

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN CONSOLIDATED GAS
COMPANY,

UNPUBLISHED
January 17, 2013

Plaintiff-Appellee,

v

No. 304679
Oakland Circuit Court
LC No. 2010-112574-ND

KAMPHUIS PIPELINE COMPANY,

Defendant-Appellant.

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted the trial court’s opinion and order granting summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10). Because the trial court correctly determined that defendant was not entitled to rely on plaintiff’s alleged negligence to reduce defendant’s liability under the protection of underground facilities act (PUFA), MCL 460.701 *et seq.*,¹ for damaging plaintiff’s natural gas pipeline, we affirm.

The material facts are not in dispute. Plaintiff is a public utility that owned and operated a natural gas line in the city of Milford in 2009. The city retained defendant to construct an underground water main in the area of the gas line. Defendant obtained a MISS-DIG² ticket, but did not commence the excavation work until after the ticket expired on April 13, 2009. On April 15, 2009, the gas line was ruptured during the excavation work.

¹ The PUFA is also commonly known as the MISS-DIG act.

² The PUFA requires public utilities with underground facilities to form an association for the “mutual receipt of notification of construction activities in those areas served by public utilities having underground facilities” and for notification to the association to operate as notice to each public utility having underground facilities within a proposed area of excavation and other listed activities. MCL 460.707(1). The PUFA defines “association” as “the MISS-DIG utilities communications programs.” MCL 460.701(a). The ticket in this case was issued by this association, which is commonly referred to as “MISS-DIG.”

In August 2010, plaintiff filed this negligence action against defendant, seeking reimbursement for its repair of the gas line and other related damages. Plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing that defendant was liable for all of plaintiff's damages under the PUFA. Defendant did not dispute that it was liable to plaintiff, but claimed that the damages were caused in whole or in part by plaintiff's own negligence in failing to accurately mark the approximate location of the gas line. Defendant asserted that it was entitled to a reduction of its liability by the amount of plaintiff's comparative fault. The trial court disagreed and granted plaintiff's motion.

We review de novo a trial court's decision on a motion for summary disposition. *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). A motion under MCR 2.116(C)(10) tests the factual support for a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

We also review de novo the proper interpretation and application of a statute. *Adair v State of Mich*, 486 Mich 468, 477; 785 NW2d 119 (2010). In interpreting a statute, a court's goal is to give effect to the legislative intent expressed in the statutory language. *State Farm Fire & Cas Co*, 271 Mich App at 483. Where statutory language is unambiguous, it is enforced as written. *Id.* "A statutory provision is ambiguous if it irreconcilably conflicts with another provision or when it is equally susceptible to more than one meaning." *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 559; 808 NW2d 456 (2010). As explained in *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012):

"We interpret th[e] words in [the statute in] light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). Statutory interpretation requires courts to consider the *placement* of the critical language in the statutory scheme. *USF&G*, 484 Mich at 13 [*United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009)]. In doing so, courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). [Emphasis and brackets in the original.]

The PUFA "was enacted to protect underground facilities during construction activities." *White v City of Ann Arbor*, 406 Mich 554, 564 n 2; 281 NW2d 283 (1979). The act established an association, commonly referred to as "MISS-DIG," for the receipt of notification regarding construction activities in areas where public utilities have underground facilities. MCL 460.701(1)(a); MCL 460.707(1). The PUFA expressly precludes excavation and other activities in areas containing underground facilities unless the location of all underground facilities in the area is ascertained, as prescribed in MCL 460.705 or MCL 460.707. See MCL 460.703.

MCL 460.707(1) provides, in pertinent part, that “[n]otification [of construction activities] to the association shall be effected in writing as set forth in section 5 or by telephone call, providing the same information required by section 5, made by the person or public agency responsible for the excavating, demolishing, discharging of explosives, drilling or boring procedures, or tunneling operations.” MCL 460.705(1) provides:

Except as provided in sections 7 and 9, a person or public agency responsible for excavating or tunneling operations, drilling or boring procedures, or discharge of explosives in a street, highway, other public place, a private easement for a public utility, or near the location of utility facilities on a customer’s property, or demolition of a building containing a utility facility, shall give written or telephone notice to the association as required in section 7 of intent to excavate, tunnel, discharge explosives, or demolish at least 2 full working days, excluding Saturdays, Sundays, and holidays, but not more than 21 calendar days, before commencing the excavating, demolishing, discharging of explosives, tunneling operations, or drilling or boring procedures. Beginning on October 1, 1990, the notice required in this subsection shall be given at least 3 full working days, excluding Saturdays, Sundays, and holidays, but not more than 21 calendar days, before commencing the excavating, demolishing, discharging of explosives, tunneling operations, or drilling or boring procedures.

MCL 460.708 establishes the duties of a public utility that is served with notice, as well as additional duties imposed on the person or public agency seeking to engage in excavation or other activities where the precise location of the underground facilities cannot be determined. The initial duty imposed on a public utility that is provided with notice is as follows:

Not less than 1 working day in advance of proposed construction, unless otherwise agreed between the person or public agency performing the excavation, discharging of explosives, drilling, boring, tunneling, or demolition and the public utility, a public utility served with notice pursuant to section 5 or 7 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 excavation, discharging of explosives, drilling, boring, tunneling, or demolition, 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. For the purposes of this act, the approximate location of underground facilities is defined as a strip of land at least 36 inches wide but not wider than the width of the facility plus 18 inches on either side of the facility. If the approximate location of an underground facility is marked with stakes or other physical means, the public utility shall follow the color coding prescribed in this section. [MCL 460.708 (emphasis added).]

MCL 460.711 imposes additional duties on a person or public agency after the public utility provides information to the person or agency:

Upon receiving the information provided for in sections 5 or 7, a person or public agency excavating, tunneling, or discharging explosives shall exercise reasonable care when working in close proximity to the underground facilities of any public utility. If the facilities are to be exposed, or are likely to be exposed, only hand-digging shall be employed in such circumstances and such support, as may be reasonably necessary for protection of the facilities, shall be provided in and near the construction area.

The PUFA provides for civil liability, criminal liability, and injunctive relief. MCL 460.713 to MCL 460.716. At issue in this case is the PUFA's provisions for civil liability. Pursuant to MCL 460.713, the PUFA "does not affect any civil remedies for damage to public utility facilities and does not affect any civil remedies a person may have for actual damage to the person's property caused by a public utility's negligence in staking its facilities, except as otherwise specifically provided for in this act." Although the PUFA applies to both a "person"³ and a "public agency" engaged in excavation and other activities, pursuant to MCL 460.714 it imposes civil liability only for harm caused by a "person." *State Farm Fire & Cas Co*, 271 Mich App at 486-487. MCL 460.714, which is the focus of the dispute in this case, provides:

In a civil action in a court of this state, when it is shown by competent evidence that damage to the underground facilities of a public utility resulted from excavating, tunneling, drilling or boring procedures, or demolishing operations, or the discharge of explosives, as described in section 3, and that the person responsible for giving the notice of intent to excavate, tunnel, demolish, or discharge explosives failed to give the notice, or the person did not employ hand-digging or failed to provide support, the person shall be liable for the resulting damage to the underground facilities, but the liability for damages shall be reduced in proportion to the negligence of the public utility if it fails to comply with section 8.

This Court considered the purpose of MCL 460.714 in *State Farm Fire & Cas Co*, 271 Mich App at 487, in the context of addressing a claim by the city of Detroit that it was entitled to governmental immunity for damage sustained by a home when the city's water main failed. Although this Court determined that the city's water department is a public utility subject to the PUFA, this Court interpreted MCL 460.714 as not imposing liability on a public utility, but rather as limiting the public utility's ability to recover damages when it fails to satisfy the notice requirements in MCL 460.708. *Id.* at 486-487. This Court explained:

This section clearly does not impose liability on public utilities for a failure to give proper notice under MCL 460.708. Instead, it imposes liability on a "person" if the underground facilities of a public utility are damaged by the activities described in MCL 460.703 and the "person" responsible for giving the notice prescribed by MCL 460.705 or MCL 460.707 failed to give notice or the

³ MCL 460.701(b) provides that "[p]erson" includes an individual, partnership, corporation, association, or any other legal entity. Person does not mean a public agency."

“person did not employ hand-digging or failed to provide support” MCL 460.714. However, the public utility’s recovery is reduced “in proportion to the negligence of the public utility” if the public utility failed to comply with the notice requirements of MCL 460.708. *Id.* Consequently, the only penalty imposed on a public utility for failing to give notice under MCL 460.708 is a limitation on its ability to recover for damages to its underground facilities. [*Id.* at 487.]

In this case, defendant does not dispute that it is a person liable for the damages to plaintiff’s underground gas line caused by its excavating activities. We reject defendant’s argument that it should be permitted to reduce plaintiff’s damages under MCL 460.714 based on plaintiff’s failure to accurately mark the approximate location of the gas line as set forth in MCL 460.705 under an expired MISS-DIG ticket. Although it is undisputed that the gas line was ruptured 14 feet from where it had been marked in one direction and 27 feet from where it had been marked in another direction, the trial court did not err by determining that defendant was not entitled to rely on the markings, which were made pursuant to a MISS-DIG ticket that had expired, to limit plaintiff’s ability to recover for damages to the gas line.

The unambiguous language of MCL 460.714 limits a public utility’s ability to recover damages only if it fails to comply with MCL 460.708. *State Farm Fire & Cas Co*, 271 Mich App at 487. The PUFA contains a comprehensive scheme that specifies what a person must do in order to trigger a public utility’s duties under MCL 460.708. That provision plainly links a public utility’s duties to a particular notice served on the public utility with respect to a person’s or public agency’s commencement of excavation or other activities. Examining the statutory provisions as a whole, the only reasonable conclusion is that a person liable for damages under MCL 460.714 cannot rely on the markings provided by a public utility under an expired MISS-DIG ticket to limit the public utility’s damages for harm to its underground facilities.

To interpret the limitation on a public utility’s ability to recover damages under MCL 460.714 as requiring consideration of either visible conditions of the markings under an expired MISS-DIG ticket or the elapsed time between the expired MISS-DIG ticket and the excavation activities, as defendant suggests, would contravene the rule of statutory construction that a court may read nothing into a statute that is not within the Legislature’s manifest intent as derived from the act itself. See *Mich Ed Ass’n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011). MCL 460.714 contains multiple types of actions or inactions by a person that can trigger the person’s liability for harm to a public utility’s underground facilities, but it only limits a public utility’s ability to recover for damages to its underground facilities based on its failure to comply with MCL 460.708. The circumstances of this case involve a defendant who had no lawful authority under the PUFA to engage in underground activities at the time that

it ruptured the gas line. Therefore, the trial court correctly determined that there was no basis for reducing defendant's liability for damages.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood

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SERVITTO, J. (*concurring*).

I agree with the conclusions reached by the majority, but write separately to address defendant's reliance on and reference to *SBC v J.T. Crawford, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2007 (Docket No. 275334), in support of its argument that it is allowed to limit plaintiff's ability to recover damages under MCL 460.714 based on plaintiff's failure to accurately mark the approximate location of the gas line as set forth under an expired MISS-DIG ticket. In that case, a panel of this Court, of which I was a member, was also presented with an expired MISS-DIG ticket, but indicated that the contractor who ruptured a utility line while working under the expired MISS-DIG ticket was not "necessarily liable for the entirety of the damages." *Slip op.* at page 5. The *SBC* panel then referenced MCL 460.708, indicating that the trial court did not consider that statutory provision. The panel remanded for a finding of whether competent evidence demonstrated whether the damages at issue were caused by the contractor's activities and whether the utility company complied with MCL 460.708. *Id.*

Not only is *SBC* an unpublished and nonbinding opinion, it is my belief that it does not stand for the proposition that a utility company's lack of compliance with MCL 460.708 serves to reduce one's liability for damages in all instances, and, specifically where a MISS-DIG ticket has expired. The *SBC* panel simply directed the trial court to consider the issue on remand. While perhaps not artfully worded, the panel's choice of the phrase "does not mean that [the contractor] is *necessarily* liable for the entirety of the damages" indicates, in my opinion, possibility rather than an unequivocal determination.

/s/ Deborah A. Servitto