SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DE 19801-3733
TELEPHONE (302) 255-0670

March 2, 2007

RE: Harris, *et. al.* v. Quickform Concrete Co., LLC, *et al.* v. Tech Consultants & Quickform Concrete Co., LLC
C.A. No. 03C-10-243WCC

Submitted: February 20, 2007
Decided: March 2, 2007

On Defendants One Call Concepts and Miss Utility Inc.'s Motion for Summary Judgment and Motion in Limine. GRANTED.

On Defendant Delmarva Power & Light's Motion for Summary Judgment as to Plaintiffs' Complaints. GRANTED IN PART, DENIED IN PART.

On Defendant Delmarva Power & Light's Motion to Strike Plaintiffs' Expert Douglas Buchan. RESERVED.

On Defendant Delmarva Power & Light's Motion for Summary Judgment as to the Contributory Negligence of Plaintiff Keith Baldwin. DENIED.

On Defendant Daisy Management Group, Ltd. and Daisy Construction Company's Motion for Summary Judgment on the Issue of Contributory Negligence/Assumption of the Risk. DENIED.

On Defendant Daisy Management Group, Ltd.'s Motion for Summary Judgment. DENIED.

On Defendant Daisy Construction Company's Motion for Summary Judgment. DENIED.

On Defendant City of Wilmington's Motion to Dismiss, or in the Alternative,

Motion for Summary Judgment. DENIED.
Dear Counsel:

The Court has before it a number of dispositive motions filed by various parties. The Court heard argument on each of the above-indicated motions on February 20, 2007, at which time each party advised the Court that, in light of the impending trial date of March 19, 2007, it was preferred that a basic statement from the Court indicating which parties remain in the litigation, as opposed to a complete opinion, would assist the parties in the mediation process and possibly reaching settlement prior to the fast-approaching trial date. As such, this is the Court's abbreviated opinion with respect to each motion. The Court has not attempted to address every argument made by counsel, but instead will only comment on those that are significant, in the Court's opinion, as to that particular issue.

FACTS

On behalf of the City of Wilmington (the "City"), Tech Consultants, Inc. ("Tech Consultants") prepared a proposal and bid package to repair sidewalks along the 1800 block of West Third Street in Wilmington, Delaware (the "project site"). As a result, a contract between Quickform Concrete Co.[1] ("Quickform") and the City was formed, and construction was to begin on or around July 2, 2003.

Prior to commencing construction, Silvano Del Signore, who appears to be in charge of this project and employed by Quickform or one of its Daisy affiliates, contacted One Call Concepts ("OCC") to advise it that this construction was to begin. Mr. Del Signore requested to have all utilities marked at 820 W. Third Street. OCC then contacted Delmarva Power & Light ("Delmarva") with the information it was provided by Mr. Del Signore, and instructed Delmarva to mark the appropriate utility lines at 820 W. Third Street.

As the Delmarva employee arrived at W. Third Street, he received a call from an employee of Utiliquest who earlier marked the project site on behalf of Verizon. The Utiliquest employee advised Delmarva that 820 W. Third Street did not exist, that the correct address was 1820, and that Utiliquest had contacted Quickform to advise them of the error. The Delmarva employee then went to 1820

[1]Quickform is an affiliated company of Daisy Construction Company and Daisy Management Group, both of which are defendants in this case.

W. Third Street and marked utilities from 1818 to 1822 W. Third Street.[2] Unbeknownst to OCC or Delmarva at this time, the project site also included 1816 W. Third Street.

Thereafter, Quickform and/or Daisy Construction began construction at the project site. Richard Baldwin, who was an employee of Quickform, operated a backhoe at the project site, and used the backhoe to dig on or near 1816 W. Third Street, which had not been previously marked by Delmarva. Upon digging, the backhoe struck a gas pipe, and about twenty or thirty minutes later, an explosion occurred. The claims currently before the Court revolve around this gas explosion on July 2, 2003 at 1816 W. Third Street.

MISS UTILITY, INC.

Defendant Miss Utility Inc. ("MUI") moved for summary judgment since MUI does not conduct business in Delaware. There was no opposition to this motion either through written responses or at oral argument, and the Court has no basis to conclude MUI conducts business in the State of Delaware. As such, summary judgment with respect to MUI is hereby granted.

ONE CALL CONCEPT

The plaintiffs[3] assert OCC failed to comply with the Underground Utility Damage Prevention and Safety Act by failing to have in place a positive response mechanism to verify correct information was provided by a contractor. Plaintiffs' theory is that, because this safety measure was not in place, the error that Mr. Del Signore provided 820 instead of 1820 W. Third Street was not discovered, causing the explosion. If OCC had made a mistake and relayed an incorrect address to Delmarva, the plaintiffs may have the ability to show negligence on the part of OCC by showing that "but for OCC not having a method to detect erroneous information, the explosion would not have occurred."

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[2]It was the practice of this employee to be overly cautious and mark one unit on either side of the designated area, thus he marked both 1818 and 1822 W. Third Street.

[3]The Court is aware that not all plaintiffs in this case have filed a complaint against each defendant. However, for ease of digestion, the Court will simply use "plaintiffs" to mean the relative plaintiffs to that defendant.

But, unfortunately, "820" was not the error that started the chain of events potentially causing the explosion. The plaintiffs' theory requires one to conclude that if OCC detected the error and contacted Mr. Del Signore, he would not only have realized that 820 was incorrect, but he would also have realized that 1816 was to be included as one of the addresses to be marked out. But, this theory is flawed. Mr. Del Signore stated he did not know the 1816 W. Third Street address was to be included in the construction plan.[4] Thus, the only correction Mr. Del Signore would have made had OCC discovered the error would be from "820" to "1820." That correction would not have altered the outcome here since 1816 W. Third Street would still have gone unmarked. As plaintiffs' expert Ingo Zeise testified, a positive response mechanism would not have prevented 1816 from exploding in this instance.[5]

Negligence is typically not disposed of via summary judgment, but when a movant clearly establishes a lack of disputed material facts, summary judgment is appropriate.[6] Here, there are no material facts in dispute. All parties agree that Mr. Del Signore provided OCC the wrong address of 820 W. Third Street, and that he did not know the construction plans included 1816 W. Third Street. OCC admits it did not have a safety measure in place to verify erroneous information, through one was not required under 26 Del. C. §§ 801, 807, but, even if a positive response mechanism was in place, the outcome here would not have changed. OCC asserts summary judgment is warranted since there are no disputed facts in evidence indicating OCC was negligent, and this Court agrees. As such, OCC's motion for summary judgment is hereby granted.

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[4]The relevant portion of Silvano Del Signore's deposition is as follows:

> Q: Thank you. And for the site of the gas explosion, did you call in that site for Miss Utility – to Miss Utility?
>
> A: Not where the explosion happened because I didn't have that address, but that ones nearest to them, yes.
>
> Q: And the correct information or the correct site of the explosion, 1816 West 3rd, was, then, never called in to Miss Utility?
>
> A: That's correct.

OCC Mot. Summ. J., Ex. C at 120-121.

[5]OCC Mot. Summ. J., Ex. F at 76.

[6]*Lightburn v. Del. Power & Light Co.*, 167 A.2d 64, 66 (Del. Super. Ct. 1960).

In light of the above decision, the motion with respect to plaintiff's expert Ingo Zeise is moot.

DELMARVA POWER & LIGHT MOTIONS

(A) Delmarva's Statutory Duty to Notify Quickform of the Address Error

The first assertion by plaintiffs is that Delmarva was negligent by not acting in accordance with the Underground Utility Damage Prevention and Safety Act when Delmarva did not verify the address provided by OCC was correct, and did not contact OCC once it determined the address was wrong. Plaintiffs are asserting the purpose of the act to protect the safety of the public, coupled with an operator's responsibility to mark utility lines and advise the excavator of utility lines within five feet of construction, creates a duty on Delmarva to contact excavators, operators or the notification center if an incorrect address is provided.[7] Under the unique circumstances of this case, the Court finds Delmarva has met this duty. First, there is no dispute that Delmarva properly marked the utilities at 1820 W. Third Street, which it is agreed was the address intended to be provided by Quickform when they called OCC. Second, Delmarva met its duty to notify the excavator of the markings at 1820 W. Third Street by faxing directly to Quickform the markout sheet completed after 1820 W. Third Street was marked, which also indicated specifically that 1820 was marked instead of 820.[8] Thus, Delmarva advised Quickform of the address error, meeting its statutory duty.

And, even if the Court could find some duty of Delmarva to contact OCC with the corrected address so that OCC could advise Mr. Del Signore of the error, by not doing so, Delmarva's actions did not directly or indirectly cause the explosion. As the Court has indicated above, Mr. Del Signore did not advise OCC of the plans to dig at 1816 W. Third Street because Mr. Del Signore was not aware the project site extended to that address. In essence, the plaintiffs speculate that if Delmarva would have contacted OCC to advise them of the

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[7]The code requires Delmarva, as the operator, that "if it is determined by an operator that a proposed excavation or demolition is planned within 5 feet of a utility line . . . and that the utility line may be damaged, the operator shall notify the person who proposes to excavate or demolish and shall physically mark the horizontal location of the utility line…"

[8]Dennis Aff., Ex. A.

mistaken address and that they marked an address different than the one on the ticket OCC provided, OCC would have then contacted Mr. Del Signore and the explosion would have been adverted. But, as explained in relation to the OCC argument above, this circular logic by the plaintiffs falls apart when Mr. Del Signore is placed in the equation. As such, the Court does not find that Delmarva's conduct was negligent in this area.

(B) Depth of the Gas Line at 1816 W. Third St.

Plaintiffs next allege Delmarva failed to follow proper statutory procedures with respect to the depth of the gas line at 1816 W. Third Street, and therefore Delmarva was negligent. However, plaintiffs do not have any support for their theory. Philip L. Phillips, Jr., manager of the Gas Engineering Department for Delmarva, indicated in his deposition that company standards in effect in 1962, the year this gas line was installed, could not be located and the oldest standard found was from 1971, which reflected that gas lines were to be buried 24 inches underground. When the Court asked at the February 20, 2007 hearing who would testify as to whether an industry standard for burying gas lines had been violated, no one responded. Without some guidance to the jury in this area they would simply be left to speculate or use their own judgment on how deep such a line should be buried. This is obviously improper. Thus, upon review of the record provided, the Court finds the plaintiffs have nothing to support their theory that the gas line was not buried appropriately.

More importantly, even if the Court determined there was an appropriate standard to assess whether the gas pipe was buried deep enough at 1816 W. Third Street, there is nothing to reflect that the depth of the pipe was the cause of the accident. Due to the negligent conduct of Quickform, Mr. Baldwin was not even aware the pipe existed, thus he had no reason to refrain from digging any depth he wanted at 1816 W. Third Street. The simple fact is that the depth of this gas line had nothing to do with causing this accident, and the plaintiffs have no expert testimony to state otherwise. As such, there is no liability to Delmarva in this area.

(C) Section 324A

Plaintiff Scott J. Suiter argues Delmarva had a greater duty pursuant to Section 324A of the Restatement (Second) of Torts because Delmarva assumed

responsibility by marking more than 1820 when it marked both 1818 and 1822 W. Third Street. While the Court appreciates the creative thinking of counsel in formulating the basis of this argument, it simply is without merit. As the plaintiff himself argues, the Delaware Supreme Court in *Handler Corp. v. Tlapechco* stated:

> Clearly this section [Section 324A] provides for liability if one undertakes a duty and does not use reasonable care to carry out the assumed duty. [9]

In the present case, once Delmarva recognized that the correct address to be marked was 1820 W. Third Street, in an abundance of caution and as was this employee's standard practice, Delmarva marked the utilities for the adjacent properties. Therefore, properties at 1818, 1820 and 1822 were appropriately marked. Obviously this practice is reasonable and consistent with the effort to protect the public from inappropriate disturbance of dangerous utilities, and it appears the plaintiff's argument is really no more than a repackaging and circling back to an alleged failure of Delmarva to notify OCC of the reporting error by Quickform. Again, the problem with such argument falls upon Mr. Del Signore's ignorance of a need to mark 1816 and the errors committed by Quickform, not Delmarva. The Court finds the facts here do not establish a violation of Section 324A. Delmarva cannot be held negligent for acting too reasonably or cautious, as they did in this instance.

(D) Motion to Strike Plaintiffs' Expert Douglas Buchan

As a result of the decisions set forth above, the only issue remaining regarding Delmarva's summary judgment motion as it relates to the plaintiffs' complaint is the assertion made by the plaintiffs through their expert, Mr. Buchan, of the violation of the Pipeline Safety Act and 49 C.F.R. § 192.13 of the Pipeline Safety Regulations. While the motion filed by Delmarva was to exclude Mr. Buchan's testimony, in essence the request is better characterized as a motion in limine requesting a *Daubert* hearing to determine whether a sufficient foundation can be established for the expert testimony. While the Court has very significant concerns regarding the qualifications and opinions of Mr. Buchan based upon the submissions of counsel, it does not feel it can exclude the only

[9] 901 A.2d 737, 747 (Del. 2006).

expert that the plaintiffs have on this issue without at least first conducting a formal *Daubert* hearing. As such, at the moment, Delmarva will remain in the case solely on the issue of whether they violated federal regulations, which if followed would have provided notice of a gas line to the construction workers and would have prevented the explosion. The *Daubert* hearing regarding this expert will occur on the first day of trial following jury selection, and before opening statements to the jury.

DAISY MANAGEMENT GROUP, LTD. & DAISY CONSTRUCTION COMPANY'S MOTIONS

(A) Two Year Statute of Limitations

Daisy Management argues the amendment to include it as a party, which occurred on June 14, 2006, was past the two year statute of limitations, and therefore should not be allowed. Daisy Management's argument that it could not reasonably know that it may be named as a defendant is hard to imagine considering the close interlinked nature of the three entities, and considering Daisy Construction has always been a named party.

Rule 15(c) requires that the added party (here, Daisy Management) had notice of the action, and will therefore not be prejudiced if added, and that the added party knew or should have known that the action would be brought against the added party but for a mistake.[10] Here, Mr. Iacono is the president of both Daisy Management and Daisy Construction. Daisy Construction was always a party to this suit, and Mr. Iacono was presumably aware of this lawsuit and its allegation since its inception. As the controlling party of all the Daisy entities, and being familiar with the relationship between Daisy Management and Quickform, Mr. Iacono should have known that if this information regarding the interrelationship of his businesses was available to the plaintiffs, Daisy Management would have been named as a party to the litigation. Further, it is the Court's recollection that the issue of whether Daisy Construction or Daisy Management was a proper party was raised by their counsel, not the plaintiffs, as the Court remembers expressing concern regarding counsel's potential dual representation and its possible conflict. It was after the issue was raised that the Court allowed additional discovery specifically in this area to address the

[10] *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258 (Del. 1993).

confusion which lead to the basis for adding Daisy Management. Daisy Construction and Daisy Management are not big corporations that did not regularly communicate with each other, but rather are smaller entities with the same general parties. It is clear that the two companies are closely intertwined and the amendment would not prejudice Daisy Management, and it is therefore proper pursuant to Rule 15(c) to add Daisy Management after the statute of limitation expired.

(B) Relationship Between Quickform, Daisy Management and Daisy Construction

At least on paper, Daisy Management asserts that Quickform, Daisy Construction and Daisy Management are all separate and distinct entities. However, complicating that statement are questions about how Daisy Management functions in relation to Daisy Construction, and exactly where Quickform fits into this triangular business affair. The ties between the three companies are numerous and complicated, and the companies appear to be co-mingled whenever it was advantageous to the controlling party of all three entities, Mr. Iacono. This interaction appears to be far from a clear professional delineation of management practice and control so as to allow an undisputed factual finding as to the relationship of each company and the employees that are involved in this dispute. In all the interaction between these companies - from pay, to benefits, to work performed, to control - the only thing that the parties seem to be able to agree on is that Mr. Del Signore was controlled by Mr. Iacono. Since Mr. Iacono is a major player in all three companies, this is not particularly helpful.

The primary issue in regard to these entities is how one characterizes the employment situation of Mr. Del Signore. Daisy Corporation argues to the Court that in "apparently 2001 or 2002" Mr. Del Signore was moved to oversee the operations of Quickform, and became an employee and part owner of that corporation, even though Daisy Management continued to provided services regarding Mr. Del Signore's wages and benefits. Mr. Del Signore had worked for over twenty years with Daisy affiliates, and obviously was a trusted employee of Mr. Iacono.

The unfortunate problem here is that Quickform, Daisy Construction and Daisy Management are not the same as DuPont, Hercules and ICI. There has

not been a clean break with distinct management and separate employees, and the interplay is so perverse that when the Chief Financial Officer of Daisy Management, Paul Chantler, was asked about the employment status of Mr. Del Signore, he stated the following:

> Q. At some point in time did he [Mr. Del Signore] leave Daisy Construction?
> A. When Quickform Concrete was formed, he became the operations manager of Quickform.
> Q. Did he leave Daisy Construction's payroll?
> A. He was – he remained on Daisy Constructions's payroll.
> Q. What was his position with Quickform at that time?
> A. Operations manager.
> Q. At the time of the gas line explosion on July 2, 2003, whose payroll was Silvano Del Signore on?
> A. Daisy.
> Q. Is Silvano Del Signore still on Daisy's payroll?
> A. No.
> Q. When did he cease or when did that end?
> A. Sometime in 2004.
> Q. Why?
> A. With Quickform closing down, there was no longer a need for Silvano and his skills. There was no longer a need at Daisy or anywhere else.[11]

Later in the deposition, Mr. Chantler said:

> A. One of the clarifications that I think is appropriate and it is connected to my previous response, yes, Silvano Del Signore and, yes, Miguel Alverez were on the payroll of Daisy Construction, but just like my time was billed, their time was billed to Quickform Concrete at the end of every month.
> Q. Okay. So they would bill out their time to Quickform and remain on the payroll of Daisy?

[11]Chantler Depo. 14-15.

A. They were on the payroll of Daisy as administrative convenience, but their time was paid for by Quickform Concrete. Their services were paid for by Quickform Concrete.
Q. So they would get paychecks – what you're saying is they would get paychecks from Daisy Construction – does Daisy have a logo or just Daisy Construction?
A. Yes, a logo.
Q. They would receive their paychecks from Daisy and then Quickform would then do what you're saying?
A. They would be billed by Daisy Construction for their services.[12]

When questioned regarding Mr. Del Signore's benefits, Mr. Chantler stated:

Q. Well, these members, they were also receiving their benefits, then, through Daisy?
A. There were some benefits, yes.
Q. Health?
A. Yes.
Q. Healthcare?
A. Yes.
Q. Was there a 401(k) plan?
A. Yes.
Q. That was through Daisy?
A. Yes.
Q. What other benefits did they – you said something about – what else besides health insurance and a 401(k) were they getting through Daisy?
A. There might have also been dental if they were participating in that plan.[13]

Now, the Court acknowledges that Mr. Chantler has submitted an errata sheet indicating that when he used the phrase "Daisy" he was referring to Daisy Management instead of Daisy Construction, but the Court believes this further

[12] *Id.* at 38-39.

[13] *Id.* at 40-41.

evidences the commingling of the companies and particularly the employment of Mr. Del Signore, which makes it impossible at this juncture for the Court to grant summary judgment. The jury will have to decide whether Mr. Chantler was telling the truth at his deposition or when he is in a courtroom under oath at trial. To the Court it would seem logical that an individual who is the Chief Financial Officer, and who oversees the books and records of at least Mr. Iacono's management company, would certainly appreciate and know the difference of whether an employee works for Daisy Construction, Daisy Management or Quickform, and his credibility on these issues is suspect. Regardless, there are clearly disputed facts here that makes the question of who Mr. Del Signore works for and what entity controls his employment an issue to litigate.

While the interaction of these companies and the management supervision of them, as well as Mr. Del Signore, may become focused at trial, it is abundantly clear that the Court will never be in a position to grant a dispositive motion as to these parties in a pretrial setting. It will take a masterful presentation by their trial counsel with extremely well-prepared witnesses to untangle this corporate quagmire.[14] As a result, all three companies will remain in the litigation and the summary judgment motions will not be granted.

CITY OF WILMINGTON MOTION

(A) Agency Relationship with the City

The City contracted with VanDemark & Lynch (not party to this suit) to provide engineering and management services for sidewalk improvement throughout Wilmington. VanDemark subcontracted its duty to Tech Consultants, who would determine the extent of sidewalk repair, mark the area and determine the specifications required. Payment by the City was made to VanDemark, who then submitted payment to Tech Consultants. The City also contracted with

[14]The Court further notes the commingling of these companies continues to be evident through its counsel in this case, who represents both Daisy Management and Daisy Construction. For instance, in the reply filed by Daisy Construction to support its summary judgment motion, counsel outright states on two separate occasions that Mr. Del Signore was employed by Daisy Management, which is of course the exact opposite of what that same counsel represents throughout his motions filed on behalf of Daisy Management. While this may have been an innocent mistake, it does suggest to the Court that the interplay of the companies' relationship is perhaps one of convenience, and is similar to spooking a gaggle of wild quail hoping the Court will find one close enough to shoot.

Quickform to perform repairs to the sidewalks within Wilmington. Thus, the City asserts it is not liable to the plaintiffs since neither Tech Consultants nor Quickform were employers or agents of the City, but rather were independent contractors hired to oversee the work.

Whether an agency relationship exists is usually a question of fact for the jury.[15] An agency relationship is "created when one party consents to have another act on its behalf, with the principle controlling and directing the acts of the agent."[16] While not particularly clear, sprinkled throughout the documents provided to the Court is some indication of oversight, approval and specific direction given to the contractors by City employees. And while the Court has significant doubts whether this interaction will be sufficient to establish an agency relationship, at this point it is unclear as to the degree of control the City exercised over the project, and for that reason, neither dismissal nor summary judgment is appropriate.

(B) Municipal Torts Claim Act

What the Court finds more significant in regards to the liability of the City is the assertions made that it was directly negligent for failing to provide sketches of the scope of work to Quickform and Tech Consultants, and that the City did not intervene once it knew Mr. Del Signore was not attending markouts. As indicated previously, negligence is typically determined by a jury provided material facts are in dispute, as they are here. However, the City asserts it is protected by sovereign immunity pursuant to 10 Del. C. § 4010.

Section 4012 lists the exceptions to municipal immunity. While the repair of a sidewalk is not included among the list of exceptions, the code does state:

> A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances:
> (3) In the sudden and accidental discharge, dispersal, release or escape of … gases…into or upon land, the atmosphere….

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[15] *Fisher v. Townsend*, 695 A.2d 53 (Del. 1997).

[16] *Id*. at 57.

The facts here appear to be precisely what the legislature had in mind when it decided to allow recovery under Section 4012(3). The exception is narrowly tailored to the discharge of a gas caused by the negligent actions of the City.

It is entirely proper for the City to assign its responsibilities in managing and supervising construction projects in which it has little expertise or simply lacks the resources to do it itself. However, in doing so, the City cannot ignore deficiencies that come to its attention and take no action to correct the improper performance of its contracts. There is at least disputed facts here to suggest that City workers were made aware of Quickform's failure to regularly attend markout sessions, a procedure intended to identify the work that needed to be completed and a mechanism to minimize the potential for disaster such as what has occurred here. A reasonable jury could find that the City's failure to take corrective action was negligent and this omission was a contributing factor to the explosion. As such, because there are material facts in dispute regarding the City's action, and because the Court finds the immunity argued by the City to be inappropriate, summary judgment will not be granted at this juncture.

CONTRIBUTORY NEGLIGENCE

The Court has several motions for summary judgment requesting the Court find that certain plaintiffs were more than fifty percent at fault, and therefore should be precluded from recovery because of their contributory negligence. While there may become a basis as the evidence is presented to the jury to instruct them on contributory negligence related to the plaintiffs' conduct once the pipeline was struck, it is not the function of the Court at this juncture to be parceling out disputed facts to decide in its judgment whether the fifty percent threshold has been met. Candidly, the Court has never been asked to make such a ruling, probably because it is so obviously inappropriate.

The other issue raised in this area is that the plaintiffs meet the definition of excavators found in Title 26 *Del. C.* § 802 and have violated the obligations found in § 806. The Court finds that it is unreasonable to believe that the legislature intended every worker or backhoe operator to perform the multitude of duties found in § 806, particularly when it appears that their employer had performed that responsibility based upon the various markouts laid by Tech Consultants and Delmarva in this area. The excavator here is Quickform, and it

is this party that was required to comply with § 806, not every employee that may have moved a shovel of dirt. As such, the Court does not find a basis for contributory negligence by the plaintiffs under this theory.

CONCLUSION

Based upon the above, the following conclusions have been reached:

(1) One Call Concepts and Miss Utility are dismissed from this litigation;
(2) Delmarva remains in the litigation, but only as to the limited issue regarding its alleged negligence based upon a violation of federal regulations;
(3) Daisy Management and Daisy Construction's motions for summary judgment are denied and both remain parties to this litigation; and
(4) City of Wilmington's motion is denied and it remains a party to this litigation.

SCHEDULING

The pretrial conference in this matter is rescheduled to Wednesday, March 14, 2007 at 10:00 a.m. The pretrial stipulation will be due on Monday, March 12, 2007.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

WCCjr:twp

cc: Prothonotary