

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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S.D. WARREN COMPANY,

Plaintiff,

v

CONSUMERS POWER COMPANY and  
HYDAKER-WHEATLAKE COMPANY,

Defendants,

HYDAKER-WHEATLAKE COMPANY,

Third-Party Plaintiff/Counter-  
Defendant,

and

CONSUMERS POWER COMPANY,

Third-Party Plaintiff/Counter-  
Defendant-Appellant,

v

KELLY SERVICES, INC.,

Third-Party Defendant-Appellee.

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Before: Meter, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant/third-party plaintiff Consumers Power Company (Consumers) appeals by right from the trial court's ruling that third-party defendant Kelly Services, Inc. (Kelly) did not have to indemnify Consumers from damages that occurred after Consumers utilized Kelly personnel to map the route on which a trench would be dug. Consumers claims that damages were caused to an underground structure because of the Kelly employee's negligence. Because we hold that the jury's finding that Consumers had constructive knowledge of the underground structure means as a matter of law that Consumers knew or should have known about the structure's existence – regardless whether the Kelly employee was negligent – we hold that there is no basis for

determining the indemnity clause's scope. Thus, we affirm the trial court, albeit for different reasons. See MCR 7.216(A)(7).

## I. Background

This is the parties' third appearance before this Court. To delineate the initial installment of the somewhat complex factual and procedural history of the case, we quote the following from our previous opinion, *S D Warren Co v Hydaker-Wheatlake Co*, unpublished per curiam opinion of the Court of Appeals, issued February 6, 2001 (Docket Nos. 216208 and 216271):

In these consolidated appeals, defendants Consumers Power Company (Consumers) and its subcontractor Hydaker-Wheatlake Company (Hydaker) appeal as of right from a judgment entered in favor of plaintiff S.D. Warren Company (plaintiff). The judgment was entered following a jury trial limited to the issue of damages on plaintiff's trespass claims against Consumers and Hydaker. In Docket Nos. 216208 and 216271, Consumers and Hydaker challenge the order granting plaintiff partial summary disposition of its trespass claims. In Docket No. 216208, third-party plaintiff Consumers contests the order denying summary disposition of its claim for indemnification against third-party defendant Kelly Services, Inc. (Kelly Services). We reverse and remand for proceedings consistent with this opinion.

## I. Facts and Proceedings

### A. Trespass

This case arises from an incident on September 1, 1993 in which Hydaker struck and damaged a portion of plaintiff's sewer line while installing an underground electrical line at Consumers' direction. Plaintiff operates a paper manufacturing facility (the mill) in Muskegon. The production wastes from the mill are sent to a municipal pumping station through a thirty-inch "force main" owned and maintained by plaintiff. The sewer line runs through property owned by the State of Michigan/Department of Natural Resources (State) and leased to the City of Muskegon (City) for recreational development. Plaintiff holds an easement to maintain and operate underground facilities in the portion of the property through which the sewer line passes. The instrument creating the easement was duly recorded in 1986 and identifies the grantee as "Scott Paper Company," plaintiff's predecessor in interest.

In July 1993, the City retained Consumers to install a power line through the leased property. To this end, Richard Heisser (a retired Consumers employee whom Consumers obtained pursuant to its contract for temporary personnel with Kelly Services) met with the City's Park Supervisor, Bernadette Young, to discuss the City's desired route of installation and method. Heisser completed a layout design and staked the path for installation.

On August 26, 1993, Consumers contacted “Miss Dig,” a statutorily mandated organization created to receive notice of proposed excavation and to provide such notice to all registered utilities having underground facilities within proposed areas of excavation. MCL 460.705, MCL 707; MSA 22.190(5), MSA 22.190(7). “Miss Dig” disclosed the existence of a Marathon Oil pipeline in the planned excavation area; it did not disclose the existence or location of plaintiff’s sewer line because the line was not registered with the organization.<sup>1</sup> The path of the sewer line was not identified by flags, stakes or markers.

In the meantime, Consumers had contracted with Hydaker to install the power line in the manner designed and specified by Consumers. On September 1, 1993, Hydaker struck and damaged plaintiff’s sewer line during the course of installing the underground power line. Because the sewer line was not pressurized at the time of the incident due to unrelated repairs, members of Hydaker’s work crew did not know that they had hit the line until the days following the incident. The mill cannot operate without the sewer line and was therefore shut down until the repairs were completed.

In 1996, plaintiff filed a complaint against both Consumers and Hydaker, seeking recovery for damage to its sewer line under theories of trespass and negligence. The trespass counts alleged that Consumers, without authority, directed and caused Hydaker to commit a trespass on plaintiff’s easement that resulted in damage to its sewer line. The negligence counts alleged that Consumers and Hydaker failed to use reasonable care in determining whether there were underground structures in the path of proposed excavation; that they failed to provide notice to plaintiff, as the holder of an easement in property, that it was planning to dig on the easement; and that they failed to use due care to avoid damage to the sewer line. In its general allegations, plaintiff claimed that “the presence of the underground sewer line was visible on the surface due to the presence along the sewer line of an air and vacuum relief structure within approximately 160 feet, and a manhole within approximately 200 feet, of the location where the damage occurred.” Consumers and Hydaker denied this allegation in their answers to the complaint.

Plaintiff filed a motion for partial summary disposition on the trespass claims pursuant to MCR 2.116(C)(10). Plaintiff argued that defendants were liable as a matter of law because it was undisputed that Hydaker, while acting on Consumers’ behalf, intruded upon and damaged the sewer line without plaintiff’s authorization. In support of its motion, plaintiff submitted responses to interrogatories in which Consumers admitted that it only corresponded with the

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<sup>1</sup> Consumers and Hydaker do not contest on appeal the trial court’s ruling that while plaintiff could have, it was not required to register with “Miss Dig” because the statute only requires “public utilities” and not private companies to register.

City about the project and that neither entity notified plaintiff about the excavation plans.

Consumers and Hydaker filed a response requesting dismissal of the trespass claims. They argued that plaintiff could not establish that they intended to commit a trespass without showing that they had actual or constructive notice of the sewer line.<sup>2</sup> Plaintiff responded by maintaining that their intentional entry on the property and the intentional acts committed thereon satisfied the intent requirement.<sup>3</sup> The trial court agreed with plaintiff and granted its motion for partial summary disposition, reserving the issue of damages for trial. In rejecting Consumers' and Hydaker's motion for reconsideration, the trial court concluded that while cases from other jurisdictions supported their position, "this Court determines Michigan law to be otherwise."

#### B. Indemnification

Thereafter, the trial court granted Consumers and Hydaker leave to file a third-party complaint against the State and the City, alleging that they were entitled to indemnification for any judgment rendered in favor of plaintiff on the trespass claims. Consumers and Hydaker claimed that the City, as lessee in direct control of the property owned by the State, invited them onto property that was subject to plaintiff's easement and that the incident would not have occurred but for its direction or invitation. After extensive litigation, however, the parties stipulated on September 11, 1998, to dismiss the third-party complaint with prejudice and without costs. Neither the State nor the City are parties to this appeal.

On December 3, 1997, Consumers and Hydaker were permitted to amend the complaint to add Kelly Services as a third-party defendant. Consumers and Hydaker alleged that any damage to plaintiff's sewer line was caused by the negligence of Kelly Services employee Richard Heisser, and that Kelly Services was contractually obligated to indemnify them for any and all damages arising

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<sup>2</sup> Defendants maintained that they had contacted Miss Dig pursuant to state law and common practice to give notice of the excavation; that examination of the adjacent terrain revealed no indication of a hidden sewer line; and that the only facts alleged concerning notice was the existence of a manhole and pressure valve that were obscured by weeds.

<sup>3</sup> Plaintiff asserted that negligence was not required to establish liability in trespass and, even if it were, Consumers and Hydaker could not sustain that position because: (1) the easement for the sewer line was recorded with the register of deeds (2) the sewer line was located in a railroad right of way (a common place for pipelines) (3) the line was marked with protruding manholes and pressure valves (4) the City Engineer's Office and the County Wastewater Management System were aware of the sewer line, and (5) defendants would have been alerted to the presence of the sewer line had they looked around and made obvious inquiries.

from the activities of its employees.<sup>4</sup> Both Consumers and Kelly Services filed motions for summary disposition pursuant to MCR 2.116(C)(10). The trial court initially granted Consumers' motion and denied Kelly Services' motion as to Consumers.<sup>5</sup> The trial court subsequently granted Kelly Services' motion for reconsideration and reversed its original decision.

Less than a week before trial, and as a result of the trial court's rulings on various motions in limine on the issue of plaintiff's comparative negligence, plaintiff moved to dismiss the negligence claims against Consumers and Hydaker and to limit trial to the issue to damages on the trespass claims. On the same date, Consumers filed a motion to dismiss the trespass claims on the ground that Richard Heisser was responsible for the damage to the sewer line, that he was not an employee of Consumers at any relevant time, and that Consumers could not be held vicariously liable for the intentional tort of trespass as a matter of law. The trial court granted plaintiff's motion, but denied Consumers' motion as untimely.

Following a jury trial limited to the issue of damages related to the trespass claim, the jury returned a \$548,134.03 verdict in favor of plaintiff. [*Id.*]

After our February 6, 2001 opinion was issued, Warren and Consumers returned to the lower court for a second trial, only to discover a difference of opinion regarding the scope of this Court's remand. Warren believed that retrial was to be held on the issues of both liability and damages, while Consumers read this Court's opinion as granting retrial on the issue of liability only. The trial court agreed with Warren, and Consumers appealed. This Court held that trial was to be held on the issue of liability only (Order granting immediate consideration, vacating trial court's order, and clarifying scope of new trial, Docket No. 236470, 9/10/01) and denied reconsideration.

Before proceeding to trial, Warren and Consumers stipulated that if the jury found that Consumers had either actual or constructive knowledge of Hydaker's underground sewer line, that would be equivalent to a finding that Consumers was liable for the damages. After the January 2002 trial, the jury, by way of a special verdict form, found that Consumers had constructive knowledge of the sewer line. Thus, on April 22, 2002, the trial court entered a judgment on the verdict against Consumers for the original amount of \$548,134.03 plus interests and costs, for a final amount of \$813,458.18.

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<sup>4</sup> Consumers and Hydaker alleged that Heisser was involved in the design for the installation of the underground power line; that he provided an installation drawing and made site visits for the purpose of installing the power line; that although not specifically marked or registered with "Miss Dig," Heisser knew that there was an underground facility somewhere in the vicinity; and that this "active" negligence of Kelly Services, as opposed to Consumers' and Hydaker's "passive" negligence, proximately caused the damage to the sewer line.

<sup>5</sup> The trial court granted Kelly Services' motion as to Hydaker on the ground that it was not a party to the contract for temporary personnel.

As noted in this Court's previous opinion, Consumers and Kelly filed cross-motions for summary disposition in 1998 on the issue of indemnity. In its first opinion and order, the trial court held that the indemnity clause in the general contract did not extend to damages caused by a Kelly-provided employee. Nonetheless, the trial court found that the indemnity clause in the purchase order did cover the damages at issue, and thus granted Consumers' motion for summary disposition.

Kelly moved for reconsideration. After considering the matter again, the trial court reversed its decision and held that the "the conflicts provision of the contract [] subordinated the purchase order to the contract," and that as such, the indemnity clause of the general contract prevailed.

Consumers now appeals the trial court's July 21, 1998 order granting Kelly's motion for reconsideration and dismissing Consumers' claim for indemnity.

## II. Analysis

A trial court's decision regarding a motion for reconsideration is reviewed for an abuse of discretion. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709; 609 NW2d 607 (2000), citing *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223; 611 NW2d 333 (2000), citing *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

To succeed on a motion for reconsideration, the moving party must demonstrate that the trial court made "a palpable error by which the court and the parties have been misled and show that a different disposition of the [preceding motion for summary disposition] would result from correction of the error." MCR 2.119(F)(3). The court rule has been interpreted to give a trial court unrestricted discretion in ruling on motions for reconsideration. *Sutton v Oak Park*, 251 Mich App 345, 405-406; 650 NW2d 404 (2002). The court may grant reconsideration "to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000), citing *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987).

But a trial court's judgment regarding contract interpretation is reviewed de novo by this Court, and the de novo review encompasses "whether the language of a contract is ambiguous and requires resolution by the trier of fact." *DaimlerChrysler Corp v G-Tech Professional Staffing*, \_\_\_\_ Mich App \_\_\_\_; \_\_\_\_ NW2d \_\_\_\_ (Docket No. 241109, Dec. 23, 2003), slip op 2, citing *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 469, 480; 663 NW2d 447 (2003), and *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003).

Nonetheless, we cannot reach the indemnity clause issue, because there is no adjudication of negligence on the part of Kelly. Despite the fact that Consumers utilizes the majority of its brief to argue why Kelly must indemnify it, we find that prior to consideration of the indemnity clause, there must be a finding that Heisser was negligent. Even assuming that Kelly must indemnify, which we do not decide, Kelly argues that the jury's decision that Consumers had constructive knowledge of the sewer line (which knowledge translated into liability for

Consumers per the parties' stipulation) cannot be translated into a finding that Heisser was negligent as a matter of law. We agree.

Because the issue whether Heisser was negligent was not argued before or decided by the trial court or the jury, Consumers is requesting that this Court decide that because the jury determined that Consumers was negligent, Heisser was negligent. We decline to do so. Relying on trial testimony regarding Heisser's methodology of mapping the route, Consumers contends that because Heisser was the "only person who actually laid out the route for the new power line," a finding that Consumers had constructive knowledge of the underground structure necessarily meant that solely Heisser was negligent. We find that remand on the issue is inappropriate because of the jury's specific finding that Consumers had constructive knowledge. Constructive knowledge means that "[i]f one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact . . . ." *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 717; 597 NW2d 506 (1999), quoting Black's Law Dictionary (6th ed), p 314. Thus, the jury's finding that Consumers had constructive knowledge of the pipeline meant as a matter of law that Consumers failed to exercise reasonable care to discover that there was a sewer line in the planned excavation route.<sup>6</sup> Therefore, because the jury determined that ultimate responsibility lay with Consumers, remand would be futile.

In sum, we find it unnecessary to decide whether the trial court's ruling regarding the indemnity clause was correct because there was no determination at any stage of the lower court proceedings that Heisser, and thus Kelly, was negligent. Thus, we affirm the trial court's judgment in Kelly's favor for the reasons stated in this opinion.

/s/ Patrick M. Meter

/s/ Kurtis T. Wilder

/s/ Stephen L. Borrello

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<sup>6</sup> Moreover, the parties dispute whether Consumers put Heisser in "responsible charge" of the engineering task of laying the route, which was forbidden by the contract. Consumers claims it did not put Heisser in responsible charge, thus raising the question how Consumers could attribute liability to Heisser while at the same time claiming he was *not* in responsible charge of the work. If Heisser was not in responsible charge, it seems Consumers would bear ultimate responsibility for his mistake. The internal inconsistency of Consumers' argument bolsters our conclusion that Consumers bore ultimate responsibility for the mistake.