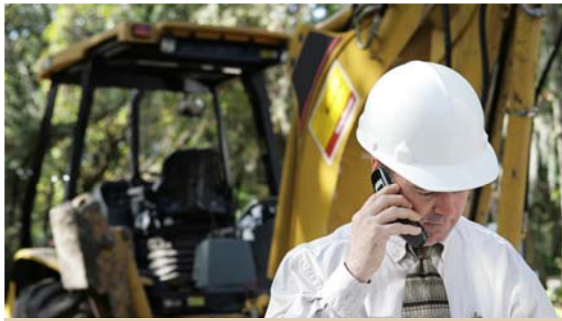

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PENNSYLVANIA SUPREME COURT REJECTS EXTENDING *BILT-RITE* THEORY OF LIABILITY TO UTILITY COMPANY IMPROPERLY MARKING UTILITY LINES PURSUANT TO THE PENNSYLVANIA ONE CALL ACT

By: Gaetano P. Piccirilli, Esq. and David R. Bronstein, Esq.

In a new case handed down just before the champagne corks popped at midnight last year, the Pennsylvania Supreme Court held that an excavation contractor could not sue a utility company for damages resulting from project delay and disruption—even where the utility company clearly caused those damages—unless there was a contract between the two entities. The high court in *Excavation Tech., Inc. v. Columbia Gas Co. of Pa.*[1] held that even if the utility company had incorrectly and incompletely marked its underground facilities such that the contractor then hit them in doing its work, causing significant and costly job delays, the utility company could not be sued.

Since the inception of Pennsylvania's One Call system, contractors that perform any type of excavation work rely upon utility companies to accurately mark the locations of their underground utility services and equipment to avoid personal injury and property damage during their work. But, personal injuries and property damage are not the only type of damage an excavation contractor may suffer due to a utility company's failure to adequately mark utility locations. Inadequate marking of underground facilities can cause delay in project completion, labor and material downtime and could result in additional costs for the contractor. It would only seem just that the contractor could look to the utility company for compensation for these "economic damages."

In *Excavation Technologies*, a utility contractor (Excavation) requested that Columbia Gas of Pennsylvania (Columbia Gas), pursuant to the One Call Act, mark the locations of gas lines in and around a worksite. According to Excavation, Columbia Gas improperly marked some of the lines and failed to mark others. While performing its work, Excavation struck a number of gas lines, causing a delay and disruption to Excavation's project which resulted in economic damages in excess of $70,000. Seeking compensation, Excavation sued Columbia Gas. Excavation sought recovery under the theory of negligent misrepresentation, a recently accepted theory of liability in construction law arising from the 2005 Pennsylvania Supreme Court decision in *Bilt-Rite Contractors, Inc. v. The Architectural Studio*.[2] Relying upon the theory of *Bilt-Rite* and § 552 of the Restatement of Torts (sections (1), (2) and (3)), Excavation argued that it relied upon information provided by Columbia Gas to its detriment. Columbia Gas responded with a motion to dismiss, arguing that the *Bilt-Rite* holding did not apply to Excavation's claim and that the economic loss doctrine precluded liability. The Pennsylvania Supreme Court agreed with Columbia Gas and denied Excavation's claim.

Generally, the *Bilt-Rite* case extended to contractors the ability to sue design professionals on whose plans they worked under a theory of negligent misrepresentation.[3] Prior to *Bilt-Rite*, even on the most poorly designed projects, a design professional could not be sued by a contractor even if the contractor suffered significant losses due to design issues.[4] Rather, the law only allowed a party that had contracted with the design professional to sue the design professional. Moreover, a legal doctrine called the "economic loss doctrine" precluded contractors from suing design professionals in negligence. The economic loss doctrine precludes a contractor from bringing a cause of action in tort law (*e.g.* negligence) that resulted purely in economic losses, *i.e.*, money damages, with no accompanying property damage or physical injury.[5] Thus, even where a contractor was not at fault, where the economic loss doctrine applied, the contractor's recourse was limited to recovering against whomever it contracted with—often either another contractor or the project owner. The contractor had no recourse against the design professional.

The Supreme Court of Pennsylvania in *Bilt-Rite* created an exception to the economic loss doctrine and held that an architect who had provided drawings and specifications upon which a contractor relied upon in preparing a bid for work could be liable to the contractor under a theory of negligent misrepresentation, even though the contractor did not have a contract with the architect.[6] The *Bilt-Rite* court held that a design professional who could be liable under a negligent misrepresentation claim was "one who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions …" Since *Bilt-Rite* was decided in 2005, construction

industry litigants have sought to expand its holding beyond design professionals. The latest case, *Excavation Technologies*, is another example of an attempt to expand the *Bilt-Rite* rationale, this time to utility companies acting pursuant to the Pennsylvania One Call statute.

In *Excavation Technologies*, the Supreme Court of Pennsylvania had to consider whether the *Bilt-Rite* exception to the economic loss doctrine applied to Columbia Gas, a utility company, in Excavation's lawsuit to recover for solely economic damages. The Court found that *Bilt-Rite* did not apply to Columbia Gas and dismissed Excavation's lawsuit. The Court cited three main justifications to support its conclusion. First, the Court found that, unlike a design professional, a utility company marking utility lines pursuant to Pennsylvania One Call was not in the business of providing information for pecuniary gain—an essential element of a negligent misrepresentation claim. Generally, in the construction setting, Pennsylvania courts have taken a conservative approach to extending the liability set forth in *Bilt-Rite* beyond design professionals, and *Excavation Technologies* is a continuation of that trend.

Second, deferring to the state legislature, the Court found that when the Pennsylvania One Call statute was enacted, the legislature "did not intend for utility companies to be liable for economic harm caused by an inaccurate response under [Pennsylvania One Call] because it did not provide a private cause of action."[7] Per the Court, when it established Pennsylvania One Call, the legislature was (presumably) aware of the economic loss doctrine and the relationships among the participating entities and that, in that light, "there is simply no statutory basis to impose liability for economic losses here."[8] Thus, per the Supreme Court's logic, a contractor's only recourse on this issue is to seek to have the legislature amend the Pennsylvania One Call Act to include a private right to recover these types of damages. This idea is not at all novel, as other states such as California[9] and New Jersey[10] allow for contractors to recover against utility companies for delay and disruption suffered due to a failure to properly comply with their One Call statutes. For example, New Jersey's statute specifically provides that a utility company that fails to comply with the act in such a way that the failure affects a "planned excavation or demolition" is liable for "costs, labor, parts, equipment and personnel downtime, incurred" by an excavation contractor.[11]

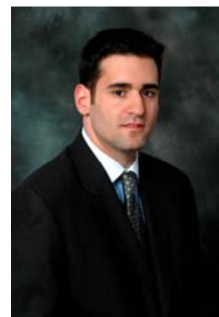
Third, the *Excavation Technologies* court rejected Excavation's argument that liability existed under § 552(3) of the Restatement of Torts (which refers to a "public duty" to give information to protect particular "segments of the population"). The Court found that the purpose of the Pennsylvania One Call statute was not to protect against economic losses, but rather was to protect against physical harm to individuals and workers on construction sites and to avoid property damage to utilities and surrounding structures.[12] Moreover, the Court noted that excavation contractors must still employ "prudent techniques" to determine the precise location of underground equipment. Per the Court, "permitting recovery would shift the burden from excavators, who are in the best position to employ prudent techniques on job sites to prevent facility breaches."

The Court also noted that if it were to allow for a utility company to be liable for economic losses, then the costs would be passed to the consumer. In this case, if the legislature envisioned such a result, it would have specifically accounted for utility companies to have liability for economic losses.

Based upon the reasoning of *Excavation Technologies*, excavation contractors seeking to hold utility companies responsible for economic damages resulting from faulty markings should focus their attention on the legislature to provide for such a right of recovery. In addition, contractors who perform excavation work should review their contracts thoroughly to ensure that they understand who bears the risk for project delay and disruption for these conditions. Until then, contractors are implored to use all prudence in performing their work to prevent injury and property damage, as well as damage to the bottom line.

[1] *Excavation Tech., Inc. v. Columbia Gas Co. of Pa., Supreme Court of Pennsylvania W.D. No.: 32 WAP 2008 (December 29, 2009).*
[2] *Bilt-Rite, 866 A.2d 270 (Pa. 2005).*
[3] *See Bilt-Rite, 866 A.2d at 285-86 (adopting RESTATEMENT OF TORTS (Second) § 522 "Negligent Misrepresentation" in case where general contractor suffered losses due to conduct of architect with whom it did not have privity).*
[4] *Except of course in instances where the contractor had a contract with the design professional.*
[5] *Spivack v. Berks Ridge Corp., 78 586 A.2d 402, 405 (Pa. Super. 1991).*
[6] *Id. at 287-88.*
[7] *Excavation Technologies, at pp. 4-5.*
[8] *Id.*
[9] *Cal. Gov. Code. § 4216.7(c).*
[10] *N.J.S.A. §48:2-80.*
[11] *N.J.S.A. §48:2-80(d).*
[12] *Id. at pp. 6-7.*

CONTRIBUTORS



GAETANO PICCIRILLI

Gaetano is an associate in the Construction Practices Group.

For more information, please contact Gaetano at 215.864.6288 or email him at piccirillig@whiteandwilliams.com.

DAVID BRONSTEIN

David is counsel in the Construction Practices Group.

For more information, please contact David at 215.864.7142 or email him at bronsteind@whiteandwilliams.com.

OFFICE LOCATIONS

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