

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

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AT&T,

Plaintiff-Appellant,

v

KILGOUR & COMPANY, INC. and S-CON  
CORPORATION,

Defendants-Appellees.

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UNPUBLISHED  
January 24, 2013

No. 306686  
Wayne Circuit Court  
LC No. 10-003744-CZ

Before: TALBOT, P.J., and JANSEN and METER, JJ.

PER CURIAM.

In this negligence action, AT&T appeals as of right the trial court's April 29, 2011, order granting summary disposition<sup>1</sup> in favor of Kilgour & Company, Inc. ("Kilgour") and S-Con Corporation ("S-Con"). We affirm.

Kilgour is a business that performs horizontal earth boring and is owned by Jonathan Kilgour. S-Con, which was involved in the construction of a CVS pharmacy, hired Kilgour to provide horizontal boring services. The purpose of the boring was to provide the CVS pharmacy with a water supply. Kilgour performed two bores for S-Con. The bore that resulted in the instant litigation was a 16 inch bore that measured 96 feet in length and occurred on December 1, 2007.

According to the records, on November 19, 2007, at 9:05 a.m., Jeff Stokes from S-Con contacted MISS DIG System, Inc. ("Miss Dig").<sup>2</sup> The work S-Con was performing was installation of a water main and sanitary sewer at Canton Center and Cherry Hill Roads. The

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<sup>1</sup> MCR 2.116(C)(10).

<sup>2</sup> Miss Dig "serves as a message handling notification service for underground facility owners. [Miss Dig] takes information about . . . planned excavations and distributes the information to its membership. It is then the responsibility of each facility owner to mark the approximate location of their underground facilities at the excavation site." Miss Dig System, Inc. <http://www.missdig.net> (accessed December 13, 2012).

ticket indicated that the “Digstart” was November 20, 2007, at 8:00 a.m. and further noted “NE COR NEW CVS PHARMACY SITE STK ENTIRE PROP.”

On November 27, 2007, Stokes contacted Miss Dig at 11:18 a.m. The ticket indicated that the “Digstart” was on the same date at 11:17 a.m. The ticket further noted “STK S SD OF CHERRY HILL FRM CANTON CENTER GOING E APX 1000 FT ACROSS FRM NEW CVS PHARMACY SITE.” The records of SM&P Utility Resources, Inc. (“SM&P”),<sup>3</sup> which is a subcontractor of AT&T that is responsible for marking AT&T’s lines, indicate that SM&P was at the job site regarding this call on November 30, 2007.

On December 1, 2007, at approximately 9:00 a.m., Jonathan Kilgour arrived at the job site. AT&T’s lines had already been marked in the area where Kilgour was going to bore. Kilgour began to hand dig to locate AT&T’s fiber optic lines, but none could be located. As a result, Jonathan Kilgour asked Stokes to call Miss Dig for an emergency request to re-mark the lines so that Kilgour could start boring.

Stokes contacted Miss Dig on December 1, 2007, at 9:54 a.m. According to the records, the “Digstart” was noted to be on that same date at 9:51 a.m. The ticket further noted “STK NE COR OF INTER GOING 1000FT E & N.” Jonathan Kilgour testified that SM&P came to the job site that day and appeared to be concerned that Kilgour was unable to find the fiber optic lines that were originally marked. After discovering that the original marking was incorrect, SM&P then re-marked AT&T’s fiber optic lines. Kilgour then hand dug, located and exposed the lines.

Kilgour then began boring. Kilgour struck a group of approximately three conduits containing fiber optic lines belonging to AT&T that allegedly had not been marked by SM&P. Jonathan Kilgour immediately reported that the lines had been struck.

Appellate review of a trial court’s decision to grant summary disposition is *de novo*.<sup>4</sup> “A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.”<sup>5</sup> This Court reviews a motion brought under this subsection “by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.”<sup>6</sup> Summary disposition is proper “if there is no genuine issue regarding

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<sup>3</sup> USI is a foreign corporation operating locally under the assumed name of SM&P Utility Resources, Inc. (“SM&P”).

<sup>4</sup> *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

<sup>5</sup> *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 582-583; 794 NW2d 76 (2010).

<sup>6</sup> *Comerica Bank v Cohen*, 291 Mich App 40, 45; 805 NW2d 544 (2010) (citation and quotations omitted).

any material fact and the moving party is entitled to judgment as a matter of law.”<sup>7</sup> “When the record leaves open an issue on which reasonable minds could differ, a genuine issue of material fact exists that precludes summary disposition.”<sup>8</sup>

On appeal, AT&T argues that the trial court erred when it granted summary disposition in favor of Kilgour when it did not file a motion. We disagree.

Kilgour did not file a motion for summary disposition, but instead filed a concurrence with S-Con’s motion for summary disposition. Motion practice is delineated in MCR 2.119, which contains no limitations on the subject-matter of a motion. Thus, filing a concurrence is permitted. Additionally, “[i]t is within the trial court’s discretion to allow” a late filed motion.<sup>9</sup> “An abuse of discretion occurs when the [trial court’s] decision results in an outcome falling outside the principled range of outcomes.”<sup>10</sup>

Here, Kilgour filed its concurrence with S-Con’s motion on April 28, 2011, the day before the hearing on S-Con’s motion. Kilgour’s concurrence, however, indicated that it concurred with S-Con’s arguments that the Miss Dig Act was complied with, that there was no genuine issue of material fact, and that the “the sole negligent party responsible for the damage” was AT&T. Kilgour was the party whose boring caused the alleged damage. The concurrence relied on the arguments made by S-Con regarding AT&T’s allegations of negligent boring and also relied on S-Con’s evidence. The concurrence additionally provided evidence regarding when SM&P purportedly responded to Stokes’s November 27, 2007, call to Miss Dig. AT&T was provided with notice of the arguments that were made by Kilgour on January 21, 2011, when it was served with S-Con’s motion for summary disposition, more than three months before the hearing on S-Con’s motion. Because AT&T had the opportunity to respond to the arguments pertaining to Kilgour, AT&T was not prejudiced by the late filing of Kilgour’s concurrence. Thus, the trial court did not abuse its discretion when it accepted Kilgour’s concurrence and granted summary disposition in its favor.<sup>11</sup>

AT&T also argues that summary disposition in favor of S-Con and Kilgour was improper because it was based on a credibility determination made by the trial court and ignored documentary evidence that created a genuine issue of material fact. We disagree.

Pursuant to what is commonly known as the “MISS-DIG Act”:

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<sup>7</sup> *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 712-713; 777 NW2d 205 (2009) (citation and quotations omitted).

<sup>8</sup> *Id.* at 713.

<sup>9</sup> MCR 2.116(D)(4).

<sup>10</sup> *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

<sup>11</sup> *Id.*

A person<sup>[12]</sup> or public agency shall not discharge explosives, excavate, or tunnel in a street, highway, public place, a private easement of a public utility, or near the location of a public utility facility owned, maintained, or installed on a customer's premises, or demolish a building containing a public utility facility without having first ascertained in the manner prescribed in [MCL 460.705 or MCL 460.707] the location of all underground facilities of a public utility in the proposed area of excavation, discharging of explosives, tunneling, or demolition.<sup>13</sup>

The Act requires that a person or public agency responsible for boring procedures provide "at least 3 full working days [notice], excluding Saturdays, Sundays, and holidays, but not more than 21 calendar days, before commencing . . . boring procedures."<sup>14</sup> A notice of intent to bore must include "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 . . . boring procedure, . . . and the location of the . . . boring[.]"<sup>15</sup>

Not less than 1 working day in advance of proposed construction, unless otherwise agreed between the person or public agency performing the . . . boring, . . . and the public utility, a public utility served with notice pursuant to [MCL 460.705 or MCL 460.707] shall inform the person or public agency of the approximate location of the underground facilities owned or operated by the public utility in the proposed area of . . . boring . . . in a manner that enables the person or public agency to employ hand dug test holes or other similar means of establishing the precise location of the underground facilities using reasonable care to establish the precise location of the underground facilities in advance of construction. . . .<sup>16</sup>

Liability is imposed on a corporation "if the underground facilities of a public utility are damaged by the activities described in MCL 460.703 and the '[corporation]' responsible for giving the notice . . . failed to give notice or the '[corporation] did not employ hand-digging or failed to provide support . . . .'"<sup>17</sup> "[T]he liability for damages shall be reduced in proportion to

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<sup>12</sup> "'Person' includes an individual, partnership, corporation, association, or any other legal entity. Person does not mean a public agency." MCL 460.701(b).

<sup>13</sup> MCL 460.703 (footnote omitted).

<sup>14</sup> MCL 460.705(1).

<sup>15</sup> MCL 460.705(2).

<sup>16</sup> MCL 460.708.

<sup>17</sup> *State Farm Fire & Casualty Co v Corby Energy Servs, Inc*, 271 Mich App 480, 487; 722 NW2d 906 (2006) (citation omitted).

the negligence of the public utility if it fail[ed] to comply with [MCL 460.708]”<sup>18</sup> and inform the corporation of “the approximate location of the [public utility’s] underground facilities.”<sup>19</sup>

The evidence establishes that Miss Dig was provided with appropriate notice of Kilgour’s boring operations. The boring that caused the alleged damage in this case took place on December 1, 2007. The Miss Dig records establish that on November 19, 2007, and November 27, 2007, more than 72 hours before Kilgour began boring, Stokes contacted Miss Dig to request that the utilities related to the CVS Pharmacy job site be marked. Although the “Digstart” on the November 19 and November 27, 2007, Miss Dig tickets indicate a “Digstart” less than 72 hours later, no evidence was presented that the “Digstart” listed was actually the time that boring began. Additionally, Jonathan Kilgour testified that the boring that resulted in the instant lawsuit did not start until December 1, 2007, which was not contradicted by AT&T’s evidence.

Jonathan Kilgour testified that Stokes was responsible for contacting Miss Dig and it was Jonathan Kilgour’s understanding that Miss Dig was told where Kilgour was boring and that Stokes requested that all utilities be marked. Jonathan Kilgour further testified that AT&T’s lines had been marked in the area where Kilgour was going to bore by the time he arrived at the job site on December 1, 2007. AT&T provided no evidence that the location that Stokes requested Miss Dig to mark, as reflected on the Miss Dig tickets dated November 19, 2007 and November 27, 2007, was not the same location where the alleged damage occurred. The information under “Stk Info” on the Miss Dig tickets seemingly describes the exact area that S-Con requested to be marked. Because no documentary evidence was provided to explain the information contained under “Stk Info,” this Court will not attempt to interpret that information. Thus, there is no genuine issue of fact regarding whether appropriate notice was given to Miss Dig.

Jonathan Kilgour testified that hand digging was performed the morning of December 1, 2007, to attempt to locate AT&T’s lines as originally marked by SM&P. The lines, however, could not be located. Jonathan Kilgour also testified that as a result, he asked Stokes to make an emergency call to Miss Dig to have the lines re-marked. Jonathan Kilgour explained that an SM&P employee returned, and after discovering the mistake regarding the initial marking, re-marked AT&T’s lines. Kilgour then hand dug, located and exposed the lines in the area where it was going to bore, and began its boring procedures. Thus, the evidence supports compliance with the MISS-DIG Act.<sup>20</sup>

AT&T contends that the trial court erred when it made and relied on a credibility determination. Consideration of deposition testimony to determine whether granting summary disposition is appropriate is permissible.<sup>21</sup> Because the evidence presented by AT&T did not

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<sup>18</sup> MCL 460.714.

<sup>19</sup> MCL 460.708.

<sup>20</sup> MCL 460.703; MCL 460.705.

<sup>21</sup> *Comerica Bank*, 291 Mich App at 45.

refute Kilgour's evidence, which will be explained in detail below, we find that AT&T's assertion that the trial court's grant of summary disposition was based on the court finding that Jonathan Kilgour's testimony was more credible than other evidence presented must fail. While AT&T asserts that Jonathan Kilgour's testimony could be untruthful, such an assertion is mere speculation as no evidence to contradict his testimony was provided. Additionally, the cases cited by AT&T are unpersuasive as they do not support the contention that the testimony of an interested witness cannot be considered by the trial court as evidence in support of summary disposition.

AT&T's assertion that the trial court erroneously disregarded documentary evidence that created a genuine issue of material fact also lacks merit. The documents produced by AT&T in opposition to S-Con's motion for summary disposition include the following: (1) a drawing of the northeast corner of Canton Center and Cherry Hill Roads; (2) an SM&P ticket which indicated that Stokes contacted Miss Dig on November 19, 2007, at 9:05 a.m. for a "Digstart" of November 20, 2007, at 8:00 a.m. The ticket further noted "STK ENTIRE PROP" and the work was noted to be performed on November 26, 2007. (3) Various photographs of the location where the boring occurred that were exhibits to Jonathan Kilgour's deposition; and (4) an SM&P ticket which indicated that Stokes contacted Miss Dig on December 1, 2007, at 9:54 a.m. for a "Digstart" on that same date at 9:51 a.m. The ticket noted "STK NE COR OF INTER GOING 1000FT E & N CREW ON SITE" and that the work was performed on December 3, 2007.

No testimony was provided to interpret the SM&P records. Therefore, similar to the Miss Dig records, the SM&P records provided by AT&T fail to establish that the area that S-Con requested to be marked before Kilgour started boring was not where the alleged damage occurred. Additionally, there was evidence presented that Miss Dig was contacted regarding marking the utilities at the CVS Pharmacy job site on November 27, 2007, which was unrefuted by AT&T's evidence. As such, no genuine issue of fact was created by AT&T's evidence regarding whether appropriate notice was given to Miss Dig of Kilgour's intent to bore at the location where the alleged damage occurred.

Viewed in the light most favorable to AT&T, the evidence presented by AT&T demonstrates that SM&P was at the job site on November 26, 2007, before the boring at issue in this case occurred. The evidence also establishes that SM&P was at the job site on December 3, 2007. AT&T did not present evidence that: SM&P was not requested to mark AT&T's lines in the area where the alleged damage occurred, did in fact mark the lines that were allegedly damaged, or was not requested to re-mark the lines on December 1, 2007. AT&T asserts that it was impossible for the lines to be marked on December 1, 2007, because it was a Saturday. AT&T, however, failed to provide evidence that SM&P or AT&T employees do not work on Saturdays, or that SM&P or AT&T employees were not on the job site on December 1, 2007,

before AT&T's lines were struck. Accordingly, contrary to AT&T's assertion, the documents fail to create a genuine issue of material fact, and relief is not warranted.<sup>22</sup>

Affirmed.

/s/ Michael J. Talbot

/s/ Kathleen Jansen

/s/ Patrick M. Meter

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<sup>22</sup> *Fries*, 285 Mich App at 712-713.