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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Sprint Communications Co., L.P., Plaintiff, vs. Western Innovations, Inc., et al., Defendants.	No. cv-06-2064-PHX-ROS **ORDER**

Pending is Plaintiff's Motion for Reconsideration (Doc. 214). Sprint Communications Company moves for reconsideration of the ruling that Sprint's strict liability and negligence per se claims were time barred and, as a consequence, grant it judgment on those claims as a matter of law. Sprint's Motion will be granted as to the first and denied as to the second.

In its March 9, 2009 Order, the Court wrote:

> In its Order of July 24, 2007, this Court ruled that a statutory strict liability claim arising out of A.R.S. § § 40-360.26 and 40-360.28 was time barred under that one year statute of limitations. If, therefore, Plaintiff's cause of action for negligence per se constitutes 'liability created by statute' it is time barred."

The Court then concluded that negligence per se did, in fact, constitute liability created by statute and was time barred. Sprint, however, argues that this was premised on a mistaken belief that the Court had earlier found Plaintiff's statutory strict liability claim time barred.

In its July 24, 2007 Order, this Court found that Plaintiff's strict liability causes of action against Western Innovations, Inc. were time barred. However, in its January 31, 2008 Order, the Court noted that the situation differed as to Defendant Haydon Building Corporation, stating that the question of when discovery occurred and a cause of action accrued are questions of fact, not to be determined on a motion for judgment on the pleadings. Accordingly, the Court denied Haydon's Motion without prejudice, allowing Haydon an opportunity to later raise the matter in accordance with Fed. R. Civ. Pro. 56.

Thus, the Court's analysis was inconsistent with regards to Haydon and therefore constitutes error.

Accordingly, the question of whether Sprint may be granted summary judgment on its strict liability and negligence per se claims must be reconsidered. In its March 9, 2009 Order the Court found that "[i]t is undisputed that Haydon obliterated Sprint's locate marks while performing grading work in the area, was aware of this fact, and requested that Western excavate as quickly as possible in the area all the same without informing Western of the destruction or making an effort to get the marks redone." To rule on Sprint's statutorily based claims must be considered in the context of the Arizona Damage Protection Act. That Act provides:

> A person shall not make or begin any excavation in any public street, alley, right-of-way dedicated to the public use or utility easement without first obtaining information concerning the possible location of any underground facility from each and every public utility, municipal corporation or other person having the right to bury such underground facilities within the public street, alley, right-of-way or utility easement.

A.R.S. § 40-360.23.

Arizona courts have found that "it is apparent that [the Act was] designed to provide a cause of action against those people who carelessly or negligently excavate in an easement to the damage of the utility located therein. . . . [I]f a person does not obtain information as to the easement then he is liable for damages. If a person obtains the necessary information and excavates in a careful and prudent manner, he can then escape liability for damages." Sedona Self Realization Group v. Sun-Up Water Co., 598 P.2d 987, 989 (Ariz. 1979).

The Court has already found that Haydon operated carelessly. The question, however, was whether they were in the process of "mak[ing[or begin[ning] an excavation" within the meaning of the statute. Haydon argues that it was an excavator with respect to the work it had earlier done but not with respect to the work Western had done. And, in fact, the statute speaks prospectively – of actions that must be taken *prior* to excavation, not as to what must be done *after* an excavation has been completed. Quite simply, while Haydon behaved carelessly and negligently in connection with the events in question, the Court cannot say that it *excavated* carelessly and negligently, at least on the facts evident at this time.

Plaintiff attempts to escape the prospective focus of the statute by basing its claim on subsection (C) of that provision which it claims "expressly prohibits excavators from moving or obliterating the marks placed by utility owners to identify the location of underground utilities." However, that subsection reads:

> An excavator or an underground facilities operator shall not move or obliterate markings made pursuant to this article or fabricate markings in an unmarked location for the purpose of concealing or avoiding liability for a violation of or noncompliance with this article.

A.R.S. § 40-360.23.

When construing a statute, Arizona courts consider "the statutory language; if the language is plain and unambiguous, [they] will apply it without resorting to other rules of construction. The individual provision at issue, however, must be considered in the context of the entire statute of which it is a part." Arizona Dep't of Econ. Sec. v. Superior Court, 923 P.2d 871, 874 (Ariz. Ct. App. 1996) (internal citations omitted). Subsection (C) is plain and unambiguous; the provision prohibits destruction of marks for the purposes of concealing damage done while excavating rather than destruction of marks wholesale. In other words, an excavator who damages an underground facility may not erase or move marks in order to make it appear that she had not excavated carelessly or negligently. Haydon's behavior, in which marks were apparently erased incidentally to excavation and helped contribute to damage done later by a second excavator, does not fall within the statute's ambit.

Accordingly, Plaintiff's requested relief must be granted in part and denied in part. The Court's earlier finding that Plaintiff's Negligence Per Se and Strict Liability claims were time barred is reversed, however Plaintiff will not be granted judgment as a matter of law on those claims.

IT IS SO ORDERED.

DATED this 21st day of May, 2009.

Roslyn O. Silver
United States District Judge