NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 2072

LAFOURCHE PARISH WATER DISTRICT NO. 1

VERSUS

ELLENDER BACKHOE & DOZER SERVICE, INC.

Judgment Rendered: May 2, 2008

Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche, Louisiana
Docket Number 101920

Honorable Jerome J. Barbera, III, Judge Presiding

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| Misael A. Jimenez, Jr.<br>Donald F. Harang, Jr.<br>Larose, LA | Counsel for Plaintiff/Appellee,<br>Lafourche Parish Water District<br>No. 1 |
| Andrew W. Ralston<br>Stacey Moak<br>Baton Rouge, LA | Counsel for Defendant/Appellant,<br>Ellender Backhoe & Dozer<br>Service, Inc. |

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BEFORE: WHIPPLE, GUIDRY AND HUGHES, JJ.

**WHIPPLE, J.**

This is an appeal from a judgment of the Seventeenth Judicial District Court in Lafourche Parish, confirming a preliminary default and awarding plaintiff repair costs for damage to its underground waterline. For the following reasons, we affirm.

## PROCEDURAL HISTORY

On August 1, 2005, plaintiff, Lafourche Parish Water District No. 1 ("Water District No. 1"), filed suit against defendant, Ellender Backhoe & Dozer Service, Inc. ("Ellender Backhoe"), for damages allegedly caused by Ellender Backhoe's negligence in breaking an underground waterline during excavation activities on September 20, 2004, at a construction site on Louisiana Highway 308 in Lafourche Parish. Specifically, Water District No. 1 contended that Ellender Backhoe: (1) failed to call the Louisiana One Call Center, implemented pursuant to the Louisiana Underground Utilities and Facilities Damage Prevention Law ("the Louisiana Dig Law"), LSA-R.S. 40:1749.11 et seq.; (2) failed to give the appropriate notice to Water District No. 1 of its intent to engage in excavation activities; and (3) failed to wait at least forty-eight hours following notification before commencing excavation.

Ellender Backhoe did not answer the petition. Thus, on September 15, 2005, Water District No. 1 filed a motion for preliminary default, and the trial court entered a preliminary judgment by default on October 27, 2005. (R. 11). Approximately twenty-one months later, on July 25, 2007, Water District No. 1 moved to confirm the preliminary default.

Following a hearing, the trial court concluded that Water District No. 1 had established a prima facie case indicating its entitlement to damages from Ellender Backhoe for repair of the broken waterline. Thus, the court

rendered judgment in favor of Water District No. 1 and against Ellender Backhoe in the amount of $13,094.52, together with interest and attorney's fees of 25% of the principal and legal interest awarded. Ellender Backhoe filed the instant appeal.

On appeal, Ellender Backhoe contends that the trial court committed legal error in: (1) finding that Water District No. 1 established a prima facie case that the negligence of Ellender Backhoe was a cause-in-fact of the damages complained of; and (2) finding that Water District No. 1 established a prima facie case that the cost of lowering the waterline was a result of the negligence of Ellender Backhoe.

## LAW AND ANALYSIS

### Default Judgment

In an ordinary proceeding, the defendant in a principal demand must file an answer within fifteen days after service of citation upon him, except as otherwise provided by law. LSA-C.C.P. art. 1001; Power Marketing Direct, Inc. v. Foster, 2005-2023 (La. 9/6/06), 938 So. 2d 662, 669. If the defendant fails to answer within the time prescribed by law, judgment by default may be entered against him. LSA-C.C.P. art. 1701(A); Power Marketing Direct, Inc., 938 So. 2d at 669. The judgment of default, or "preliminary default," may be obtained by oral motion in open court or by written motion, and the judgment shall consist merely of an entry in the minutes. LSA-C.C.P. art. 1701(A). Where no answer has been timely filed, the preliminary default may then be confirmed on the third judicial day after entry of the default judgment. LSA-C.C.P. art. 1702(A); Power Marketing Direct, Inc., 938 So. 2d at 669.

At the hearing confirming a default judgment, the plaintiff must present proof of the demand sufficient to establish a prima facie case. LSA-

C.C.P. art. 1702(A); Clary v. D'Agostino, 95-0447 (La. App. 1st Cir. 12/15/95), 665 So. 2d 792, 793. A prima facie case is established by evidence which proves the essential allegations of the petition as fully as if each allegation had been specifically denied. When reviewing a default judgment, the appellate court is restricted to determining whether the record contains sufficient evidence to prove a prima facie case. Clary, 665 So. 2d at 793-794.

**The Louisiana Dig Law**

Louisiana Revised Statute 40:1749.13 provides, in pertinent part:

> A. Except as provided in this Section, **no person shall excavate** or demolish in any street, highway, public place, or servitude of any operator, or **near the location of an underground facility or utility**, or on the premises of a customer served by an underground facility or utility **without having first ascertained,** in the manner prescribed in Subsection B of this Section, **the specific location as provided in R.S. 40:1749.14(D) of all underground facilities or utilities in the area which would be affected by the proposed excavation or demolition.**
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> B. (1) Except as provided in R.S. 40:1749.15, prior to any excavation or demolition, each excavator or demolisher, including cable television owners or operators, shall serve telephonic notice of the intent to excavate or demolish to the regional notification center or centers serving the area in which the proposed excavation or demolition is to take place. Such notice shall be given to the notification center at least forty-eight hours, but not more than one hundred twenty hours, excluding weekends and holidays, in advance of the commencement of any excavation or demolition activity. Holidays shall consist of the following: New Year's Day; Good Friday; Independence Day; Labor Day; Thanksgiving Day; and Christmas Day, or the days on which those holidays are observe by the state.
> (Emphasis added).

Thus, pursuant to the Louisiana Dig Law, excavators must ascertain the location of underground facilities by calling the notification center prior

to excavation.[1] South Central Bell v. Milton J. Womack & Associates, Inc., 97-2413 (La. App. 1st Cir. 11/6/98), 744 So. 2d 635, 638, writ denied, 99-0644 (La. 4/23/99), 742 So. 2d 889. The Louisiana Dig Law imposes a positive duty upon an excavator to inform himself of the location of underground utilities in order to prevent damaging them. South Central Bell Telephone Company v. Sewerage and Water Board of New Orleans, 94-1648 (La. App. 4th Cir. 3/16/95), 652 So. 2d 1090, 1093, writ denied, 95-0949 (La. 5/19/95), 654 So. 2d 1090. Whether an excavator's negligence in violating this statutory duty imposes civil liability upon the excavator is determined under the duty-risk analysis. See BellSouth Telecommunications, Inc. v. Industrial Enterprises, Inc., 96-0682 (La. App. 1st Cir. 2/14/97), 690 So. 2d 145, 149.

**Finding that Ellender Backhoe's Negligence was a Cause-in-fact of Water District No. 1's Injuries**

On appeal, Ellender Backhoe contends that Water District No. 1 failed to present "any evidence whatsoever" that negligence on the part of Ellender Backhoe was a cause-in-fact of the damage.

In order to prevail on a negligence claim under LSA-C.C. art. 2315, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant failed to conform his conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries

[1]"Excavation" is defined as "any operation for the purpose of **movement** or removal **of earth** ... in or **on the ground** by the use of powered or mechanical or manual means...." LSA-R.S. 40:1749.12(4) (emphasis added). Thus, actual digging or removal of dirt is not necessary to come within the definition of "excavation."

(the scope of liability or scope of protection element); and (5) actual damages (the damages element). BellSouth Telecommunications, Inc., 690 So. 2d at 149. In this assignment of error, Ellender Backhoe challenges whether Water District No. 1 proved the third element.

To meet the cause-in-fact element, a plaintiff must prove only that the conduct was a necessary antecedent of the accident, that is, but for the defendant's conduct, the incident probably would not have occurred. BellSouth Telecommunications, Inc., 690 So. 2d at 149. In the instant case, Water District No. 1 presented evidence that Ellender Backhoe did not call Louisiana One Call prior to beginning its excavation work on September 20, 2004, as it was required to do by statute. See LSA-R.S. 40:1749.13(B). As a result of Ellender Backhoe's failure to call, no markers had been placed on the ground to mark the location of underground utilities. The record further establishes that James Ellender of Ellender Backhoe was operating a backhoe at the site when the waterline was damaged.

Considering the foregoing, we find no manifest error in the trial court's determination that Water District No. 1 established a prima facie case showing that Ellender Backhoe's negligence in excavating without giving prior notification to the regional notification center and without informing itself of the location of any underground utilities was a cause-in-fact of the damage to Water District No. 1's waterline. See South Central Bell Telephone Company, 652 So. 2d at 1093-1094.

Regarding Ellender Backhoe's arguments on appeal that Water District No. 1's purported negligence in allegedly failing to bury the waterline to the proper depth was the cause-in-fact of the damage to the waterline, we find that Ellender Backhoe is attempting to raise issues which a reviewing court is prevented from reviewing when considering a default

judgment. See Clary, 665 So. 2d at 794. The issues of whether Water District No. 1 was negligent and whether such negligence was a cause of the damage to the waterline is outside the limited review allowed. The affirmative defense of comparative negligence must be specifically pleaded in the answer. LSA-C.C.P. art. 1005; Smith v. Jack Dyer & Associates, Inc., 633 So. 2d 694, 699 (La. App. 1st Cir. 1993). The issue of any fault on the part of Water District No. 1 was not specifically pleaded and was not before the court below, and no evidence of any alleged negligence is contained in the record. Accordingly, these issues are not properly before this court for review. See Clary, 665 So. 2d at 794.

Thus, we find no merit to this assignment of error.

**Finding that Ellender Backhoe's Negligence Caused the Damages Claimed**

In this assignment of error, Ellender Backhoe contends that the trial court committed legal error in finding that the cost incurred by Water District No. 1 in lowering the waterline was a result of Ellender Backhoe's negligence. It further contends that "the cost of repairing the water main to the condition it was in prior to this incident is a mere fraction of the damages claimed" by Water District No. 1.

The plaintiff bears the burden of proving with legal certainty every item of damages claimed. South Central Bell, 744 So. 2d at 640. In establishing its damages herein, Water District No. 1 offered the testimony of Dirk Barrios, the general manager for Water District No. 1. Barrios testified that Water District No. 1 had to repair the damage caused to the waterline by Ellender Backhoe and that it had hired WGS Contractors to perform the repair.

Water District No. 1 also submitted the affidavit of Mona Zeringue, office manager for Water District No. 1. Zeringue attested that Water District No. 1 had incurred costs in the amount of $13,094.52 for the repair work necessitated by the damage caused by Ellender Backhoe. Attached to her affidavit were the invoice from WGS Contractors for the work performed and a copy of the check from Water District No. 1 used to pay the invoice.

Although Ellender Backhoe argues on appeal that the costs incurred by Water District No. 1 include more than simply repairing the damage caused by its negligence, there is no evidence to support this assertion. While Barrios did testify that the invoice from WGS Contractors was for "the repair work to **lower** the waterline," this does not somehow establish that the work performed was not necessitated by Ellender Backhoe's negligence. Rather, both Barrios and Zeringue indicated that the costs incurred were necessary to "repair" the damage caused by Ellender Backhoe. Moreover, no contradictory evidence was presented to dispute this amount. See BellSouth Telecommunications, Inc., 690 So. 2d at 150.

Ellender Backhoe's forum and opportunity to dispute the amount of the costs incurred was in the trial court below. An attempt to now dispute the amount of costs incurred is outside the limited review this court can conduct in considering a default judgment. See Clary, 665 So. 2d at 794. This assignment of error also lacks merit.

## CONCLUSION

For the above and foregoing reasons, the July 30, 2007 judgment, confirming the preliminary default and awarding the Lafourche Parish Water District No. 1 damages and attorney's fees against Ellender Backhoe &

Dozer Service, Inc., is affirmed. Costs of this appeal are assessed against Ellender Backhoe & Dozer Service, Inc.

**AFFIRMED.**