial court granted summary judgment to APS on Gunnell's claim and APS's counterclaims, finding that Gunnell's negligence in failing to determine the owner of the steel pipe superseded APS's negligence in failing to mark the pipe's location. *Id.* The court of appeals affirmed, and Gunnell filed a petition for review, arguing that if both he and APS were at fault, then the UCATA applied. *Id.*

¶22 The Arizona Supreme Court considered a series of indemnification cases dealing with a statute governing overhead power lines similar to the statute at issue, A.R.S. § 40-360.28(B), holding a contractor/violator liable for damages to the facilities and indemnification to the owner for damages resulting from injuries to third parties. *Gunnell*, 202 Ariz. at 393, ¶¶ 19-20, 46 P.3d at 404 (citations omitted). In those cases, the negligent party was required to indemnify the facilities owner for damages resulting from injury to the excavator's employee despite the facilities owner's own negligence. *Id.* at ¶ 20. Without affecting the overhead lines cases, the court found that comparative negligence principles applied to the Underground Facilities Act under the facts presented by Gunnell; otherwise, the statute would violate Article 18, Sections 5 and 6 of the Arizona Constitution. *Id.* at ¶ 21. The court found it significant that, rather than an indemnification claim, Gunnell's case involved a plaintiff who

was both the injured worker and the employer/contractor. *Id.* at ¶¶ 20-21.

¶23 The court noted that evidence existed that both Gunnell and APS were negligent per se, and that under such circumstances, "the court should ordinarily apply the provisions . . . of UCATA that enacts a comparative negligence regime." *Id.* at 394, ¶ 22, 46 P.3d at 405. The court rejected the analysis of the trial court and the court of appeals:

[B]oth the trial judge and court of appeals, in affirming, concluded that the legislature made an excavator's negligence a superseding cause and thus relieved the negligent owner of all liability to either the injured excavator or any third person. However, article XVIII, § 5 applies not just to the courts but also to the legislature. *Schwab v. Matley*, 164 Ariz. 421, 425, 793 P.2d 1088, 1092 (1990). We do not believe . . . that the constitution allows the legislature to negate article XVIII, § 5 or 6 by decreeing through statute that a negligent actor whose conduct was a cause of injury was the sole cause of the injurious event.

Such a legislative declaration would violate section 5 by taking the issue of a plaintiff's negligence from the jury. . . . Our courts have made it clear that when there is evidence of negligence by a claimant, whether plaintiff or counterclaimant, the provisions of sections 5 and 6 cannot be avoided by judicial or legislative relabeling.

Id. at 394-95, ¶¶ 24-25, 46 P.3d at 405-06 (footnote omitted).

¶24 The court looked to the legislative history of the Underground Facilities Act to support its decision, finding

"nothing . . . to suggest that the Underground Facilities Act was intended to transfer all liability for fault to the negligent excavator and leave an owner generally immune from answering for its own negligent conduct." *Id.* at 395, ¶ 27, 46 P.3d at 406. One study group was charged with identifying items requiring legislative action to "equitably identify responsibility for facility damage." *Id.* at 395-96, ¶ 28, 46 P.3d at 406-07 (emphasis removed). Another group indicated the necessity to determine how to administer comparative negligence. *Id.* The court viewed this information as evidencing the intent that the responsibility for line damage be equitably apportioned. *Id.* at 396, ¶¶ 28-29, 46 P.3d at 407.

¶25 SRP argues that *Gunnell* does not require the application of comparative fault to a claim for damages to underground facilities as is the case here. It argues that *Gunnell* recognized that, under A.R.S. § 40-360.28(B), a violator of the Underground Facilities Act was "liable to the owner of the facility for all damages to the facilities." SRP notes that, in describing the statute at issue, the court offered two interpretations of A.R.S. § 40-360.28(B), both of which reiterated the language that the violator was liable for all damage to the line. *Gunnell*, 202 Ariz. at 391, ¶ 10, 46 P.3d at 402. The court's subsequent analysis, however, including the discussion on the constitutional requirement that questions of

comparative fault be left to a jury and the court's reliance on legislative history discussing equitable division of responsibility for line damage, demonstrates that the ruling in *Gunnell* is not as limited as argued by SRP. We also note that UCATA expressly applies to claims for property damage as is at issue here. A.R.S. § 12-2506(A), (B).

¶26 SRP also argues that comparative fault is not applicable because the statutory language giving SRP the right to recover for damage to its facilities does not provide for comparative fault. *Gunnell*, however, answers this argument when it notes that the legislature cannot avoid the requirement that comparative fault be left to the jury. 202 Ariz. at 394-95, ¶¶ 24-25, 46 P.3d at 405-06.

¶27 SRP contends that interpreting the statute as being subject to comparative fault in this case would render meaningless that portion of the statute pertaining to the fifteen-day validity period of the blue stake markings. We disagree. Violation of the statute would still be negligence per se. See *Brannigan v. Raybuck*, 136 Ariz. 513, 517, 667 P.2d 213, 217 (1983) (breach of statute intended as safety regulation is negligence per se). In addition, such a violation would subject the violator to a civil penalty "not to exceed five thousand dollars." A.R.S. § 40-360.28(A).

¶128 In this case, evidence was presented that both Vark and SRP violated the statute: Vark by excavating after the fifteen-day validity period and SRP by mismarking the location of its underground facilities. Applying *Gunnell*, where evidence shows both parties are negligent, the trial court should apply comparative negligence. 202 Ariz. at 394, ¶ 22, 46 P.3d at 405. Issues of comparative negligence must be left to the jury. Ariz. Const. Art. 18, § 5.

¶129 The trial court did not disagree that comparative fault applied to the Underground Facilities Act. The court concluded, however, that because the statute made SRP's allegedly incorrect marks invalid at the time Vark excavated, the evidence was inadmissible. We will not disturb a trial court's decision on the admissibility of evidence absent clear abuse of discretion and prejudice. *Gasiorowski v. Hose*, 182 Ariz. 376, 382, 897 P.2d 678, 684 (App. 1994).

¶130 We conclude that the trial court erred in excluding the evidence. As in *Gunnell*, evidence exists that the excavator and the owner both violated the statute. We see no basis for treating Vark's violation of excavating outside the fifteen-day period without recalling the Blue Stake Center any differently than *Gunnell's* violation of failing to call the Blue Stake Center to identify the owner of the steel pipe. We are not persuaded by SRP's argument that, because the fifteen-day period

had expired, Vark essentially excavated as if he had never had the lines marked at all. The record shows that he had the lines marked and that he had evidence that they had been marked improperly; it was for the jury to evaluate the evidence and determine the relative degrees of fault. The Varks were clearly prejudiced by the exclusion of the evidence of SRP's alleged mismarking. This was the only evidence of comparative fault by SRP, and its exclusion resulted in the granting of summary judgment against the Varks.

¶31 Comparative fault applies to the version of the Underground Facilities Act in place at the time of Vark's excavation. We therefore reverse the trial court's decision granting summary judgment and remand for further proceedings. Because of our ruling, SRP is not at this time the prevailing party. As a result, we vacate the trial court's award of attorneys' fees. See A.R.S. § 40-360.27 (providing for an award of a reasonable attorney's fee to the prevailing party). We need not and do not address the Varks' remaining arguments nor do we address SRP's cross-appeal regarding the attorneys' fees, which have now been vacated.

¶32 The Varks have requested an award of attorneys' fees pursuant to A.R.S. § 12-341.01(B) and Rule 21 of the Arizona Rules of Civil Appellate Procedure. Neither of these authorities

supports an award of fees to the Varks in this case. We therefore deny the request.

CONCLUSION

¶33 For the foregoing reasons, we conclude that comparative fault applies to the Underground Facilities Act in effect at the time when Vark excavated his property. Further, the court erred in excluding evidence of SRP's alleged fault and therefore erred in granting summary judgment. We reverse and remand the matter to the trial court for further proceedings.

/s/

PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

DONN KESSLER, Judge