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January 14, 2010

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RE: UPDATE: Excavation Technologies, Inc. v. Columbia Gas Co. of Pennsylvania

Dear Sirs and Mesdames:

As you may recall, on behalf of the Pennsylvania Utility Contractors Association, Associated Pennsylvania Constructors, National Utility Contractors Association, and ABC of Western Pennsylvania, we filed a brief with the Pennsylvania Supreme Court on July 14, 2008 supporting the Contractor's position in an important case entitled Excavation Technologies, Inc. v. Columbia Gas Co. of Pennsylvania.

In that case, the Contractor was attempting to recover damages for "downtime" caused when the Gas Company failed to accurately mark the locations of its underground gas lines. Both the trial court and the first appellate court sided with the Gas Company and dismissed the Contractor's claim by finding that Pennsylvania law effectively immunized the Gas Company from liability for purely economic damages.

In short, we supported the Contractor's efforts to change the state law through the court system. The Pennsylvania Supreme Court, despite considering the matter for nearly a year and a half, recently issued its opinion protecting the Gas Company from liability and directing us to work through the state legislature if we want to ensure that contractors have a remedy for

economic losses caused by a utility's negligence in marking underground lines. Of course, we also have a right to petition for reconsideration with the Court. At this time, we do not plan to petition, but please let me know by January 22, 2010, if you would like us to take any further action.

Attached for your use is an article summarizing this important opinion. Kindly let us know if you publish the article or quote a portion of it in your newsletter.

Please do not hesitate to contact me if you have any questions or would like to discuss the situation.

Very truly yours,

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

Kevin J. McKeon

KJM:mb
Enclosure

PA Supreme Court Refuses to Allow Contractor to Recover "Downtime" Losses Against Gas Company, Even When the Gas Company Fails to Accurately Mark Lines Pursuant to the One Call Act

By
Kevin J. McKeon, Esquire
Watt, Tieder, Hoffar & Fitzgerald, LLP

Experienced contractors recognize that it can be difficult for courts to appreciate the manner in which construction work is performed in the field, and must also recognize the importance of ensuring that their voices are heard in the legislature. The Pennsylvania Supreme Court recently issued an opinion that demonstrates both of these points. In Excavation Technologies, Inc. v. Columbia Gas Co. of Pennsylvania, 2009 WL 5103605 (Pa., Dec. 29, 2009), the Court held that a Contractor may not recover against a Gas Company for "downtime" damages caused by the Gas Company's failure to properly mark the location of its underground lines. In doing so, the Court refused to apply its earlier opinion in the Bilt-Rite case to allow the Contractor to recover purely economic damages against the Gas Company, and directed contractors to look to the state legislature if they want to create a remedy for such damages.

In the "ExTech" case, the Contractor was attempting to recover damages for "downtime" wages and equipment rates incurred when the Contractor was delayed and forced to stand idle when the Gas Company allegedly failed to accurately mark the locations of its underground gas lines. Initially, both the trial court and the first appellate court sided with the Gas Company and dismissed the Contractor's claim, but Pennsylvania's highest court agreed to take jurisdiction of the case.

The Contractor and the Gas Company filed briefs with the Pennsylvania Supreme Court in July of 2008. At the same time, a brief supporting the Contractor's position was filed on behalf of the Pennsylvania Utility Contractors Association, the National Utility Contractors Association, the Associated Pennsylvania Constructors, and the Associated Builders and Contractors of Western Pennsylvania, while the Energy Association of Pennsylvania filed a brief supporting the Gas Company's position. Oral argument took place in September of 2008, and on December 29, 2009, the Court issued its opinion, effectively immunizing the Gas Company from liability for the Contractor's economic losses, in the absence of any personal injuries or property damage.

While the outcome of the case may be disappointing for contractors, the Court's treatment of the factual scenario and its comments about the One Call Act should be studied.

In that regard, the Court addressed several arguments from the Contractor. The Contractor's first argument arose out of the Court's earlier holding in Bilt-Rite Contractors, Inc. v. Architectural Studio, involving the application of the Economic Loss Doctrine.

Although subject to certain exceptions, the Economic Loss Doctrine generally bars a plaintiff from recovering economic (*i.e.*, financial) damages in a negligence case unless the plaintiff also suffers some personal injury or property damage. Despite having no personal injury or property damage, and having no contract with the architect, the contractor in Bilt-Rite

sued the architect for negligent misrepresentation. Ultimately, the Court in Bilt-Rite recognized an exception to the Economic Loss Doctrine in adopting Sections 552(1) and 552(2) of the Restatement (Second) of Torts, and allowed the contractor to pursue a claim for purely economic damages against the architect.

Following the holding in Bilt-Rite, the Contractor in ExTech argued that the same exception should apply against the Gas Company. The ExTech Court found, however, that unlike the architect in Bilt-Rite, the Gas Company was *not* a professional information provider, and therefore was *not* subject to liability under Sections 552(1) or 552(2).

The Contractor's second argument was that the Court should adopt another exception to the Economic Loss Doctrine, as defined in Section 552(3) of the Restatement (Second) of Torts. In short, Section 552(3) allows for recovery of economic damages for negligence if the defendant is under a "public duty" to provide information. The Contractor in ExTech argued that pursuant to Pennsylvania's One Call Act, the Gas Company was under a public duty to accurately mark the location of its underground lines.

The One Call Act specifically requires "facility owners," like the Gas Company and other utility companies, to mark their "underground lines at the site within eighteen inches horizontally from the outside wall of such line," and to "follow the Common Ground Alliance Best Practices for Temporary Marking." See 77 P.S. §177. Despite these statutory duties, the Court refused to adopt Section 552(3) or to apply it to the Gas Company. Instead, the Court cited three reasons in support of its decision to immunize the Gas Company from liability under Section 552(3).

First, the Court read the purpose of the One Call Act restrictively, finding that "its purpose is not to protect against economic losses," but only to protect against "physical harm...and to avoid property damage." (ExTech, 2009 WL 5103605, *3). Second, the Court emphasized that the Act obligates the Contractor to find the "precise location" of underground lines and did not "remove the ultimate responsibility...from the party doing the digging." (Id. at *4). Lastly, while citing "public policy," the Court bowed to the Gas Company's threat to pass its potential liability for contractors' economic losses "on to the consumer." (Id.). Therefore, the Court concluded that if utility companies are to be held liable for contractors' economic losses, "the legislature will say so specifically." (Id.).

While the Court's ruling does not help contractors who are forced to contend with unexpected delay costs caused by unmarked or inaccurately marked underground lines, the Court's comments regarding the One Call Act could be troubling. For instance, one portion of the majority opinion states:

> [Contractor] maintains this subsection [552(3)] applies because [the Gas Company] was under a duty to provide it accurate information as to the location of its underground gas lines. We disagree for multiple reasons.

(Id. at *3). Surely the Court meant that it disagreed only with the Contractor's argument that Section 552(3) *applied* to the Gas Company, and did not mean that it disagreed with the idea that the Gas Company *had a duty* to mark its lines accurately pursuant to the One Call Act.

Nevertheless, the ambiguity in this portion of the Court's majority opinion prompted one member of the Court, Justice Saylor, to file a concurring opinion.

Justice Saylor agreed with the outcome of the majority's decision, but felt compelled to write to "depart, however, from the majority's reasoning to the extent that it downplays the obligations of facility owners under the One Call Act." (Id. at *4).

In his opinion, Justice Saylor specifically quoted the provision of the One Call Act requiring facility owners, like the Gas Company, to mark their "underground lines at the site within eighteen inches horizontally from the outside wall of such line." (Id. at *4-5, quoting 73 P.S. §177(5)(i)). He also specifically quoted the provision of the One Call Act requiring "best efforts to comply with the Common Ground Alliance best practices." (Id. at *5, n.1, quoting 73 P.S. § 184). And he even went so far as to quote from the Common Ground Alliance Best Practices themselves for the proposition that "damage prevention is a shared responsibility," and to emphasize the "critical interrelationship between the facility owners' and excavators' respective duties." (Id. at *5).

In a lengthy footnote, Justice Saylor also seemed to question the implication that contractors are subject to a higher level of responsibility than the utility companies. In doing so, Justice Saylor pointed out that contractors are to use prudent techniques like hand-digging *within the tolerance zone specified by the utility companies*. Therefore, he concluded, the One Call Act "reinforces the dependence of excavators, in the exercise of their own responsibilities, on the careful execution of the facility owners' own obligations" to mark their lines at the job site. (Id. at *5, n.2).

Justice Saylor further argued that since the One Call Act provides for additional compensation to the contractor when "prudent techniques" are required due to "known uncertainties in locating facilities," that "by implication, the same level of caution is not required where the facility owner has made a positive identification, and excavation proceeds in areas outside the tolerance zones." (Id.). This comment seems to reinforce the proper application of the One Call Act, and nothing in the majority or the concurring opinion can be construed to erode the contractor's statutory right to compensation from the *project* owner, following proper notice, for additional work in locating a line under the circumstances described in Section 5 of the One Call Act.

Nevertheless, much like the majority, the concurring justice concluded that a remedy allowing contractors to recover economic losses against utility companies "is best suited to legislative consideration." (Id. at *6). Therefore, the ExTech case not only demonstrates the challenges courts may face in the practical application of the One Call Act, but it also demonstrates that contractors must participate in the political process, and make themselves heard through the legislature in order to protect their interests.

Kevin J. McKeon is a partner with the national construction law firm, Watt, Tieder, Hoffar & Fitzgerald, LLP, and a Pennsylvania lawyer. He can be reached directly at kmckeon@wthf.com or 703-749-1000.