

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

|                                  |   |                          |
|----------------------------------|---|--------------------------|
| RICHARD G. FRUNZI,               | ) |                          |
|                                  | ) |                          |
| Defendant/Counterclaim           | ) |                          |
| Plaintiff Below,                 | ) |                          |
| Appellant,                       | ) | C.A. No. N11A-08-001 MMJ |
|                                  | ) |                          |
| v.                               | ) |                          |
|                                  | ) |                          |
| PAOLI SERVICES, INC., a Delaware | ) |                          |
| corporation,                     | ) |                          |
|                                  | ) |                          |
| Plaintiff/Counterclaim           | ) |                          |
| Defendant Below,                 | ) |                          |
| Appellee.                        | ) |                          |

Submitted: April 3, 2012  
Decided: July 6, 2012

On Appeal from the Court of Common Pleas  
**AFFIRMED IN PART; REMANDED IN PART**

**MEMORANDUM OPINION**

Scott G. Wilcox, Esquire, Whiteford, Taylor, Preston, P.A., Wilmington,  
Delaware, Attorneys for Appellant

John H. Newcomer, Jr., Esquire, Morris James, LLP, Wilmington,  
Delaware, Attorneys for Appellee.

**JOHNSTON, J.**

Defendant-Appellant Richard Frunzi (“Frunzi”) has appealed the July 19, 2011 decision of the Court of Common Pleas. The Court of Common Pleas entered judgment in favor of Plaintiff-Appellee Paoli Services, Inc. (“Paoli”) in the amount of \$9,000.<sup>12</sup>

Frunzi contends that the Court of Common Pleas’ decision constituted legal error and was not supported by substantial evidence.

### **FACTUAL BACKGROUND**<sup>1</sup>

Frunzi, a self-employed contractor, was in the final stages of construction of his new home, located at 2619 Old County Road in Bear, Delaware. In order to obtain a certificate of occupancy, Frunzi needed to have a sanitary sewer line installed and connected to the New Castle County sanitary sewer line.

On December 17, 2007, Frunzi hired Paoli to install approximately 217 feet of sanitary sewer line on Frunzi’s property (the “Project”) for \$10,400. The sewer line was to run from Frunzi’s house to a manhole in the street in order to connect with the New Castle County sewer line. The contract explicitly excluded, inter alia, Paoli’s performance of engineering services, surveying, verification and notification of existing utilities and

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<sup>1</sup> The facts surrounding this action are set forth in detail in the Court of Common Pleas decision.

dewatering of excavations.<sup>2</sup> The contract further provided that any alterations or deviations from the agreed upon work would only be performed upon execution of a written work order.

Pursuant to agreement of the parties, Frunzi acted as the general contractor on the project.<sup>3</sup> In preparing for installation of the sanitary sewer line, Frunzi determined: the depth of the water table; where his residential sanitary sewer line would connect to the county sanitary sewer line; and the route of the sewer line from the residence to the manhole so as to avoid the water table. Frunzi painted a line on his property to depict the route of the sanitary sewer line.<sup>4</sup>

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<sup>2</sup> Specifically, the contract included the following provisions:

Engineering (redesign, stakeout, as-built drawings, etc.)[,], compaction testing, [b]onding, permits, and inspecting fees, if required[,], are not included per this proposal.

Surveying to be handled by the property owner and/or general contractor.

Paoli Services is not responsible for verification of existing utilities [and]/or re-engineering to avoid conflicts.

Paoli Services is not responsible for the coordination of, notification of, [and]/or installation of conduits for utility companies not shown on plans.

Dewatering of any excavations is specifically excluded per this proposal.

<sup>3</sup> The record establishes that Frunzi had extensive experience in the construction industry, including installing sanitary sewer lines.

<sup>4</sup> After discussions with an inspector from New Castle County, Paoli was required to change the route of the sanitary sewer line. The change in the sewer's line route is not relevant to this litigation.

Prior to any work commencing on the project, Frunzi claimed that he and Paoli's owner, Domenick Paoli ("Domenick"), talked extensively about the high water table. According to Frunzi, he advised Domenick, on two separate occasions, about the depth of the water table and where Domenick could expect to hit water during excavation. Frunzi claims that Domenick said he could "handle" any issues that arose with respect to the water table. Domenick disputes Frunzi's contention, arguing instead that neither he nor any employee of Paoli was advised by Frunzi of the high water table on the site.

In January 2008, work commenced on the project. Paoli's foreman, Luigi Barlotti ("Bartolotti"), began performing excavation work. While excavating, a 32-inch storm drain owned by the Delaware Department of Transportation ("DelDOT") was punctured. Neither Frunzi nor Paoli were aware of the existence of the underground storm drain.

Paoli installed approximately 196 feet of sewer line before encountering issues with the water table. At that point, the water table flooded the trench line, causing the walls of the trench to collapse. The high water table also enlarged the size of the trench, ultimately causing the neighbor's driveway to cave-in. Paoli contended that it advised Frunzi of the issues that arose with respect to the water table and that Frunzi agreed to

pay for dewatering the trench. However, Paoli never issued a written work order for the additional dewatering services. Shortly after the issues with the water table arose, New Castle County stopped Paoli from continuing to work on the Project and ordered Paoli to prepare a construction sequence.

In February 2008, Frunzi terminated his contract with Paoli despite Paoli's assurance that it would complete the Project. Thereafter, Frunzi hired Brandywine Construction Company, Inc. ("BCCI") to complete the Project. BCCI dug up the sides of the manhole to expose the connection, and installed 21-feet of pipe to connect into the lateral pipe that had already been installed on Frunzi's property. BCCI also repaired the storm drain, which involved replacing 20-feet of the damaged storm drain. Additionally, BCCI repaired the roadway which had caved-in as a result of Paoli's excavation. BCCI charged Frunzi \$19,251.56 for this work.

### **PROCEDURAL CONTEXT**

On October 20, 2009, Paoli filed suit in the Court of Common Pleas against Frunzi,<sup>5</sup> alleging breach of contract. Paoli contended that it was entitled to payment for all work performed under the contract, as well as the agreed upon "extra work" that arose as a result of the water table. Paoli

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<sup>5</sup> The Complaint also named Frunzi's wife, Megan Frunzi, as a co-defendant. At the start of trial, the parties stipulated to releasing Mrs. Frunzi from any and all claims related to the suit.

sought damages in the amount of \$21,062.05, plus interest, costs, and attorneys' fees.

On January 27, 2010, Frunzi filed a counterclaim, alleging breach of contract and negligence. Frunzi claimed that Paoli failed to perform the contracted-for work. Additionally, Frunzi claimed that Paoli was negligent by failing to exercise reasonable and diligent care in excavating Frunzi's property. Frunzi sought damages in the amount of \$14,416.13 for the cost of hiring a new contractor, attorneys' fees in the Lane action,<sup>6</sup> and food expenses.

On June 7, 2011, the matter proceeded to trial.

### ***The Trial***

Domenick testified that the Project entailed excavation of the land and installation of approximately 216 linear feet of pipe. The route of the sewer pipe was marked on the ground by Frunzi, who was the general contractor for the Project. According to Domenick, neither he nor any Paoli employee was provided with: specific drawings regarding the route of the sewer line; the depth that the pipe needed to drop from the house to the sewer line; the conditions of the property; the existence of an underground storm water drain; or the existence of a high water table on the property. Domenick

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<sup>6</sup> Frunzi's neighbors, the Lanes, filed suit to recover damages resulting from the collapse of their driveway.

testified that he was provided with only a diagram depicting a cross-section of the manhole and a diagram of the lines and grades of Frunzi's property.

Domenick testified that before any work began on the Project, an inspector from New Castle County advised Paoli that the route of the sewer line needed to change from that determined by Frunzi.<sup>7</sup> This change affected the depth of the sewer line. Domenick testified that he advised Frunzi of the sewer line change prior to excavating any land, and Frunzi neither objected to the change nor warned of issues with the water table.

At some point in time during excavation, Paoli encountered a storm water drain owned by DeIDOT. Domenick testified that Paoli was not contractually responsible for locating the storm drain. Rather, it was Frunzi's responsibility, as the general contractor, to identify all underground utilities.

Domenick further testified that Paoli successfully installed 196 feet of pipe before encountering issues with the high water table. According to Domenick, the high water table flooded the trench line, causing the trench walls to collapse. The high water table also enlarged the size of the trench which ultimately caused the neighbor's driveway to cave-in. Domenick

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<sup>7</sup> Frunzi's plan called for the sewer line to "come out of the house 45 degrees, ... run 12 feet, turn 45 degrees, go out 184 feet to the easement ... and from there 45 [degrees] into the manhole" for a total distance of 217 feet. After discussions with the New Castle County inspector, the pipe would no longer come into the manhole at an angle. Rather, the pipe would come in "on a direct shot into the manhole."

contended that Frunzi was advised of the water table issues and agreed to pay all costs associated with dewatering.

In February, Frunzi cancelled the contract with Paoli despite Paoli's reassurances that it would complete the Project. Domenick stated that Paoli was advised by Frunzi that he was hiring another company to install the remaining 21 feet of pipe. Domenick testified that Frunzi had not paid Paoli for any of the work performed.

Bartolotti testified that he was never advised by Frunzi of the existence of the high water table or the storm drain. Bartolotti further testified that Frunzi never indicated that the water table would be affected due to the change in the sewer line route. When Paoli encountered flooding issues due to the water table, Bartolotti contended that Frunzi gave no indication that he would not pay for the dewatering services.

John Everhart ("Everhart"), a project manager for BCCI, testified that BCCI was hired to complete the Project. According to Everhart, when BCCI arrived at the site, there were no open excavations on the property. As a result of Paoli backfilling the hole, ground conditions were bad.

Everhart testified that based on his experience in the area, he was aware of the existence of a high water table. Everhart stated that those in the industry would know that you usually encounter ground water anywhere



from four to six feet in depth in that area. Everhart testified that he confirmed the depth of the water table with Frunzi before beginning work.

In order to complete the Project, BCCI had to dig up the side of the manhole and expose the connection. BCCI then tied into the manhole and ran approximately 22 feet of pipe to connect into the lateral pipe that had been installed on Frunzi's property. According to Everhart, BCCI completed this portion of the repair in one day. BCCI also repaired the damaged storm drain by replacing a 20 foot section of pipe. Additionally, BCCI repaired the damage to the neighbor's driveway, which had caved-in as a result of the excavation. Everhart testified that Frunzi was billed \$19,251.56 for the work, and that Frunzi had already paid \$7,251.56.

Frunzi testified that before issuance of the certificate of occupancy for his new house, he needed to install a sanitary sewer line to tie into the New Castle County sewer line. Because he was working to finish construction on his new home, he hired Paoli to install the sewer line. In preparing for the sewer line, Frunzi, the general contractor, drilled a test hole on his property to determine the depth of the water table. According to Frunzi, the test hole on his property showed the water table to be seven feet below the surface. Frunzi also determined the water table at the manhole cover to be nine feet below the surface. Based on these calculations, Frunzi determined the route

of the sewer line such that it would avoid the water table, and painted the route on the ground.

Frunzi testified that although he did not provide Domenick with any documents pertaining to the depth of the water table, he talked extensively with Domenick about the high water table on the property. According to Frunzi, Domenick stated that he was familiar with the water table in that area based on previous work.

After Paoli commenced work on the Project, Frunzi noticed that Paoli was not following the markings on the ground which delineated the route of the sewer line. Frunzi testified that he advised Paoli employees that they were proceeding incorrectly and therefore would hit the water table quickly. Frunzi, in turn, was told by a Paoli employee that any water table issues would be handled.

Shortly thereafter, Frunzi was advised that Paoli had encountered water in the trench, which required Paoli to utilize dewatering devices. The water table caused the walls of the trench to collapse, and subsequently, engulf a portion of the neighbor's driveway. Frunzi further testified that he learned that Paoli had struck an unidentified, underground storm drain.

Frunzi testified that based on the issues Paoli encountered during the excavation, New Castle County shut down the Project and required Paoli to

provide a construction sequence before continuing with the Project. It was at this point that Paoli presented Frunzi with change orders, which raised the contract price to approximately \$27,000. Frunzi declined to sign the change orders, and subsequently terminated his contract with Paoli. Frunzi testified that he hired BCCI to complete the Project and perform any necessary repairs for approximately \$19,000.

As a result of damage to the neighboring driveway, Frunzi testified that the neighbors, the Lanes, filed suit against Frunzi. The suit eventually was settled.

Frunzi further testified that he incurred food expenses as a result of delays in obtaining the certificate of occupancy for his house. Frunzi testified that he did not obtain the certificate of occupancy until the end of May 2010. As a result, he had to dine out and incur food expenses totaling \$1,191.42.

### ***The Court of Common Pleas' Decision***

By Opinion dated June 27, 2011, the Court of Common Pleas awarded damages to Paoli in the amount of \$9,436.96. With respect to the damage to DelDOT's storm drain, the court found Frunzi and Paoli equally liable.

According to the court, both parties breached their statutory obligation<sup>8</sup> as “excavators” to ascertain the location and type of underground utilities.

Turning next to installation of the sanitary sewer line, the court found that Frunzi breached the contract by not paying Paoli for the work completed on the first 196 feet of sewer line. According to the court, because Paoli substantially performed under the contract by installing 196 feet of residential pipe line, Frunzi was obligated to pay for this work.

With respect to the remaining 21 feet of sewer line, the court found that Paoli breached its contractual obligations by negligently excavating the land. Specifically, the court noted:

Paoli knew of the high water table, knew that water was going to have to be pumped, knew the high water table created the possibility for cave-ins, and did not take either preventative or timely corrective action. Paoli did not promptly shore up the trench with a trench box, did not take preventative action of pumping the ground water, and did not know how to adequately address the situation once it occurred.

As such, the court found that Paoli breached the contract with respect to the last 21 feet of sewer line.

As to damages, the court was unable to determine the amount of damages attributable to repair of the storm drain.<sup>9</sup> In calculating the

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<sup>8</sup> See 26 Del. C. § 801, *et seq.*

measure of damages for Frunzi's breach of contract, the court assessed the "completed" portion of the contract (196 feet) versus the "uncompleted" portion (21 feet). The court determined that by installing 196 feet of pipe, Paoli had completed 90.74% of the contracted-for work.<sup>10</sup> As such, the court found that Frunzi was obligated to pay 90.74% of the \$10,400 contract price, or \$9,436.96.

The court then addressed Frunzi's entitlement to damages for Paoli's breach in negligently excavating the land for the remaining 21 feet of sewer line. The court found that because Frunzi had not paid any of the contract price, he sustained no damages from Paoli's breach.

Finally, the court found that Frunzi was not entitled to attorneys' fees in the instant litigation. According to the court, the contract entered into by Paoli and Frunzi did not provide for the recovery of attorneys' fees. The court further denied Frunzi recovery of attorneys' fees for defending the litigation initiated by the Lanes. The court found no binding authority to award attorneys' fees for a third-party lawsuit.

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<sup>9</sup> BCCI's invoice did not sufficiently breakdown the costs associated with repair of the storm drain, installation of the last 21 feet of sewer line, or repairs to the neighbor's driveway.

<sup>10</sup> This value was calculated using the following equation: (linear feet completed/linear feet contracted for) x 100%, or (196 ft/ 217 ft) x 100%.

The court made no findings whatsoever with regard to Frunzi's meal expenses.

***Memorandum Opinion on Plaintiff's Motion for Reargument***

By Opinion dated July 19, 2011, the Court of Common Pleas reaffirmed its findings. The court, however, modified the amount of damages awarded to Paoli. After reviewing BCCI's invoice, the court was able to determine some of the costs associated with repair of the DelDOT storm drain. The court found that Paoli and Frunzi were each liable for \$436.84 for damage to the storm drain. As such, the court reduced Paoli's award of damages to \$9,000.12 to reflect these costs.

**STANDARD OF REVIEW**

In considering appeals from the Court of Common Pleas to the Superior Court, factual issues are reviewed on the record and are not tried *de novo*.<sup>11</sup> This Court's role is to correct errors of law and to review the factual findings of the court below to determine if such findings are sufficiently supported by the record and are the product of an orderly and logical deductive process.<sup>12</sup> If substantial evidence exists for a finding of fact, this

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<sup>11</sup> 11 Del. C. § 5301.

<sup>12</sup> *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

Court must accept that ruling.<sup>13</sup> This Court must not make its own factual conclusions, weigh evidence, or make credibility determinations.<sup>14</sup> Questions of law are reviewed *de novo*.<sup>15</sup>

## **PARTIES' CONTENTIONS**

### ***Frunzi's Argument***

Frunzi contends that the Court of Common Pleas erred in imposing liability on Frunzi for damage to the storm drain. Frunzi argues that there is no record evidence to support the court's finding that contacting the approved notification center would have disclosed the existence and location of the storm drain, and thus, prevented damage to the storm drain. According to Frunzi, Paoli, as the excavator, was exclusively in a position to discover the storm drain and avoid or minimize any damage. As such, Frunzi claims that Paoli is solely liable for the resulting damage and repair costs for the storm drain.

Frunzi next claims error in the Court of Common Pleas' award of damages to Paoli. Frunzi first argues that Paoli is not entitled to any damages because Paoli did not substantially perform under the contract.

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<sup>13</sup> *Tekstrom, Inc. v. Savla*, 2006 WL 2338050, at \*4 (Del. Super.) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

<sup>14</sup> *Id.*

<sup>15</sup> *Ensminger v. Merrit Marine Constr. Inc.*, 597 A.2d 854, 855 (Del. Super. 1988).

According to Frunzi, the sewer line was neither functional nor near completion at the time the contract with Paoli was terminated. Alternatively, Frunzi contends that if a determination is made that Paoli is entitled to any monetary relief, the court erred in its calculation of damages. Frunzi argues that awarding Paoli damages based on the portion of the sewer line installed before issues arose with the water table is inappropriate.

Frunzi also argues that the Court of Common Pleas erred in not awarding him all of the damages he sustained that were the natural consequence of Paoli's breach of contract and negligence. Specifically, Frunzi claims he is entitled to damages for the work completed by BCCI, attorneys' fees for the Lane lawsuit, and meal expenses incurred as a result of delay in occupying the property.

### ***Paoli's Argument***

Paoli argues that the Court of Common Pleas properly determined that Paoli and Frunzi were both "excavators" under the Act, and therefore, both parties were obligated to contact the approved notification center prior to excavating. Because neither party complied with the Act's statutory duties, Paoli contends that the court properly found Paoli and Frunzi equally liable.

Paoli next claims that because it performed a substantial portion of the contracted-for work - installation of 196 feet of sewer pipe - it was entitled



to be paid for such work. Frunzi's failure to pay, therefore, was a breach of his contractual obligations.

As to damages, Paoli contends that the Court of Common Pleas correctly determined that Paoli was entitled to \$9,000.12 for installation of the first 196 feet of sewer line. Paoli further contends that the court properly denied Frunzi recover for attorneys' fees incurred in defending the Lane litigation.

## **ANALYSIS**

### **I. Storm Drain Liability**

In 1995, the Delaware General Assembly enacted the Underground Utility Damage Prevention and Safety Act<sup>16</sup> (the "Act") for the purpose of "avoid[ing] disruption and discontinuation of utility services to members of the public and to promote safe operations during excavation and demolition."<sup>17</sup> The Act establishes procedural safeguards to ensure that persons performing excavation or demolition operations know of the presence or location of underground utilities in the excavation or demolition area.<sup>18</sup>

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<sup>16</sup> 26 Del. C. § 801 *et seq.*

<sup>17</sup> 26 Del. C. § 801(a).

<sup>18</sup> *Id.*

An “excavator,” as defined by Section 802, is “any person, including those acting either as an employer or employee, intending to perform or performing excavation or demolition work.”<sup>19</sup> Pursuant to Section 806, an “excavator” is required to ascertain the location and type of utility lines present on a site prior to undertaking any excavation or demolition activities.<sup>20</sup> The excavator then must notify the approved notification center<sup>21</sup> of the specific location, starting date, and description of the intended excavation or demolition activity.<sup>22</sup>

The Court of Common Pleas determined that both Frunzi and Paoli were “excavators” under the Act.<sup>23</sup> Because neither Frunzi nor Paoli

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<sup>19</sup> 26 *Del. C.* § 802(8).

<sup>20</sup> 26 *Del. C.* § 806.

<sup>21</sup> The Court of Common Pleas also uses the terms 811 or “Miss Utilities” to refer to the approved notification center.

<sup>22</sup> 26 *Del. C.* § 806.

<sup>23</sup> In its Memorandum Opinion on Plaintiff’s Motion for Reargument, the Court of Common Pleas found that Frunzi was also a “designer” for the Project. A “designer,” as defined by the Act, is “any architect, engineer or other person, acting either as an employer or employee, who prepares a drawing for a construction or other project which requires excavation or demolition.” 26 *Del. C.* § 802(4). According to the court, by painting lines on his property to depict the route of the sewer line, Frunzi acted as a “designer.” As such, Frunzi had a statutory obligation to contact the approved notification center and obtain the identity of underground facility operators in the area of the proposed excavation. 26 *Del. C.* § 805(1). Frunzi did not contact the approved notification center. Therefore, the court found that Frunzi failed at his duty as a “designer” as well as an “excavator.” The Court finds no error in the Court of Common Pleas’ determination.

performed its statutory obligations, the court imposed equal liability for the storm drain damage.

This Court finds substantial record evidence to support the Court of Common Pleas' decision to impose equal liability. Paoli was hired to excavate the land in order to install Frunzi's sanitary sewer line and connect it to the New Castle County sewer line. As an excavator, Paoli had a duty to determine whether utilities were present on the site, and if so, to notify the approved notification center. Paoli performed neither task, instead relying solely on Frunzi for information regarding any underground utility. Clearly, Paoli breached its duties as an excavator under the Act.

Frunzi, likewise, failed to perform his statutory duties. As noted by the Court of Common Pleas, Frunzi had the intent to excavate the land in order to install the sanitary sewer line. As such, Frunzi, had a duty to ascertain the existence of underground utilities and contact the approved notification center. Frunzi, like Paoli, performed neither task. Therefore, Frunzi breached his duties as an excavator.

Because neither Frunzi nor Paoli performed their statutory duties, the Court finds no error in the Court of Common Pleas' decision to impose equal liability for damage to the storm drain.<sup>24</sup>

## **II. Sewer Line Liability**

It is established Delaware law that in order to recover damages for a breach of contract, the plaintiff must demonstrate substantial compliance with all of the provisions of the contract.<sup>25</sup> If the plaintiff commits a material breach, plaintiff cannot complain if the non-breaching party subsequently refuses to perform.<sup>26</sup> However, if the plaintiff's breach is only partial or slight, the injured party is not relieved of the duty to perform, although there may be recovery of damages for the breach.<sup>27</sup> Non-

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<sup>24</sup> In reaching this conclusion, the Court rejects Frunzi's argument that he cannot be held liable because no record evidence was presented showing that the storm drain was registered. First, the Court finds it highly improbable that a storm drain owned by DelDOT, a state agency, would not be registered with the approved notification center. Second, the fact that an underground utility *might* not be registered with the approved notification center surely does not dispense with the Act's requirements. To accept Frunzi's argument would effectively obviate the need for any persons to comply with the Act. Plainly, this is not what the Legislature intended.

<sup>25</sup> *E. Elec. and Heating, Inc. v. Pike Creek Prof'l Ctr.*, 1987 WL 9610, at \*4 (Del. Super.).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing 11 *Williston on Contracts* § 1292, at 8).

performance by the injured party under such circumstances will operate as a breach of contract.<sup>28</sup>

**A. Paoli Completed a Substantial Portion of the Contracted-for Work.**

The Court of Common Pleas determined that Paoli completed a substantial portion of the contract by installing 196 feet of sewer line,<sup>29</sup> or 90.74% of the contracted-for work. The court found that Paoli was entitled to be compensated for this work. Frunzi's failure to pay Paoli for the completed work, therefore, constituted a breach of the contract.

The record establishes that Paoli was hired to install 217 feet of sewer line. Paoli properly installed 196 feet of sewer line before its contract was terminated. The Court finds no error in the lower court's determination that Paoli's performance of 90.74% of the contracted-for work constituted a substantial part of the contract, and thus, Paoli was entitled to be paid for the completed work. This Court finds substantial record support for the Court of Common Pleas' finding that Frunzi breached his contractual obligations in failing to pay Paoli for the "completed" work.

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<sup>28</sup> *E. Elec. and Heating, Inc.*, 1987 WL 9610, at \*4.

<sup>29</sup> In reaching this conclusion, the Court of Common Pleas necessarily determined that Paoli's breach with respect to the remaining 21 feet of pipe was not material. *See E. Elec. and Heating, Inc.*, 1987 WL 9610, at \*4. The Court agrees. The fact that BCCI was able to install the remaining 21 feet of sewer line in one day suggests that Paoli's breach was merely partial or slight.

### **B. Paoli Breached Contract by Negligently Excavating Site.**

Notwithstanding the Court of Common Pleas' finding that Paoli completed a substantial portion of the contracted-for work, the court also properly determined that Paoli breached the contract by negligently excavating the land during installation of the remaining 21 feet of sewer line. As noted by the court, Paoli knew (or should have known) of the depth of the water table on the property and the possibility of cave-ins during excavation, yet failed to take any preventative or timely corrective action.<sup>30</sup> The Court finds no error in the Court of Common Pleas' determination regarding Paoli's negligence.

### **III. Damages**

Damages for breach of contract are confined to those that are the direct, natural and proximate result of the breach.<sup>31</sup> The standard remedy for

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<sup>30</sup> In making this determination, the Court of Common Pleas found the testimony of Frunzi more credible than that of Domenick or Bartolotti. This Court is bound by that credibility determination. *Barney v. C.P. Diver Chevrolet-Olds, Inc.*, 1994 WL 555278, at \*3 (Del. Super.); *see also Romain v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 1427801, at \*2 (Del. Super.) (“When the determination of facts turns on the issue of credibility and the acceptance or rejection of a witness's testimony, the Superior Court may not substitute its opinion for that of the trier of fact, and must approve the Court of Common Pleas' findings upon review.”).

<sup>31</sup> *Hajoca Corp. v. Sec. Trust Co.*, 25 A.2d 378, 381 (Del. Super. 1942); *see also Carey v. McGinty*, 1988 WL 55336, at \*6 (Del. Super.) (“[T]he damages which are recoverable for breaches of duties created by contract are those injurious consequences which “might have been foreseen or anticipated” as being likely to follow from the negligent act or breach, these consequences to be considered to be the natural and probable consequences.”).

breach of contract is based upon the reasonable expectations of the parties.<sup>32</sup>

Expectation damages are measured by the amount of money that would place the non-breaching party in the same position as if the breaching party had fully performed the contract.<sup>33</sup> “Specifically, when there is a breach of contract involving improvements to real property, the basic measure of damages is the amount required to remedy the defect by replacement or repair, unless the amount is disproportionate to the probable loss in value or it constitutes economic waste.”<sup>34</sup>

A plaintiff also may recover consequential or special damages for breach of contract. Consequential damages are those that result “naturally but not necessarily from the wrongful act, because they require the existence of some other contract or relationship.”<sup>35</sup> “Consequential damages are not

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<sup>32</sup> *Leary v. Oswald*, 2006 WL 3587249, at \*1 (Del. Super.).

<sup>33</sup> *Duncan v. TheraTx, Inc.* 775 A.2d 1019, 1022 (Del. 2001); *see also* Restatement (Second) of Contracts § 347 cmt. a (“Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will ... put him in as good a position as he would have been in had the contract been performed.”).

<sup>34</sup> *Leary*, 2006 WL 3587249, at \*1.

<sup>35</sup> *Bonanza Rest. Co. v. Wink*, 2012 WL 1415512, at \*3 (Del. Super.).

recoverable unless they are foreseeable and are traceable to the wrongful act and result from it.”<sup>36</sup>

### **A. Sewer Line Repairs**

In determining the appropriate measure of damages, the Court of Common Pleas assessed the contract based on the “completed” work and the “uncompleted” work. The court found that Paoli was entitled to damages in the amount of \$9,000.12 for installation of the first 196 feet of sewer line, or the “completed” work. The court further found that because Frunzi had not paid for any of the work performed by Paoli, Frunzi suffered no damages from the “uncompleted” work – that is, the installation of the remaining 21 feet of sewer line. The Court finds the Court of Common Pleas’ calculation of damages to be erroneous.

Although the Court of Common Pleas properly found that Paoli was entitled to damages for the work it “completed,” the court failed to offset that amount by the damages resulting from Paoli’s breach. In other words, Paoli’s recovery should have been reduced by the costs expended to repair the damage caused by Paoli’s negligent excavation.

The matter must be remanded to the Court of Common Pleas to determine (based on BCCI’s invoice, if possible) the costs incurred to repair

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<sup>36</sup> *Id.*



the damage to the sewer line caused by Paoli's failure to properly perform excavation in the area affected by a high water table. Additionally, the court also must determine the costs expended to repair the neighbor's driveway as this, too, was the result of Paoli's breach.

### **B. Meal Expenses**

Frunzi has provided no authority for the proposition that meal expenses are recoverable as damages for a delay in obtaining a certificate of occupancy. Therefore, the Court of Common Pleas correctly declined to award these damages to Frunzi.

### **C. Attorneys' Fees**

The Court of Common Pleas determined that Frunzi was not entitled to recover attorneys' fees incurred in defending a lawsuit filed by a third-party. The court noted that although attorneys' fees are considered consequential damages, Frunzi pointed to no binding authority, which would authorize the court to award attorneys' fees in such circumstances. The court declined to "extend Delaware case law when no other authority exists or is asserted for an award of attorney[s]' fees [in defending a third-party action]."

The Court finds no error in the Court of Common Pleas' legal conclusion. Frunzi has failed to cite to any binding authority<sup>37</sup> that would entitle him to recover attorneys' fees incurred in defending the Lane litigation.

### **CONCLUSION**

The Court finds the Court of Common Pleas' factual findings with respect to liability to be sufficiently supported by the record and the product of an orderly and logical deductive process.

As to damages, the Court finds that the Court of Common Pleas properly denied Frunzi's requested damages for attorneys' fees and meal expenses. However, the Court finds that the Court of Common Pleas erred in calculating the appropriate measure of damages for negligent excavation.

Paoli is entitled to damages for the completed work in the amount of \$9,436.96 (90.74% of the \$10,400 contract price), minus \$436.84 as previously calculated for one half of the damage to the storm drain; totaling \$9,000.12.

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<sup>37</sup> In his briefing, Frunzi identifies a treatise on attorneys' fees, which provides: "It is generally held that where the wrongful act of the [counterclaim] defendant has involved the [counterclaim] plaintiff in litigation with others, or placed the [counterclaim] plaintiff in such relation with others as makes it necessary to incur expenses to protect his or her interest, such expenses, including attorney's fees, should be treated as the legal consequence of the original wrongful act, and may be recovered as damages." 1 Attorneys' Fees § 8:3. This authority is not binding on the Court.

On remand, the Court of Common Pleas must determine the actual costs incurred to repair the damages caused by Paoli's negligent excavation. First, Paoli's recovery must be offset by the costs expended to repair the neighbor's driveway. Second, Frunzi is entitled to offset Paoli's recovery by the specific construction costs incurred because of Paoli's failure to anticipate the high water table. This second amount shall not include the cost of completing 21 feet of sewer line had the excavation not been negligently performed.

**THEREFORE**, the matter is **AFFIRMED IN PART AND REMANDED IN PART** to the Court of Common Pleas to make factual findings consistent with this Court's opinion.

**IT IS SO ORDERED.**

/s/ Mary M. Johnston

The Honorable Mary M. Johnston