STATE OF MICHIGAN

COURT OF APPEALS

S.D. WARREN COMPANY,

Plaintiff-Appellee,

v

HYDAKER-WHEATLAKE COMPANY,

Defendant/Third-Party Plaintiff-Appellee,

and

CONSUMERS POWER COMPANY,

Defendant/Third-Party Plaintiff-Appellant,

and

KELLY SERVICES, INC.,

Third-Party Defendant-Appellee,

and

STATE OF MICHIGAN, DEPARTMENT OF NATURAL RESOURCES, and CITY OF MUSKEGON,

Third-Party Defendants.

UNPUBLISHED
February 6, 2001

No. 216208
Muskegon Circuit Court
LC No. 96-334247-NZ

S.D. WARREN COMPANY,

Plaintiff-Appellee,

v

No. 216271
Muskegon Circuit Court

HYDAKER-WHEATLAKE COMPANY, LC No. 96-334247-NZ

Defendant/Third-Party Plaintiff-Appellant,

and

CONSUMERS POWER COMPANY

Defendant/Third-Party Plaintiff-Appellee,

and

KELLY SERVICES, INC.,

Third-Party Defendant-Appellee,

and

STATE OF MICHIGAN, DEPARTMENT OF NATURAL RESOURCES, and CITY OF MUSKEGON,

Third-Party Defendants.

Before: Saad, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

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.[1] 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

[1] 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.

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 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.[2] Plaintiff responded by maintaining that their intentional entry on the property and the intentional acts committed thereon satisfied the intent requirement.[3] 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.

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[2] 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.

[3] 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's 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.

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 from the activities of its employees.[4] 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.[5] 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.

II. Standard of Review

We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 567 NW2d (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(10), the court considers the affidavits, pleading, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Id.*; *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith*, *supra* at 455; *Quinto*, *supra* at 362-363.

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[4] 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.

[5] 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.

III. Trespass

A

The intentional tort of trespass is defined as an unauthorized invasion upon the private property of another. *Giddings v Rogalewski*, 192 Mich 319, 362; 158 NW 951 (1916); *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 706; 609 NW2d 607 (2000). While an actor's intent in *causing* a trespass is generally irrelevant, *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 345; 568 NW2d 847 (1994), the actor must "intend to intrude" on the property of another without authorization to do so. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995), citing Prosser & Keeton, Torts (5th ed), § 13, pp 73-74.

In this case we are asked to decide how the "intent to intrude" element required for liability in trespass should be applied in a case involving damage to a privately-owned, underground sewer line located within a valid easement. Consumers and Hydaker argue that the intent element is satisfied only upon a showing that they intended to strike the sewer line, a standard which would require plaintiff to prove that they knew or should have known that the sewer line existed. Plaintiff, on the other hand, maintains that the intent element was established once Consumers and Hydaker intentionally entered onto the easement and performed the excavation without authorization. Consistent with Michigan precedent, we apply the view adopted by the majority of jurisdictions and hold that Consumers and Hydaker are only liable in trespass for damaging the sewer line if they had actual or constructive notice of the structure's existence.

B

Because the trial court did not specify the act or acts which constituted the alleged trespass, we must first analyze the point at which the alleged trespass, if any, occurred. We conclude that the trial court erred to the extent it ruled that the trespass occurred when Consumers and Hydaker intentionally entered onto the subsurface of plaintiff's easement and began to excavate. An easement is the right to use the land of another for a specified purpose. *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997), citing *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191, 192; 550 NW2d 850 (1996). An easement does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for the enjoyment of the rights conferred by the easement. *Id.*, citing *Morrill v Mackman*, 24 Mich 279 (1872). An interference with one's right to use an easement is a trespass. 1 Cameron, Michigan Real Property Law (2d ed), § 6.33, p 221; see also *Schadewald*, *supra* at 40 (activities by the owner of the easement that go beyond the reasonable exercise of the use granted by the easement may constitute a trespass to the owner of the fee).

In this case, the easement agreement included the right to "lay, construct, install, operate, inspect, maintain, repair, renew, change the size of, and remove a pipe line or lines . . . for the transportation of liquids or gasses or mixtures thereof and/or all waste and sewage . . . " The easement also included the right to "trim and remove brush, shrubs, trees, and other growth, and the right of ingress and egress in, over, and across and through the above-described land . . . for

any and all purposes necessary or convenient to the exercise by Grantee of the rights and easements herein granted." Based on this language, we conclude that Consumers' and Hydaker's intentional entry onto the subsurface of the easement to perform the excavation did not constitute a trespass because it did not interfere with plaintiff's enjoyment of its easement to maintain and operate underground structures. See 75 Am Jur 2d, Trespass, § 30, p 31 and cases cited ("[t]he possession of the owner of an easement over land is not sufficient to support an action of trespass for an injury to or disturbance in the enjoyment of the easement").[6] Therefore, the intentional entry onto the easement and the act of excavating itself did not constitute a trespass. Rather, the trespass, if any, occurred when Consumers and Hydaker struck the sewer line.

C

The issue then becomes the standard for holding Consumers and Hydaker liable for striking the underground sewer line. We have found only two Michigan cases which address the issue of trespass in the context of underground structures. In *Edison Illuminating Co v Misch*, 200 Mich 114; 166 NW2d 944 (1918), the case upon which Consumers and Hydaker rely, the plaintiff brought an action for trespass on the case[7] against the defendant contractor for damage to its underground steam conduits, which it maintained in a public alley pursuant to a city franchise. *Id.* at 115-116, 122. The owners of the premises adjacent to the alley had hired the defendant to perform the mason work associated with the construction of a building on the owner's premises. *Id.* at 116. The damage to the plaintiff's conduits occurred when the defendant extended the excavation beyond the owner's lot line and into the alley. *Id.* at 116. The plaintiff argued at trial that several manholes in the area of excavation gave the defendant notice of the existence of underground structures while the defendant claimed that it was the plaintiff's duty to see that proper public records were kept regarding their location. *Id.* at 116-119. In affirming the jury verdict in favor of the plaintiff, our Supreme Court held, in pertinent part:

> We are clearly of the opinion that the defendant had no right to interfere with any structures rightfully in the alley. That the mains and conduits in question had been lawfully and properly placed in the alley by authority of the city is, we think, too clear for controversy. The defendant made excavation into the alley at

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[6] The complexity of this case is compounded by the undisputed fact that the City lessee (on behalf of the State owner) gave Consumers permission to be on the land to perform the excavation. The City's and the State's liability for having "directed" and/or "authorized" the trespass was litigated (after the trial court's ruling that is the subject of this appeal) in conjunction with Consumers' and Hydaker's third-party complaint against those entities, which the parties stipulated to dismiss. However, neither party has briefed or argued how the issue of permission affects the resolution of this case.

[7] "Trespass on the case" is defined as an action at common law "to recover damages that are not the immediate result of a wrongful act but rather a later consequence. This action was the precursor to a variety of modern-day tort claims, including negligence, nuisance, and business torts. Often shortened to *case*. Also termed *action on the case*." Black's Law Dictionary (7th ed), p 1509. (Emphasis in original.)

> his peril. If he did not have from the surrounding objects and monuments sufficient to put him upon notice of the presence of the mains and conduits in the alley, there was at least sufficient evidence to warrant the submission of that question to the jury, which was done by the trial court. The plaintiff and its assignor were, by their mains and conduits, rightfully first in the alley, and their rights were entitled to protection by defendant in such occupancy. [*Id*. at 122-123 (emphasis added; citation omitted).]

In *Marathon Pipe Line Co v Nienhuis*, 31 Mich App 407; 188 NW2d 120 (1971), the case upon which plaintiff and the trial court rely, the plaintiff sued the defendants landowners and construction company in trespass and negligence for damage to its pipeline, which was located in an easement over the landowners' property. *Id.* at 408-409. The damage occurred when the construction company struck the pipeline while performing excavation work for the landowner. *Id.* The landowner claimed that the plaintiff's employee had told him that the pipeline lay in a straight line between certain posts and that since the excavation took place some distance from the line running from the post running between the posts, it was excused from liability. *Id.* at 411. Following a bench trial, the trial court found the landowners liable in trespass and negligence, and the construction company liable in trespass. *Id.* at 409.

Noting that the landowners were only challenging the trial court's findings of fact and not its legal conclusions, and without differentiating between negligence and trespass, this Court concluded that the trial court's findings were not clearly erroneous. *Id.* at 412-413. This Court also affirmed the trial court's finding that the construction company had committed a trespass based on the above-quoted passage from *Edison* without accompanying rationale. *Id.* at 414.[8] The *Marathon* Court concluded, however, that "[s]ince the construction company was acting under the direction of [landowner] and since they did unintentionally become a wrongdoer, they are entitled to indemnification from the [landowners]." *Id.* at 415.

While the holdings in *Edison* and *Marathon* are less than clear, both cases contain language suggesting that notice or knowledge is a factor to consider in determining a contractor's liability in trespass for damaging an underground structure. In determining whether the contractor in *Edison* had committed a trespass, the Supreme Court expressly stated that the question whether the contractor had notice of the underground conduits from surrounding objects and monuments was properly submitted to the jury. In deciding the same issue fifty-four years later, the *Marathon* Court cited *Edison* with approval and relied on that case in sole support of its ruling that the construction company had committed a trespass. Moreover, in concluding that the trial court's factual findings as to the landowners' liability were not clearly erroneous, the *Marathon* Court specifically pointed to the physical characteristics that would have given notice

[8] In a footnote the *Marathon* Court explained its conclusory holding on grounds that the construction company provided no authority on appeal in support of its position that it did not commit a trespass and did not distinguish the cases cited by the plaintiff. *Id.* at 414, n 4.

of the underlying structure.[9]

To the extent that there is any uncertainty as to whether *Edison* and *Marathon* establish a notice-based rather than a strict liability standard, our construction of these cases is consistent with the position taken by most jurisdictions. Most courts hold that liability in the context of underground structures requires proof that the excavator intended to make contact with the thing damaged and that intent is established by showing that the excavator had actual or constructive notice of the underground structure. See Prosser & Keeton, *supra* at § 13, p 74 and cases cited.

This position is best illustrated by *Cover v Phillips Pipe Line Co*, 454 SW2d 507 (Mo, 1970). In *Cover*, the plaintiff sued the defendant contractor in trespass for damaging the plaintiff's underground pipeline. *Id.* at 509. The plaintiff alleged that the contractor intended to do the act that caused the rupture; that the severing of the pipeline resulted in absolute liability for violating its possessory interest in its easement and the puncturing of the pipeline lawfully in place; and, that such a result followed whether the intrusion was treated as a trespass to land or to a chattel. *Id*. at 511. Following a jury trial in favor of defendant on this issue, the lower court granted plaintiff's motion for judgment, finding the contractor liable in trespass as a matter of law. *Id*. at 509, 511.

The Supreme Court of Missouri reversed, holding that the contractor could not have committed a trespass upon the pipeline company's easement or personal property if he lacked actual or constructive knowledge of the pipeline's existence. *Id.* at 513. The court first determined that, whether the pipeline be considered a chattel or real property, liability in trespass for a physical intrusion causing damage to the pipeline required an intent to bring about the intrusion; otherwise, the plaintiff was relegated to a claim based on negligence. *Id.* at 511-512. In support of this initial proposition, the court reasoned:

> An intent to intrude upon or intermeddle is an essential element of trespass to a chattel. 'Under the principle of law that allows recovery for a trespass to chattels, it is necessary that the defendant have acted for the purpose of interfering with the chattel, or, what is almost that same thing, that he have acted with knowledge that such would be the result of his conduct. In other words, he must

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[9] Contrary to the position taken by plaintiff and the trial court, we do not believe that the *Marathon* Court's conclusion that "[s]ince the construction company was acting under the direction of [landowner] and since they did unintentionally become a wrongdoer, they are entitled to indemnification from the [landowners]," supports the conclusion that the Court held that construction companies are strictly liable in trespass under these circumstances. To the contrary, the quoted language comes from the Court's analysis concerning the construction company's indemnification claim against the landowner. Because the landowner instructed the construction company where to dig, and because the construction company relied on the landowner's direction, we read the language in *Marathon* as nothing more than a statement that the construction company cannot be held liable for relying on the landowner's direction. The language does not support the position that a construction company may be held strictly liable in trespass even though it had no notice of the underground structure. To the extent *Marathon* could be construed otherwise, we hold that it was wrongly decided.

> have intended the intermeddling. If he does not intend thus to meddle, he is not liable today as a trespasser; but if his conduct is negligent, he is liable under the principles of the law of negligence.' . . . According to Restatement of the Law of Torts 2d, § 217, 'A trespass to a chattel may be committed by intentionally * * * intermeddling with a chattel in the possession of another,' and the intention required 'is present when an act is done for the purpose of using or otherwise intermeddling with a chattel or with knowledge that such intermeddling will, to a substantial certainty, result from the act.' [*Id*. at 512 (citations omitted).]
>
> The same intent is required to establish a claim of trespass to real property. 'Generally speaking, therefore, when there is an act of volition which results in a physical intrusion of another's land there is no liability in the absence of an intention to bring about the intrusion of negligence in the doing of the act.' Harper and James, The Law of Torts, (1956) Vol I § 1.4, p 15. (Exception noted in cases involving extra-hazardous activities, such as blasting.) Where there is no intentional, voluntary, conscious act there is no trespass. [*Id*. (citations omitted).]

The *Cover* court then cited *Socony-Vacuum Oil Co v Bailey*, 202 Misc 364; 109 N.Y.S.2d 799 (1952), for the proposition that the defendant could not be held liable in trespass where there was no proof that he intended to do the very act that resulted in immediate damage (i.e., strike the pipeline) or that he knew about the existence and location of the pipeline. In reaching this conclusion, the *Bailey* court reasoned:

> There is no question that in the instant case the defendant was acting voluntarily when he operated the bulldozer in such a manner as to strike the plaintiff's pipe line. It must, however, have been more than just a voluntary act. The act must also have been intentional except in a case of negligence which it has already been established is not involved herein. It was not necessary, however, that the trespasser intend to commit a trespass or even that he know that his act will constitute a trespass. The actor may be innocent of moral fault, but there must be an intent to do the very act which results in the immediate damage. In other words, trespass requires an intentional act. Applying this requirement to the case at bar, it is difficult to find the defendant's act in striking the pipe to be an actionable trespass. There is no proof that the defendant intended to strike the pipe and, in fact, it is clearly established to the contrary, for he did not know the existence or location of the line, nor is he charged with such knowledge for purposes of determining whether his action was intentional. Without an intentional act, the defendant's conduct cannot give rise to a trespass and, therefore, the plaintiff's cause of action based on the theory of trespass must fail. [*Cover*, *supra* at 512-513, quoting *Bailey*, *supra* at 801-802 (Citations omitted).]

Based on the reasoning employed in *Bailey*, the *Cover* court found that the acts of the contractor which resulted in the damage to the pipeline were voluntary. However, the *Cover* court concluded that because the issue of actual and constructive knowledge was contested, it was an issue for the jury and not for the court to declare as a matter of law. *Id.* at 513. Therefore, the majority view as represented by the *Cover* and *Bailey* courts holds that a

contractor's liability in trespass for damage to an underground structure requires proof that the contractor intended to do the act that resulted in the immediate damage and that such intent requires proof that the contractor had actual or constructive notice of about the existence and location of the structure. See also *Texas-New Mexico Pipeline Co v Allstate Construction Inc*, 369 P2d 401 (NM, 1962). *Wisconsin Telephone Co v Reynolds*, 87 NW2d 285 (Wis, 1958); *Mountain States Telephone & Telegraph Co v Kelton*, 285 P2d 168 (Ariz, 1955).

While we acknowledge that other jurisdictions have reached the contrary result and adhere to the strict liability standard advanced by plaintiff, we find the logic underlying the majority view more persuasive. The basic law of trespass, which presumes that the subject of the trespass is apparent upon visual inspection and imposes strict liability, is not applicable in cases involving hidden underground structures. In such cases it would be inequitable to hold the contractor strictly liable for damaging an underground structure where the contractor lacked actual or constructive knowledge of its existence. Contrary to Consumers' and Hydaker's urging, however, we do not adopt a pure negligence standard that would implicate issues of the owner's comparative negligence, thereby abrogating the principle that an owner need not take action to protect its property from potential trespassers. *Preston v Austin*, 206 Mich 194, 200-201; 172 NW 377 (1919). Rather, the standard recognized by the majority view establishes that the cause of action remains in trespass, but defines the intent element as whether the alleged trespasser has actual or constructive notice of the location and existence of the underground structures. Once the notice element is established, the trespass is complete. For the foregoing reasons, we hold that the trial court erred in granting summary disposition on the ground that Consumers and Hydaker committed a trespass when they intentionally entered the property to perform the excavation.

D

The question then becomes whether the trial court erred in its alternative conclusion that even if Consumers' and Hydaker's interpretation of the law were correct, the result would remain the same because they had actual or constructive notice of the sewer line's existence. We conclude that the trial court erred in resolving this issue of fact against Consumers and Hydaker. In finding that Consumers and Hydaker had constructive notice, the court relied on plaintiff's allegation in the complaint that there was a manhole and pressure valve near the "break point." However, Consumers and Hydaker denied that allegation in their answers, and presented documentary evidence establishing that a "Miss Dig" search failed to reveal the existence of the pipe, that the sewer line was not flagged or otherwise marked, and that the crew members who performed the excavation did not see anything that would have alerted them to a sewer line in the vicinity. Moreover, neither party submitted any record evidence indicating how far plaintiff's facility was located from the installation project or the "break point."[10] Accordingly, we conclude that a question of fact exists on the issue of actual or constructive notice, and the trial

[10] Ronald Bajt, plaintiff's project manager, testified that the facility was located about 1000 feet from the breakpoint. In their appellate briefs, however, both Consumers and Hydaker state that the mill was located "more than two miles" from the point of damage and that the "intervening space is filled with subdivisions, roads, and so on."

court erred in making a factual finding and in viewing the evidence in the light most favorable to the moving party. *Quinto, supra* at 362; *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999).

We also reject the trial court's conclusion that Consumers and Hydaker had constructive notice as a matter of law because plaintiff's easement had been recorded with the register of deeds. There is no Michigan case law establishing that a recorded easement for an underground structure automatically puts excavators on notice of the structure. Nevertheless, we agree with other jurisdictions that hold that a contractor employed to do work on land not in a public street or right of way is not required to search for easements where it has no interest in the title to the land and where there is nothing in the nature of the land to cause the contractor to make the inquiry.[11] See *Texas-New Mexico Pipeline Co, supra* at 403; *Mountain States Telephone and Telegraph Co, supra* at 171. Accordingly, we reverse the trial court's grant of summary disposition in favor of plaintiff with respect to this issue and remand for further proceedings consistent with this opinion.

IV. Indemnification

Consumers argues that the trial court erred in denying its motion for summary disposition on its claim for contractual indemnification against Kelly Services. Because Consumers' claim is contingent upon a legally sustainable finding with respect to Consumers' liability on the underlying trespass action, resolution of this issue is premature and we therefore decline to address it at this time. See *Allstate Ins Co v Freeman*, 432 Mich 656, 701, n 1 (Boyle, J.); 443 NW2d 734 (1989); *Wakefield Leasing Corp v Transamerica Ins Co*, 213 Mich App 123, 126; 539 NW2d 542 (1995); *Johnston v Detroit Hoist & Crane Co*, 142 Mich App 597, 601-602; 370 NW2d 1 (1985).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael J. Talbot

[11] We note that the trial court did not charge Consumers or Hydaker with knowledge based on evidence regarding Heisser's involvement which was submitted after the trial court's ruling on plaintiff's summary disposition motion.

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Before: Saad, P.J., and Jansen and Talbot, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I agree in large part with the majority's opinion, but respectfully disagree with part III, D. I accept that the issue of whether there was actual or constructive knowledge of the underground sewer on the part of Consumers Power Company and Hydaker-Wheatlake Company is a question of fact that must be resolved by a fact finder. That being said, I would not hold *as a matter of law* that contractors employed to do work on land not in a public street or right of way are not required to search for easements where they have no interest in the title to the land and where there is nothing in the nature of the land to cause the contractor to make the inquiry. Rather, I believe that, the issue of actual or constructive knowledge being a question of fact, the question of whether the recorded easement gave notice to Consumers Power and Hydaker-Wheatlake of the underground sewer is simply one piece of evidence that should be considered by the jury in making its ultimate determination whether Consumers Power and Hydaker-Wheatlake had actual

or constructive knowledge in this case. Thus, I would not foreclose consideration of this important evidence as a matter of law.

In all other respects, I agree with the majority's opinion.

/s/ Kathleen Jansen