

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

EAST OHIO GAS CO.
DBA DOMINION EAST OHIO

C.A. No. 25060

Appellee

v.

PERRAM ELECTRIC, INC.

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
AKRON MUNICIPAL COURT
COUNTY OF SUMMIT, OHIO
CASE No. 08 CVF 05922

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

BAIRD, Judge.

{¶1} Defendant-Appellant, Perram Electric, Inc. (“Perram”), appeals from the decision of the Akron Municipal Court, granting judgment in favor of Plaintiff-Appellee, East Ohio Gas Company d/b/a Dominion East Ohio (“Dominion”). This Court affirms.

I

{¶2} Perram was working as a subcontractor on a construction project to widen certain roads for the City of Akron. Part of Perram’s work on the project included installing street light pole foundations on West Market Street in Akron. In order to do so, Perram needed to determine where underground utility lines were located before it began excavating and installing the light pole foundations. Dominion owns and operates the gas lines located under the construction site.

{¶3} On July 12, 2007, Perram contacted the Ohio Utility Protection Service (“OUPS”) to inform them of the planned excavation and its location. Because of construction delays, the excavation did not take place as scheduled. Perram contacted OUPS again on Thursday, July 19,

2007, based on a revised excavation date for the area. OUPS, in turn, contacted Dominion, who then contacted its line location service, Central Locating Service. On Friday, July 20, 2007, Central Locating Service dispatched Michael Dobec to the construction site to mark the location of Dominion's lines in the area where Perram intended on excavating. Four days passed before Perram began excavating in the area marked by Dobec. In the interim, a different subcontractor had installed a curb within a few feet of the same area where Perram had planned to excavate. On Tuesday, July 24, 2007, shortly after Perram began excavating a site for the light pole foundation, it hit one of Dominion's plastic gas lines. As a result, Perram had to discontinue its operations and evacuate the area until Dominion was able to shut off and repair its damaged gas line.

{¶4} On May 14, 2008, Dominion filed a negligence suit to recover the costs it incurred to repair the gas line Perram had hit. Perram asserted a counterclaim alleging that Dominion had failed to properly mark the location of its underground gas lines. Perram alleged that Dominion's negligence caused economic loss to Perram in the form of downtime Perram suffered while waiting for Dominion to repair its line. The matter was tried to the bench on September 3, 2008. On September 24, 2009, the trial court granted judgment in favor of Dominion in the amount of \$5,135.21, plus post-judgment interest. Perram timely appeals from the trial court's judgment and asserts one assignment of error for our review.

II

Assignment of Error

“THE LOWER COURT’S DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE IT WAS NOT SUPPORTED BY COMPETENT CREDIBLE EVIDENCE AS TO ALL ELEMENTS OF THE CASE.”

{¶5} In its sole assignment of error, Perram argues that the trial court’s decision was against the manifest weight of the evidence because R.C. 153.64(C) imposes a duty upon Dominion to properly mark its lines and that by failing to do so, Perram cannot be liable in view of Dominion’s failure to discharge that statutory duty. Perram argues that Dobec admitted he could not specifically recall marking the U-shaped gas line that Perram later struck and that Dominion was unable to corroborate Dobec’s testimony with any other evidence that the protruding gas line was properly marked. Consequently, Perram asserts that the trial court’s judgment was not supported by competent, credible evidence because Dominion failed to produce any evidence that it had accurately marked the gas line in question, specifically a U-shaped gas line that protruded in a north-south manner beyond the gas line running east-west under the street.

{¶6} In reviewing a manifest weight challenge, this Court will affirm a trial court’s judgment if it is “supported by ‘some competent, credible evidence going to all the essential elements of the case[.]’” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶26, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. In applying the foregoing standard, this Court recognizes its obligation to presume that the trial court’s factual findings are correct and that while “[a] finding of an error in law is a legitimate ground for reversal, [] a difference of opinion on credibility of witnesses and evidence is not.” *Calame v. Treece*, 9th Dist. No. 07CA0073, 2008-Ohio-4997, at ¶15, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 81.

{¶7} Initially, we must address the nature of the negligence action asserted by Dominion in its complaint. Dominion’s complaint alleges elements of both a common law and a statutory cause of action based in negligence. The statutory cause of action asserted by

Dominion is based in R.C. 3781.25, et seq. R.C. 3781.27, however, specifically states that “[s]ections 3781.27 to 3781.32 do not apply to ‘public improvements’ as defined in section 153.64 of the Revised Code.” See, also, *East Ohio Gas Co., v. Kenmore Const. Co., Inc.* (Mar. 28, 2001), 9th Dist. Nos. 19567 & 19790, at fn. 5 (noting that R.C. 153.64 governs public improvement projects while R.C. 3781.25 governs private improvement projects); *MCI Worldcom Network Services, Inc. v. W.M. Brode Co.*, 411 F.Supp.2d 804, 807-09 (analyzing the applicability of R.C. 153.64 and R.C. 3781.27 to a negligence claim for damage to underground cables which occurred during a bridge repair project). A “public improvement” includes “construction, reconstruction, improvement *** or repair of a *** road[] [or] street, *** and all other structures or works of any nature by a public authority.” R.C. 153.64(A)(1). A “public authority” is defined to include municipal corporation, such as the City of Akron. R.C. 153.64(A)(2). Because Perram was working as a subcontractor on a construction project initiated by the City of Akron to widen its roads, Perram was engaged in a public improvement project. Accordingly, the provisions in R.C. 3781.27 through 3781.32 are inapplicable to this case and bar Dominion from pursuing its negligence claim under such statutory authority. Consequently, we consider Dominion’s action as having arisen as a common law negligence claim.

{¶8} “To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom.” *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, citing *Di Gildo v. Caponi* (1969), 18 Ohio St.2d 125, 127. “In Ohio, a nondelegable duty is imposed upon an excavator to inform himself as to whether utility lines exist below ground so that he may avoid damaging them.” *Northeast Ohio Natural Gas Corp. v. Stout Excavating, Inc.*, 9th Dist. No. 03CA0030, 2004-Ohio-600, at ¶7, citing *GTE*

North, Inc. v. Carr (1993), 84 Ohio App.3d 776, 779. An excavator who fails to act under this duty proceeds at his own risk and will be liable for any damage he may cause to underground utility lines. *Id.*

{¶9} With respect to the subcontractor’s duty on a public improvement project, R.C. 153.64 provides that the subcontractor “shall [notify] the registered underground utility protection services and the owners of underground utility facilities *** who are not members of a registered underground utility protection service, in writing, by telephone, or in person” prior to excavating in an area which may contain underground utility facilities. R.C. 153.64(C). Upon receiving such notice from a subcontractor, within 48 hours the owner of the underground facilities, in turn, “shall stake, mark, or otherwise designate the location of the underground utility facilities in the construction area in such a manner as to indicate their course together with the approximate depth at which they were installed.” *Id.* Ideally, the markings “shall be coordinated to stay approximately two days ahead of the planned construction.” *Id.* This Court has indicated that under R.C. 153.64(C), “the utility owner, as the party that installed the underground facility, will be primarily responsible for providing reasonably accurate information as to the approximate location of the line.” We have further noted that the “information must be sufficient to enable the excavator to proceed cautiously in pinpointing the actual location, so that the line will not be damaged.” *East Ohio Gas Co.*, at *9. The statute further provides that a subcontractor who complies with the notice requirements established in R.C. 153.64(C) “shall not be responsible to the owner of the underground utility facility if underground utility lines are encountered not as marked in accordance with [R.C. 153.64(C)] by the owner of the underground utility facility, unless the contractor or its subcontractor has actual notice of the underground utility facility.” R.C. 153.64(D).

{¶10} At trial, Dobec testified that he had worked as a utility line locator for Central Locating Service for over a year at the time of the incident. He had been working in that capacity on the West Akron road reconstruction project since January 2007. Dobec testified that he had been on-site marking utility lines “everyday” because there were so many different utility lines running through the area and multiple contractors performing different types of work which required he frequently mark various underground lines. Dobec stated he recalled marking the line on July 19, 2007, although he admitted he did not specifically remember exactly where on the ground he had marked the line or the U-shaped extension, nor did he recall what time of day it was when he completed the markings. He did, however, deny marking the lines inaccurately.

{¶11} Dobec testified that in order to mark a line, he utilized maps of the construction area which identified the general location of any gas, electric, or phone line in the area. Based on the general location of the line indicated on the map, Dobec used a sonar detector to identify the specific location of the underground line. Dobec admitted that the plastic lines, like the one struck by Perram, were not included on the maps he had of gas lines in the area. Dobec explained, however, that despite not being included on the maps, he was able to detect and mark the location of the plastic lines, too, because the plastic lines had two wires affixed to them. Dobec was able to detect these wires on the plastic gas lines once he attached a transmitter to the test station at the head of the plastic gas main. Dobec indicated he marked all the lines on July 19, 2007, consistent with how he had been marking lines at the construction site since he began working there. He further indicated that, with the various phone and gas lines running in every direction where Perram intended to excavate, the “whole area [] would be [] a hand-dig zone” meaning, any excavation in the area should be done by hand, without the use of excavation machinery.

{¶12} According to Dobec, the markings he made on Thursday, July 19, to identify Dominion's underground gas lines would have been erased given the installation of a concrete curb on Monday, July 23, which was constructed within a few feet of the area where Perram was excavating. Dobec indicated he marked the gas lines by painting a "thin layer of paint" across the gravel-filled road and that the marks could have been erased within minutes of his marking, given the number of vehicles and heavy equipment being utilized in that same area at that same time.

{¶13} Following Perram's hit to the gas line, Dobec prepared a damage report for his employer, in which he reflected that the gas line locating marks he made were "visible at the time of damage" and that the locating marks were "accurate." Dobec's report indicated that the markings were "within [the] tolerance zone" meaning, the gas line was within an 18-inch distance from either side of the painted markings made by Dobec, which would in turn require a party to drill further away to avoid hitting it.

{¶14} Dominion also introduced its damage report, prepared by the Dominion supervisor who responded to the scene. Dominion's report indicated that the gas line was marked with paint by Central Locating Service. The report further reflected that the cause of the damage was a "failure to maintain the marks;" a "failure to use hand tools where required;" and "a failure to verify location by test-hole." Dominion's crew leader, Paul Innocent, testified that verifying a location by "test-hole" means that the excavating crew would dig by hand, using a shovel, to verify the exact location of the underground utility line. Innocent stated that, based on the "gate box," or gas valve, visible near Perram's excavation site, he considered the area a "no-dig zone."

{¶15} Perram presented evidence from its superintendent on the project, James Strausbaugh, who testified that the U-shaped protrusion that Perram damaged while digging in the area was not properly marked. According to Strausbaugh, the excavation site was moved four feet away from the line markings and was well outside the “tolerance zone” as indicated by the lines. Strausbaugh further indicated that, based on the line markings Dobec made on Friday, Perram had painted a white mark at the location where it intended on drilling once the curb was installed. Strausbaugh testified that the installation of the curb on Monday did not affect the existing white paint markings Perram made on Friday targeting the location in which it was planning to dig.

{¶16} Based on the foregoing testimony, we conclude that the record contains competent, credible evidence to support the trial court’s judgment that Perram was negligent in performing its excavation work. The record reveals that Dominion provided Perram with reasonably accurate information as to the approximate location of Dominion’s gas line pursuant to its obligations under R.C. 153.64. Perram, however, breached the common law duty it owed to Dominion to adequately inform itself of the existence of any underground utility lines before excavating. *Northeast Ohio Natural Gas Corp.* at ¶7. Though Perram argues Dominion’s witnesses were not credible or that their testimony lacked corroboration, this Court has previously stated that it will “not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court.” *Nemeckay v. Upp*, 9th Dist. No. 24874, 2010-Ohio-1966, at ¶6, quoting *Wilson*, at ¶24. Because the trial court’s judgment was supported by some competent, credible evidence, it was not against the manifest weight of the evidence. Accordingly, Perram’s sole assignment of error lacks merit and is overruled.

III

{¶17} Dominion's assignment of error is overruled. The judgment of the Akron Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

WILLIAM R. BAIRD
FOR THE COURT

DICKINSON, P. J.
MOORE, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

L. TERRENCE UFHOLZ, Attorney at Law, for Appellant.

ERIN K. WALSH, Attorney at Law, for Appellee.