# 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

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

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