

**[J-123-2008]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

EXCAVATION TECHNOLOGIES, INC.,	:	No. 32 WAP 2008
	:	
Appellant	:	
	:	Appeal from the Order of the Superior
	:	Court entered November 7, 2007 at No.
v.	:	1237 WDA 2005 affirming the Order of the
	:	Court of Common Pleas of Washington
	:	County entered June 29, 2005 at No.
COLUMBIA GAS COMPANY OF	:	2004-5279.
PENNSYLVANIA,	:	
	:	
Appellee	:	ARGUED: September 9, 2008

**CONCURRING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: DECEMBER 29, 2009**

I support the majority’s determination that Sections 552(1) and (2) of the Second Restatement are not applicable, as well as its decision to decline to expand Pennsylvania common law via the adoption of Section 552(3) of the Second Restatement. I depart, however, from the majority’s reasoning to the extent that it downplays the obligations of facility owners under the One Call Act. See, e.g., Majority Opinion, slip op. at 6 (“[A]ppellant maintains . . . appellee was under a duty to provide it accurate information as to the location of its underground gas lines. We disagree for multiple reasons.”). Further, my assessment regarding Section 552(3) is moderately different.

Under Section 2 of the enactment, facility owners have the “duty” to

mark, stake, locate or otherwise provide the position of the facility owner's underground lines at the site within eighteen inches horizontally from the outside wall of such line in a manner so as to enable the excavator, where appropriate, to employ prudent techniques, which may include hand-dug test holes, to determine the precise position of the underground facility owner's lines.

73 P.S. §177(5)(i). The "tolerance zones" resulting from fulfillment of the facility owner's statutory obligation have a direct and substantial impact on the responsibilities of excavators. See, e.g., 73 P.S. §180 (requiring excavators working "fw]ithin the tolerance zone" to "employ prudent techniques, which may include hand-dug test holes, to ascertain the precise position of such facilities" (emphasis added)).

Like the majority, I recognize that compliance with the One Call Act represents a substantial imposition upon facility owners. Nevertheless, facility owners derive considerable benefits from maintaining often exclusive underground distribution networks to serve their customers. Moreover, the damage prevention industry standards recommended by Common Ground Alliance universally recognize that "damage prevention is a shared responsibility."<sup>1</sup> Various excerpts recognize the critical interrelationship between the facility owners' and excavators' respective duties:

More communication between the excavator and the facility owner operator is a growing necessity as the area of excavation is getting more crowded everyday with new underground facilities. . . . The facility owner/operator is required to 1) mark its underground facilities with stakes, paint or flags or 2) notify the excavator that the facility owner/operator has no underground facilities in the area of excavation. . . . Once the excavator has all of the information

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<sup>1</sup> Common Ground Alliance is a nonprofit corporation created pursuant to the issuance of the United States Department of Transportation's Common Ground Task Force report in 1999. See 73 P.S. §176. Common Ground Alliance's best practices recommendations are effectively incorporated into the One Call Act. See 73 P.S. §184 ("Except as otherwise provided for by this act, persons shall use their best efforts to comply with the Common Ground Alliance best practices.").

needed for the work area, he/she can then excavate with confidence with safety in mind for the work crew and the public at large.

Common Ground Alliance Best Practices, Version 6.0 §5-8, Practice Description (Feb. 2009).<sup>2</sup>

For the above reasons, I believe the One Call Act, like the Common Ground Alliance Best Practices, fosters a sense of shared responsibility for the protection of buried utilities for the benefit of the public at large. In this regard, I believe facility owners are required to provide accurate information to the best of their ability and to coordinate with excavators where there are uncertainties.

In addressing remedies for breach of a facility owner's duties, I acknowledge Appellant's strong argument for the adoption of Section 552(3):

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<sup>2</sup> In stressing the responsibilities of excavators over facility owners, the majority discusses a scenario involving "insufficient information," which is specifically covered by the statute, then references Section 2 of the One Call Act as requiring the excavator to employ prudent techniques such as hand-dug test holes to prevent breaches of underground facilities. See Majority Opinion, slip op. at 6-7 (citing 73 P.S. §177(5)(i)). The difficulty with this assessment is that subsection 5(i) of Section 2 appears to address the application of prudent techniques within tolerance zones specified by facility owners. See 73 P.S. §177(5)(i). Thus, the statute again reinforces the dependence of excavators, in the exercise of their own responsibilities, on the careful execution of the facility owners' own obligations. Indeed, the One Call Act makes specific provision for instances in which there are known uncertainties in locating facilities, requiring the specific exercise of prudent techniques if digging is to proceed and providing for additional compensation by project owners. See 73 P.S. §180(15). At least 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 for marked locations.

Notably, the majority's comments address only the scenario entailing "insufficient information" as to the location of facilities, Majority Opinion, slip op. at 7, and not one involving misinformation such as that alleged in Appellant's complaint. See Complaint ¶6, R.R. at 5a (averring that Appellee "supplied false information for guidance to plaintiff in its business transactions, causing pecuniary loss to plaintiff as a result of plaintiff's justifiable reliance upon the information the defendant provided").

Section 552(3) is narrowly tailored to apply in specific instances where a public duty extends to a class of persons for whose benefit the duty was created. Such an instance exists here. Without the statutory protections of the One Call Act, contractors would have to dig and perform their services without any knowledge of what is beneath the surface. The One Call Act was enacted, in large part, to protect contractors and their employees from these potentially dangerous and fatal situations where excavating occurs without proper information from the facility owners as to what was placed beneath the surface. If facility owners do not provide accurate information as to the location of their underground facilities, contractors could, and probably will, strike or damage the facilities, which would cause harm to the contractor, the contractor's employees and the general public. Providing accurate information is one of the public duties that the One Call Act triggers and facility owners must be held responsible for their negligent actions if, as here, such damages were foreseeable.

Brief for Appellant at 33-34.

Nevertheless, there are substantial countervailing considerations, including the social impact (including increased rates charged to consumers) of exposing facility owners to a new class of litigation. Furthermore, as I have otherwise observed:

Our common-law decisions are grounded in records of individual cases and the advocacy by the parties shaped by those records. Unlike the legislative process, the adjudicatory process is structured to cast a narrow focus on matters framed by litigants before the Court in a highly directed fashion. The broader tools available to the legislative branch in making social policy judgments, including the availability of comprehensive investigations, are discussed in Pegram v. Herdrich, 530 U.S. 211, 221-22, 120 S. Ct. 2143 (2000).

Bugosh v. I.U. N. Am., Inc., \_\_\_ Pa. \_\_\_, \_\_\_, 971 A.2d 1228, 1240 n.19 (2009) (Saylor, J., dissenting, joined by Castille, C.J.).

On balance, I support the majority's decision to the degree it holds that any remedy for economic loss associated with a facility owner's breach of its locating duties under the One Call Act is best suited to legislative consideration.