STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

MICHIGAN BELL TELEPHONE COMPANY,
d/b/a AT&T MICHIGAN,

Plaintiff,

vs. Case No. 2023-001291-CB

M.U.E., INCORPORATED,

Defendant.
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OPINION AND ORDER

This matter is before the Court on Plaintiff Michigan Bell Utility Company d/b/a AT&T Michigan's (AT&T) motion for partial summary disposition as to liability, Defendant M.U.E. Inc.'s, (MUE) motion for summary disposition, and AT&T's motion to strike MUE's expert, Eric Urbain.

I. Background

In March of 2022, MUE was installing an underground gas main utility line along a road in Sterling Heights. The gas main line was to be installed parallel to an underground utility line owned by AT&T that runs along a 4-mile span of the road. To install the gas main line, MUE used a trenchless underground excavation method known as directional boring in which an underground hole is drilled between two points (called a "bore shot") and the utility pipeline is then attached to the bore-head and pulled back through the bored hole.

Prior to starting directional boring, MUE allegedly submitted notices of excavation to MISS DIG 811, the organization that administers the MISS DIG Underground Facility Damage Prevention and Safety Act (the MISS DIG Act), MCL 460.721, et. seq. MISS DIG

811 notified AT&T of the upcoming work, and AT&T then purportedly hired USIC Locating Services (USIC) to mark its utility line using spray paint, small flags, and other surface markings.

After USIC marked AT&T's utility line, MUE began its installation. Relevant to this case is a bore shot that spanned 430 feet in length of the overall 4-mile-long project. According to, MUE it used soft excavation (called "spot holes") "a total of 13 times between the initial bore hole and the catch basin (for a total of 15 locations of the AT&T line), digging the spot holes and consistently locating the AT&T [utility line] on average every 30 feet on the 430-foot length of the bore shot." (Def.'s Mot., p. 4.) On March 11, 2022, during the bore shot on this section of the project, MUE struck the AT&T utility line between the location of the last spot hole and the catch basin. According to MUE, the strike occurred under a driveway.

AT&T was notified of its damaged utility line, and following its repair of the line, it filed suit against MUE.[1] It asserts three claims against MUE: violation of MCL 460.721, et. seq. (the MISS DIG Act) (Count I); negligence and negligence per se (Count II); and (3) "negligence (res ipsa loquitor)" (Count III).

On May 15, 2024, AT&T filed a motion for partial summary disposition as to liability under MCR 2.116(C)(10). MUE filed its response to AT&T's motion as well as a cross-motion seeking summary disposition under MCR 2.116(C)(8) and (C)(10) on June 7, 2024. AT&T filed a combined reply to MUE's response and a response to MUE's motion on June 10, 2024. The same day it filed its combined reply and response, AT&T also filed

[1] AT&T filed its complaint on April 19, 2023. It filed a first amended complaint in February 2024 to correctly identify MUE as defendant.

a motion to strike the testimony of MUE's expert, Eric Urbain. MUE filed its reply for its motion for summary disposition and its response to AT&T's motion to strike on June 24, 2024.[2] Oral arguments were held on July 1, 2024, where the Court took the motions under advisement.

II. Standard of Review

Summary disposition may be granted under MCR 2.116(C)(8) on the ground the opposing party has failed to state a claim on which relief can be granted. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 426-427; 722 NW2d 243 (2006). It tests the legal sufficiency of the complaint based on the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Carter*, Mich App at 427.

A motion filed under MCR 2.116(C)(10) "tests the factual sufficiency of a claim." *Maiden v Rozwood*, 461 Mich 109, 120; 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). In reviewing such a motion, a court considers the documentary evidence submitted by the parties in the light most favorable to the non-moving party. *Maiden*, 461 Mich at 120. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. The

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[2] Both AT&T's brief in support of its motion for summary disposition and its combined reply and response exceed than the 20-page limit in MCR 2.119(A)(2)(a). AT&T is cautioned against failing to comply with the page-limitations in the court rules.

initial burden is on the moving party to support its position "by affidavits, depositions, admissions, or other documentary evidence." *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The burden then shifts to the opposing party to set forth specific facts via admissible evidence that establish a genuine issue of disputed fact exists. *Maiden*, 461 Mich at 121.

Where the moving party is the defendant challenging the plaintiff's claims, it may satisfy its burden under MCR 2.116(C)(10) in one of two ways: (1) by "submit[ting] affirmative evidence that negates an essential element of the nonmoving party's claim," or (2) by "demonstrat[ing] to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Lowrey v LMPS & LMPJ*, 500 Mich 1, 7; 890 NW2d 344 (2016). "[T]he nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id.* If the non-moving party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id.*

III. AT&T's Motion for Partial Summary Disposition on Liability[3]

Both parties agree that Section 5 of the MISS DIG Act, MCL 460.725(5), is the heart of all AT&T's claims, and that that provision establishes the duty MUE was required to comply with. MCL 460.725(5) provides,

> Except as otherwise provided in this subsection, before blasting or excavating in a caution zone, an excavator shall expose all marked facilities in the caution zone by soft excavation. If conditions make complete exposure of the facility impractical, an excavator shall consult with the

[3] AT&T only seeks summary disposition on its claims for Violation of the MISS DIG Act (Count I) and negligence and negligence per se (Count II). It is not seeking summary disposition on its "negligence (res ipsa loquitor)" claim in Count III.

> facility owner or facility operator to reach agreement on how to protect the facility. For excavations in a caution zone parallel to a facility, an excavator shall use soft excavation at intervals as often as reasonably necessary to establish the precise location of the facility. An excavator may use power tools and power equipment in a caution zone only after the facilities are exposed or the precise location of the facilities is established.

A. Violation of the MISS DIG Act, MCL 460.721 *et seq.* (Count I)

In Count I, AT&T asserts a claim under the MISS DIG Act, MCL 460.721 *et seq.* based on MUE's alleged failure to comply with the statutory duties in MCL 460.725(5). According to AT&T, Section 8 of the MISS DIG Act, MCL 460.728, creates a statutory cause of action for violations of the Act. It seeks summary disposition on this claim arguing there is no genuine issue of material fact that MUE breached its statutory duties under MCL 460.725(5). In response and in its cross-motion, MUE argues this claim is legally insufficient because MCL 460.728 does not create an independent cause of action, and that claims predicated on an excavator's failure to comply with MCL 460.725(5) can only be brought as negligence claims in civil actions.

The parties' arguments are based on conflicting interpretations of MCL 460.728, entitled "Damages or equitable relief," and that states,

> This act does not limit the right of an excavator, facility owner, or facility operator to seek legal relief and recovery of actual damages incurred and equitable relief in a civil action arising out of a violation of the requirements of this act, or to enforce the provisions of this act, nor shall this act determine the level of damages or injunctive relief in any such civil action. This section does not affect or limit the availability of any contractual or legal remedy that may be available to an excavator, facility owner, or facility operator arising under any contract to which they may be a party.

There does not appear to be any caselaw on this provision, so whether it creates a cause of action appears to be a matter of first impression.

Whether a plaintiff has a cause of action under a statute presents a question of statutory interpretation. *Pitsch v ESE Michigan, Inc*, 233 Mich App 578, 586; 593 NW2d 565 (1999). A court's "purpose in construing a statute is to ascertain the reasonable meaning of the specific language employed by the Legislature." *Id.* In determining whether a statute creates a cause of action, courts first look to the language of the statute to determine whether it explicitly creates a cause of action. See *id.* at 571-572; *Randall v Michigan High Sch Athletic Ass'n*, 334 Mich App 697, 718; 965 NW2d 690 (2020).

Here, though MCL 460.728 does not use the term "cause of action," the only reasonable construction of its first sentence that "[the] act does not limit the right of [certain entities] to seek legal relief and recovery of actual damages incurred . . . in a civil action" is that it provides a cause of action for "a violation of the requirements of [the] act." See *Pitsch*, 233 Mich App at 589 (finding that though statute did not use the term "cause of action" it created a private cause of action where language of statute provided that certain persons "shall be liable for . . . necessary costs of response activity incurred by any other person[.]") (quoting MCL 299.612(2)(b)). Accordingly, the Court finds the plain language of MCL 460.728 creates a private cause of action for violations of the MISS DIG Act. Accordingly, AT&T's claim that MUE violated MCL 460.725(5) of the MISS DIG Act in Count I is a valid independent claim.

AT&T argues there is no genuine issue of material fact that MUE did not comply with its statutory duties under MCL 460.725(5). As explained below, AT&T's interpretation of the applicable statutory duty under MCL 460.725(5) is incorrect, and because its motion is based on this incorrect interpretation, its is not entitled to summary disposition.

The core of AT&T's three claims is that MUE breached its statutory duties under MCL 460.725(5) as follows: 1) MUE performed excavation within 48 inches (the "caution zone") of AT&T's marked underground utility line without first fully exposing the line; 2) MUE, while attempting to excavate parallel in the caution zone of AT&T's utility line, failed to use soft excavation in the last 30 feet of its bore path at intervals reasonably necessary to establish the precise location of AT&T's utility line; and 3) MUE used power tools and power equipment in the last 30 feet of its bore path within the caution zone of AT&T's utility line, without establishing the line's precise location.

MUE maintains it did not violate MCL 460.725(5) because as a parallel excavation, the statute only required it to "use soft excavation at intervals as often as reasonably necessary to establish the precise location of" AT&T's utility line. According to MUE, the statute did not require it to fully expose the utility line or to use soft excavation in the last 30 feet of its bore path, nor did it prohibit MUE from using power tools and power equipment in the last 30 feet of its bore path without first establishing the utility line's precise location.[4]

The parties dispute over the requirements in MCL 460.725(5) is a matter of statutory interpretation. When interpreting a statute, the goal of a court is to ascertain and effectuate the Legislature's intent. *Morrison v Dickinson*, 217 Mich App. 308, 315; 551 NW2d 449 (1996). "The Legislature is presumed to have intended the meaning it plainly expressed." *Id*. If the language of the statute is clear and unambiguous, the statute must

[4] MUE's cites the testimony of Eric Urbain, the corporate representative of MISS DIG 811, to establish statutory duty under MCL 460.725(5). As explained later in addressing AT&T's motion to strike Urbain, Urbain is not permitted to testify regarding legal questions, such as statutory interpretation, or on ultimate questions of MUE's negligence. As such, the Court will not consider Urbain's testimony on these issues.

be enforced as written, and no judicial construction is not permitted. *Sun Valley Foods v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

MCL 460.725(5) provides,

> Except as otherwise provided in this subsection, before blasting or excavating in a caution zone, an excavator shall expose all marked facilities in the caution zone by soft excavation. If conditions make complete exposure of the facility impractical, an excavator shall consult with the facility owner or facility operator to reach agreement on how to protect the facility. For excavations in a caution zone parallel to a facility, an excavator shall use soft excavation at intervals as often as reasonably necessary to establish the precise location of the facility. An excavator may use power tools and power equipment in a caution zone only after the facilities are exposed or the precise location of the facilities is established.

The unambiguous language of the statute creates are two distinct requirements that may apply when excavating in a caution zone. The first two sentences require a contractor, before blasting or excavating, to "expose all marked facilities" by "soft excavation;"[5] if total exposure is impractical, the contractor must reach an agreement with the owner about protecting the utility line. However, the requirements of the first two sentences do not apply if other requirements are "otherwise provided in this subsection." The third sentence contains the "as otherwise provided" requirements for a parallel excavation. For parallel excavations in a caution zone, rather than requiring total exposure of all marked utility lines, the statute only requires the contractor to use "soft excavation at intervals reasonably necessary to establish the precise location" of the utility line. The final sentence then authorizes the excavator to use power tools and equipment after either exposing the utility line or after "the precise location of the [utility line] is established."

[5] "Soft excavation" is defined as "a method and technique designed to prevent contact damage to underground facilities, including, but not limited to, hand-digging, cautious digging with nonmechanical tools, vacuum excavation methods, or use of pneumatic hand tools." MCL 460.723(aa).

The parties do not dispute MUE was excavating in a caution zone parallel to AT&T's utility line. Under the unambiguous language of MCL 460.725(5), as a parallel excavation, MUE was only required to use "soft excavation at intervals as often as reasonably necessary to establish the precise location of the facility." AT&T's assertion that the fourth sentence of the statute required MUE to know the "precise location" of the entirety of AT&T's utility line before it could use power tools and equipment would nullify the Legislature's "reasonably necessary" interval standard for parallel excavations. *Koenig v City of S Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999) ("a court's duty is to give meaning to all sections of a statute and to avoid, if at all possible, nullifying one by an overly broad interpretation of another"). Moreover, such an interpretation proposed by AT&T would make a contractor using soft excavation prior to a parallel excavation strictly liable if it hit the utility line no matter how reasonable its soft excavation intervals. Nothing in the unambiguous language of MCL 460.725(5) indicates the Legislature intended to make a violation of the statute a strict liability offense.

The Court therefore finds that under the unambiguous language of the statute, MUE was only required to "use soft excavation at intervals as often as reasonably necessary to establish the precise location" of AT&T's utility line. It was not required to establish the precise location of AT&T's line, either in its entirety or the last 30 feet, before using power tools and equipment. Nor was it required to fully expose the utility line or to use soft excavation in the 30 feet of its bore path before using power tools and equipment.

AT&T's request for summary disposition on its statutory violation claim is based on its erroneous interpretation of the statutory duties in MCL 460.725(5). It has not argued that it is entitled to summary disposition on this claim because MUE's soft excavation

intervals were not "as often as reasonably necessary" to establish the precise location of its utility line, which is the applicable statutory duty. As such, AT&T has not established a that there is no genuine issue of material fact that MUE violated MCL 460.725(5). Therefore, AT&T is not entitled to summary disposition on its claim in Count I that MUE violate the MISS DIG Act.

B. Negligence (Count II)

AT&T next seeks summary disposition on its claim of "negligence and negligence per se" arguing there is no genuine issue of material fact that MUE did not comply with its statutory duties under the MISS DIG Act and that MUE cannot establish a defense against the rebuttable presumption of negligence due to its violation of its statutory duties.[6] In response and in its cross-motion, MUE asserts AT&T's interpretation of MUE's statutory duties under the MISS DIG Act is incorrect.[7]

The elements of a claim of negligence are: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach of duty was a proximate cause of the plaintiff's damages; and (4) the plaintiff suffered damages. *Johnson v Bobbie's Party Store*, 189 Mich App 652, 659; 473 NW2d 796 (1991). Michigan Courts do not recognize negligence per se as a separate cause of action. *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 82; 600 NW2d 348 (1999). Rather, it is a "burden-shifting mechanism within the theory of negligence." *Abnet*

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[6] MUE also argued AT&T's claim of negligence per se is improper because it is not recognized as a separate cause of action in Michigan but is instead a burden shifting mechanism in a negligence claim. AT&T's reply indicates it is not asserting negligence per se as a separate claim but is using the burden-shifting for MUE's statutory violations to establish its negligence claim.

[7] MUE's request for summary disposition on AT&T's negligence claim is addressed later in this Opinion and Order.

v Coca-Cola Co, 786 F Supp 2d 1341, 1345 (WD Mich, 2011). Under this mechanism, "a violation of a statute creates a rebuttable presumption of negligence." *Candelaria v BC Gen Contractors*, 236 Mich App 67, 82; 600 NW2d 348 (1999). The presumption may be rebutted by evidence of a reasonable excuse for the statutory violation. *Klanseck v Anderson Sales & Serv, Inc*, 426 Mich 78, 86; 393 NW2d 356 (1986); *Zeni v Anderson*, 397 Mich 117, 122; 243 NW2d 270 (1976).

As noted earlier, AT&T's negligence claim is based MUE's alleged violations of the same statutory duties under MCL 460.725(5) identified in its statutory violation claim. AT&T asserts these violations are prima facie evidence of negligence that MUE cannot rebut. However, as explained above, AT&T's interpretation of the applicable statutory duty under MCL 460.725(5) is incorrect. Because there is no dispute MUE was conducting a parallel excavation, the applicable statutory under MCL 460.725(5) required MUE to use "soft excavation at intervals as often as reasonably necessary to establish the precise location" of AT&T's utility line facility.

Like its request for summary disposition on its statutory violation claim, AT&T's request for summary disposition on its negligence claim is based solely on its erroneous interpretation of the statutory duties in MCL 460.725(5). It has not argued that it is entitled to summary disposition on this claim because MUE's soft excavation intervals were not "as often as reasonably necessary" to establish the precise location of its utility line, which is the applicable statutory duty in this case. As such, AT&T has not established a rebuttable presumption of negligence based on a violation of a statutory duty, it is therefore not entitled to summary disposition on its negligence claim in Count II.

IV. MUE's Motion for Summary Disposition

MUE seeks summary disposition on all three of AT&T's claims. Most of its arguments are the same as those raised in its response to AT&T's motion for partial summary disposition, specifically its arguments that AT&T's MISS DIG Act violation claim is not a cognizable claim and that the applicable statutory duty under MCL 460.725(5) is that MUE was required to "use soft excavation at intervals as often as reasonably necessary to establish the precise location of" AT&T's utility line. Because those issues are addressed above, the Court will not readdress them here.

A. Negligence (Count II)

MUE argues it is entitled to summary disposition on AT&T's negligence claim because there is not genuine issue of material fact it satisfied the statutory duties under MCL 460.725(5).

As earlier explained, under the unambiguous language of MCL 460.725(5), the applicable statutory duty is that MUE was required to "use soft excavation at intervals as often as reasonably necessary to establish the precise location of" AT&T's utility line. Under this language, complete exposure of the line is not required, nor is MUE obligated to know the precise location of the entirety of the line as AT&T asserts.

MUE's evidence shows it dug 13 spot holes at an average of about 30 feet apart throughout the 430-foot length of its bore shot, and at each spot hole, MUE exposed the AT&T line. (MUE Mot., Ex. 5.; Ex. 3 p. 18, 26-28; Ex. 2.) According to MUE, the average 30-foot interval between each spot hole and the fact that each spot hole located AT&T's line demonstrates that its intervals were "as often as reasonably necessary to establish

the precise location of" AT&T's line.[8] MUE's evidence also shows that the location where it hit AT&T's line was underneath a paved driveway that was actively in use, so according to MUE's foreman on the project, Chaise Keiter, it was impossible to dig a spot hole in the middle of the driveway. (MUE Mot., Ex. 3, pp. 25- 26.) Even so, according to MUE, it had a spot hole on one side of the driveway and the catch basin (the end of the bore shot) was located on the other side, approximately 30 feet away from the previous spot hole, and the 30-foot interval in this section was reasonable. (MUE Mot., Ex. 2; Ex. 3, pp. 25-27, 38.)[9]

Michigan Courts have consistently held that reasonableness is a fact-specific inquiry that is left for the jury. See e.g., *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992) ("Once a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question for the jury.") *Lundy v Groty*, 141 Mich App 757, 761; 367 NW2d 448 (1985) ("The reasonableness of the defendant's actions in [negligence action] is clearly also a matter to be decided by the jury.") In this case, the Court is unpersuaded that from MUE's evidence, reasonable minds could not differ in concluding that the approximate 30-foot interval average between its spot holes were "as often as reasonably necessary to establish the precise location of" AT&T's line. Accordingly, a genuine issue of material

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[8] MUE's cites the testimony of Eric Urbain, the corporate representative of MISS DIG 811, where he testified that MUE satisfied the "reasonably necessary" standard under MCL 460.725(5). As explained later in addressing AT&T's motion to strike Urbain, Urbain is not permitted to testify on the ultimate questions of MUE's negligence. As such, the Court will not consider Urbain's testimony on whether MUE satisfied the statutory standard.

[9] MUE asserts "the AT&T line unexpectedly deviated from its consistent location both horizontally and several feet vertically into the range in which MUE was working," however, review of the cited deposition does not support this assertion. (See MUE Mot. Ex. 3 at 21:14-22; 22:16-23; 23:13-24:1-2).

fact exists whether MUE complied with its statutory duty under MCL 460.725(5), and MUE's request for summary disposition on AT&T's negligence claim in Count II must be denied. See *West*, 469 Mich at 183 ("A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.")

B. Negligence (Res Ipsa Loquitor) (Count III)

In its third claim, AT&T alleges res ipsa loquitor and asserts that the damage to its utility line was "of a kind which ordinarily does not occur in the absence of someone's negligence" and was "caused by excavation equipment that was in the exclusive control of MUE." (First Am. Compl., ¶¶47-48.) MUE seeks summary disposition on this claim arguing AT&T cannot establish that the doctrine of res ipsa loquitor applies in this case.

As MUE correctly notes, the doctrine of res ipsa loquitur is not an independent cause of action. *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 19; 930 NW2d 393 (2018). "The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Id.* Res ipsa loquitur is one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation. *Id.* at 21. To avail themselves of the doctrine of res ipsa loquitur, plaintiffs must meet the following conditions:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and

(4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.

Id. at 19–20. Additionally, a "plaintiff must also produce some evidence of wrongdoing beyond the mere happening of the event." *Id.* at 20. Whether the doctrine of res ipsa loquitur is applicable to a particular case is a question of law. *Id*. at 19.

In its response, AT&T simply recites the four conditions required to proceed under the doctrine of res ipsa loquitor and asserts they have been met in this case without citing any evidence to support its assertion. It has also not cited any legal authority that demonstrates the doctrine applies or should apply in cases involving an excavator's alleged breach of its duties under the MISS DIG Act. Indeed, as MUE correctly argues, AT&T's assertion that res ipsa loquitor applies is based on its flawed interpretation of MCL 460.725(5) that the statute imposes strict liability against an excavator for damage to an underground utility line. Accordingly, AT&T's attempt to apply res ipsa loquitor fails, and MUE is entitled to summary disposition on this claim.

V. AT&T's Motion to Strike Eric Urbain and Other Experts

AT&T has filed a motion to strike the transcript of Eric Urbain, the corporate representative of MISS DIG 811, from MUE's response to AT&T's motion for partial summary disposition and from MUE's cross-motion for summary disposition. It also requests the Court exclude testimony from the experts listed in MUE's Witness List classified as "Expert[s] in the field of construction means and methods, including but not limited to excavation and the MISS DIG statute." In response, MUE argues Urbain's testimony is permissible expert testimony and that he is qualified to testify as an expert.

A. Standards of Review

"A trial court's decision whether to admit or exclude evidence will not be disturbed on appeal absent an abuse of discretion. The trial court abuses its discretion if its decision is outside the range of principled outcomes." *Alpha Capital Mgt v Rentenbach*, 287 Mich App 589, 620; 792 NW2d 344 (2010).

B. Law and Analysis

AT&T argues Urbain's testimony is inadmissible because, among other reasons, he provides improper legal opinions and statutory interpretations, and he opines on the ultimate question of MUE's negligence.[10] During oral arguments, MUE's counsel stated he is offering Urbain's testimony as an expert witness, not a lay witness. So the only issue is whether Urbain's testimony as an expert witness is proper in this case.

Under MRE 702(a), threshold showing required for the admission of expert of testimony is that the proponent of the expert (in this case, MUE) demonstrate that "the experts scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." MUE has failed to provide any argument or evidence to establish this threshold issue. While it asserts that Urbain's testimony "will clearly assist the finder of fact in this matter as to the appropriate standard of care," (MUE Resp., p. 15), nothing in the rules of evidence permit such standard of care testimony by an expert in an ordinary negligence and statutory violation action.

Both parties agree that the applicable duty in this case is found in the statutory

[10] During oral arguments, the Court denied AT&T's motion to the extent it was based on the assertion that allowing Urbain's testimony would be prejudicial to AT&T as his deposition was taken after the discovery cut-off date.

requirements of MCL 460.725(5). MUE relies on Urbain's testimony about what he believes the statutory duties are as support of its interpretation of the statute. The question of what the statutory requirements are is a legal question for the Court, so Urbain's testimony regarding his interpretation of what is required by MCL 760.725(5) is inadmissible. *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 123; 559 NW2d 54 (1996) ("An expert witness . . . may not give testimony regarding a question of law, because it is the exclusive responsibility of the trial court to find and interpret the law.")

Moreover, MUE repeatedly cites Urbain's testimony where he opines that MUE complied with the statutory duties in MCL 460.725(5), and MUE relies on this testimony to show that MUE did not breach the statutory duties. Such opinion testimony is improper as it invades the province of the jury to determine the ultimate question of whether MUE violated its statutory duties and was negligent. See *id.* ("A witness is prohibited from opining on the issue of a party's negligence or nonnegligence . . . . Therefore, it is error to permit a witness to give the witness' own opinion or interpretation of the facts because doing so would invade the province of the jury.") (internal quotations omitted).

In sum, MUE's reliance on Urbain's testimony about his interpretation of the statutory duties in MCL 460.725(5) and his opinion whether MUE violated those duties is improper. The Court is unpersuaded that Urbain's testimony "will help the trier of fact to understand the evidence or to determine a fact in issue." Accordingly, the Court grants AT&T's motion to strike Urbain and his testimony is excluded from trial.

AT&T also requests the Court exclude testimony from the experts listed in MUE's Witness List it classifies as "Expert[s] in the field of construction means and methods,

including but not limited to excavation and the MISS DIG statute." However, it has not identified who these expert witnesses are, what their testimony is, or how such testimony is inadmissible. Thus, this request is denied.

VI. Conclusion

For the reasons set forth above, AT&T's motion for partial summary disposition on liability claims is DENIED. MUE'S motion for summary disposition is GRANTED IN PART as to AT&T's assertion of res ipsa loquitor in Count III and DENIED IN PART in all other respects. AT&T's claim in Count III of "negligence (res ipsa loquitor)" is DISMISSED WITH PREJUDICE. AT&T's motion to strike Eric Urbain is GRANTED IN PART as to Urbain's testimony and DENIED IN PART in other respects. This Opinion and Order neither resolves the last pending claim nor closes this case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: 09/11/2024

Kathryn A. Viviano

Signed by KATHRYN VIVIANO 09/11/2024 01:48:12 0fp2Zyzz

Hon. Kathryn A. Viviano, Circuit Court Judge