

RENDERED: JULY 2, 2020; 10:00 A.M.  
TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2019-CA-000193-MR  
AND  
NO. 2019-CA-000239-MR

FRANKFORT PLANT BOARD  
MUNICIPAL PROJECTS  
CORPORATION

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT  
v. HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 13-CI-01111

BELLSOUTH TELECOMMUNICATIONS,  
LLC D/B/A AT&T KENTUCKY

APPELLEE/CROSS-APPELLANT

### OPINION AFFIRMING

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BEFORE: COMBS, GOODWINE, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: The Frankfort Plant Board Municipal Projects Corporation (FPB) appeals from the Franklin Circuit Court's order granting summary judgment in favor of BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (AT&T).

AT&T cross-appeals the Franklin Circuit Court's order denying pre-judgment interest. We affirm on appeal and cross-appeal.

In 1936, the parties' predecessors in interest, namely, Kentucky-Tennessee Light & Power Company (now FPB) and Southern Bell Telephone and Telegraph Company (now AT&T) executed the following document:

FOR AND IN CONSIDERATION OF THE sum of One Dollar (\$1.00) each paid, the KENTUCKY-TENNESSEE LIGHT & POWER COMPANY, a corporation of the State of Kentucky, hereby grants unto the SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, its associated and allied Companies, their respective successors and assigns, the right, privilege and authority to construct, operate and maintain its lines of Telephone and Telegraph, for the general transmission of intelligence, including the necessary underground cable and conduit upon, across and under the property owned by the Kentucky-Tennessee Ligh[t] and Power Company, and known as the Frankfort Reservoir lot, located in Franklin County, State of Kentucky; said sum being received in full payment of said rights.

The Telephone Company shall pay the Kentucky-Tennessee Light and Power Company for any damages to said property for which the Telephone Company is responsible.

The Telephone Company's underground cable and conduit shall extend upon, across and under the water works property between the reservoir and Highway 60; the northerly line of Altamount Avenue and the entrance to the premises of Mrs. C.W. Hay.

The Telephone Company further agrees that their use of this property shall not interfere with any use the

Kentucky-Tennessee Light and Power Company may want to put it to in the future conduct of their business.

Witness whereof the hand and seal of the said Corporation, this the 29<sup>th</sup> day of September, 1936.

The circuit court made these findings of fact, which we adopt as our own, about events that occurred beginning in 2004:

Pursuant to an easement dated September 29, 1936 AT&T Kentucky had telecommunications facilities on property owned by FPB. By its terms, the property owner could limit the right to use the easement with any future uses of the property. Until 2004, AT&T Kentucky's use of the easement did not conflict with FPB's use of the property. In 2004, FPB initiated a project to enlarge the Reservoir substation to add a second bay. On November 29, 2004, David Carpenter, Chief Electrical Engineer for FPB, mailed a letter to Wayne Priddy at AT&T Kentucky's predecessor, BellSouth Telecommunications, regarding BellSouth's (now AT&T Kentucky's) conduit discovered during excavation. In the letter Carpenter advised BellSouth that their facilities would be under a new section of the substation and would be allowed to remain on the property. However, FPB stated that if BellSouth chose to leave its facilities as installed at the time, then BellSouth could not hold FPB responsible for any present or future damage to said facilities. Mr. Priddy recalled receiving the letter and placing the letter in a filing cabinet, which has since been emptied. However, he does not believe the letter he received was the same letter as FPB references. At the time, Mr. Priddy did not forward the letter to anyone else in the company.

On September 22, 2011, FPB excavated to place a new fence into the ground at the FPB substation at the corner of Tanglewood and Altamount in Frankfort, Kentucky. During the excavation, telecommunications

facilities belonging to AT&T Kentucky were damaged, and as a result AT&T Kentucky had to temporize, repair, and relocate its facilities.

On September 18, 2013, AT&T Kentucky filed suit against FPB requesting \$364,484.85 for damages to its facilities located on FPB's substation at the corner of Tanglewood and Altamount as a result of the excavation on September 22, 2011. Both the FPB and AT&T Kentucky moved for partial summary judgment, and . . . oral arguments occurred on July 12, 2017.

The circuit court, on November 15, 2017, granted partial summary judgment to AT&T as to liability and denied FPB's motion for summary judgment. FPB then stipulated to the amount of damages and agreed that AT&T was entitled to post-judgment interest at the statutory rate but objected to any pre-judgment interest on the award. The circuit court agreed with FPB, and, on January 10, 2019, entered an order denying AT&T's motion for pre-judgment interest. FPB's appeal questions the propriety of the summary judgment to AT&T, and AT&T argues on cross-appeal that the denial of pre-judgment interest was erroneous because the damages as awarded constituted a liquidated claim.

We begin by enunciating the applicable standard of review:

“The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Summary judgment involves only legal questions; whether a fact is material and, if so, whether there is a genuine issue regarding that material fact are legal questions. *Stathers*

*v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 478 (Ky. App. 2012). Thus, we utilize a *de novo* review standard. *Id.*

Kentucky courts have repeatedly stated, and we continue to adhere to these bedrock principles, that summary judgment is an extraordinary remedy, it is to be “cautiously applied[,]” and it “should not be used as a substitute for trial.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). “The trial court must review the evidence, not to resolve any issue of fact, but to discover whether a real fact issue exists.” *Shelton v. Kentucky Easter Seals Soc’y*, 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). This requires both the trial court and this Court to review the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in [its] favor.” *Steelvest*, 807 S.W.2d at 480.

*Joiner v. Kentucky Farm Bureau Mutual Insurance Company*, 582 S.W.3d 74, 77-78 (Ky. App. 2019). Here, the facts must be viewed in a light most favorable to FPB. *Id.* at 78.

FPB first argues that the circuit court erred as a matter of law in granting summary judgment to AT&T because of the question of causation. FPB urges that the question was not, as the circuit court decided, whether FPB’s violation of the “Call Before You Dig Law” (Kentucky Revised Statute (KRS) 367.4911)<sup>1</sup> caused the damage but rather whether the damage was caused by

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<sup>1</sup> KRS 367.4901, enacted in 1994 and effective January 1, 1995, states: “The General Assembly finds that the objective of underground facility damage prevention and the resulting benefits of public and workplace safety and protection of consumer services require an effective underground damage prevention procedure. KRS 367.4901 to 367.4917, which may be cited as

AT&T's allowing the facilities to remain in that location since 2004. FPB continues in this vein: the letter detailing its expansion over AT&T's underground facilities served as notice that henceforth maintaining the facilities in that location constituted a code violation (namely KRS 278.042, which adopts the National Electrical Safety Code) by AT&T. FPB further contends that the cost of relocating the underground facilities became AT&T's responsibility once it became aware that FPB's expanded substation was going to be built over it. At a minimum, FPB asserts, these matters were factual issues that should have been determined by a jury.

The circuit court disagreed, as do we, and held that the easement remained valid and that FPB's failure to comply with the Dig Law, which then led to the damages to AT&T's facilities, constituted negligence per se. *See* KRS 446.070.<sup>2</sup> Again, we quote directly from the circuit court's order:

In order to prove negligence per se, [AT&T] is required to show membership of the class of persons the statute was designed to protect, and the injury suffered is an event the statute intended to prevent. *Carman v. Dunaway Timber Co., Inc.*, 949 S.W.2d 569, 571 (Ky. 1997). The Kentucky Underground Facility Damage Prevention Act of 1994[] requires every excavator[] to call and obtain a location marking of all underground

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the 'Underground Facility Damage Prevention Act of 1994,' are created to provide for this procedure and accomplish this objective."

<sup>2</sup> This statute reads: "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

utilities prior to excavation. KRS [3]67.4911. The objective of the Act is, partially, to prevent damage to utility operators with underground facilities. KRS 367.4901. AT&T Kentucky is a utility operator and therefore is a member of the class the statute was designed to protect. Prior to the September 2011 excavation, FPB failed to obtain a location marking of underground utilities at the Reservoir Property. Consequently, FPB's excavation caused damage to AT&T Kentucky's underground facilities. Despite FPB being the rightful owner of the Reservoir Property, AT&T Kentucky has a valid easement for its underground facilities and FPB has a duty to comply with Kentucky's Dig Law and obtain a location marking prior to excavation. Thus, FPB is liable to AT&T Kentucky.

Hence, we affirm the Franklin Circuit Court's order granting AT&T's motion for partial summary judgment on the issue of causation.

We next turn to the cross-appeal. The parties stipulated to "the amount of damages attributable to repairs and relocation of the AT&T facility" as \$364,484.85. Furthermore, FPB agreed that post-judgment interest was proper. The parties disagreed on the issue of pre-judgment interest. AT&T argued that, because the damages were liquidated, it was entitled to pre-judgment interest of \$196,055.17.

The longstanding rule in this state is that prejudgment interest is awarded as a matter of right on a liquidated demand, and is a matter within the discretion of the trial court or jury on unliquidated demands. *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136, 141 (Ky. 1991). [Appellant] argues that the demand was liquidated, and therefore prejudgment interest should have been awarded. The trial court, here, denied prejudgment

interest, reflecting its determination that the claim was unliquidated.

*3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 450 (Ky. 2005).

Here, the circuit court found:

Stipulating to the damage amount does not make the damages liquidated. . . . Had [FPB] not stipulated to the damages amount, it would be necessary to brief the issue of damages and possibly hold a hearing for the Court to evaluate expert testimony. It is within the discretion of the trial court to award prejudgment interest when damages are unliquidated, and previous courts have denied prejudgment interest when damages were contested and unliquidated. Therefore, due to the dispute in damages, and despite [FPB's] stipulation, the Court will not award [AT&T] prejudgment interest.

The circuit court awarded damages in the stipulated amount and “post-judgment interest at the statutory rate,” but denied pre-judgment interest to AT&T.

We agree with the circuit court that the damages, albeit stipulated by the parties, remained unliquidated because of “the nature of the underlying *claim*, not the final award.” *3D Enterprises*, 174 S.W.3d at 450 (emphasis original). We find no abuse of discretion in the circuit court’s denial of pre-judgment interest. *Id.* at 450-51.

The orders of the Franklin Circuit Court are affirmed.

ALL CONCUR.



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