• A.M.'s equal protection challenges are meritless.
• The challenged statutes do not violate the special legislation clause.
• A.M.'s separation of powers argument is without merit.
• The challenged statutes are not bills of attainder.
• Because the challenged statutes do not inflict punishment, they do not violate the Ex Post Facto or Double Jeopardy Clauses.
• Section 83-174.01 is not unconstitutionally vague.
• The evidentiary issues present require remand.
• On remand, the Board must determine if A.M. was compelled to make the incriminating statements.
• The Board must also ensure that the facts underlying the experts' opinions are sufficiently reliable.
• And the Board must prohibit the experts from introducing the underlying facts through their testimony because such a practice violates A.M.'s right to confrontation.
• We have considered A.M.'s other assignments of error and conclude that none of those issues warrant discussion.

We reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THE VILLAGE OF HALLAM, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE, V. L.G. BARCUS & SONS, INC., A KANSAS CORPORATION, APPELLANT.

798 N.W.2d 109

Filed May 13, 2011. No. S-10-406.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.

3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
4. **Statutes: Legislature: Intent: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court's duty in discerning the meaning of a statute is to determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. ____: ____: ____: ____. When possible, an appellate court determines the legislative intent from the language of the statute itself.
6. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2008) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
7. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his opinion about an issue in question.
8. **Summary Judgment: Proof.** A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
9. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

William H. Selde, of Sodoro, Daly & Sodoro, P.C., for appellant.

Neal E. Stenberg, of Stenberg Law Office, and Steven J. Reisdorff, of The Law Office, P.C., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

L.G. Barcus & Sons, Inc. (Barcus), was held liable to the Village of Hallam under the One-Call Notification System Act (the Act)[1] for damage to Hallam's sanitary sewer system

[1] Neb. Rev. Stat. §§ 76-2301 to 76-2330 (Reissue 2009).

caused by an excavation. The Act establishes a one-call notification center (one-call center) so that excavators can learn of any underground facilities in the area where excavation is planned.[2] Among the issues raised by Barcus' appeal are (1) whether an operator of an underground facility which has not complied with the provisions of the Act has a remedy against an excavator for an alleged violation of the Act and (2) whether the excavator may delegate its duties under the Act to another party and thereby avoid liability.

I. FACTS AND PROCEDURAL BACKGROUND

Hallam is a village incorporated under Nebraska law. It operates a sanitary sewer system within its boundaries. On May 22, 2004, a tornado destroyed more than 150 homes and businesses in Hallam, including grain storage facilities owned by Farmers Cooperative, Inc. (Farmers).

After the tornado and before Farmers began rebuilding its facilities, Hallam hired a company to inspect its sanitary sewer system and determine whether it had been damaged by the tornado. The company lowered a video camera into manholes throughout the village and produced videotapes showing the interior of all sewer lines owned and operated by the village. The inspection was completed on June 26, 2004. Tyler L. Hevlin, a civil engineer, reviewed the inspection video and advised Hallam that the portion of its sewer which lay beneath the Farmers property was unobstructed and not in need of repair.

In June or July 2004, Farmers entered into separate contracts with McPherson Concrete Storage Systems, Inc. (McPherson), and Frisbie Construction Co., Inc. (Frisbie), to construct two cylindrical concrete grain storage bins and related structures. Under the contracts, McPherson was responsible for the concrete construction and Frisbie was responsible for the "millwright work," which included metal legs and other structures attached and adjacent to the concrete structures. Hallam issued a building permit for the construction of the bins.

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[2] See §§ 76-2302(1) and 76-2316.

In mid-June 2004, a firm identified in the record as "Terracon" conducted soil testing for the project through a series of soil "borings." The president and chief executive officer of Farmers testified that Terracon notified the one-call center before performing the borings, and Frisbie's operations manager believed that the people conducting the soil boring would have called the one-call center, but he had no personal knowledge on this point. The record provides no other information regarding communication between Terracon and the one-call center.

McPherson entered into a subcontract with Barcus to install an "AugerPile" foundation for the grain bins. The subcontract stated that Barcus' prices did not include the cost of

> location, removal, protection or relocation of any underground or overhead obstructions or utilities which interfere with our work . . . special protection of existing structures, utilities or equipment . . . . Our sole responsibility for pile location will be to accurately spot the auger on the stakes that you provide and drill the pile using our normal care.

An AugerPile foundation is constructed using an auger to drill a hole in the ground, and then the hole is filled with grout as the auger is withdrawn. The grout used in this process is a substance similar to concrete but does not contain rock. The "augered cast pile[s]" (AugerPiles) were separately numbered so that Barcus could maintain a record of its work. On the Farmers project, Barcus was to install a total of 204 AugerPiles, each 16 inches in diameter. Two hundred of the AugerPiles were to serve as the foundation for the grain bins, and four were to be the foundation for a "bulkweigher," which is used to load grain into railcars. Frisbie was to construct the bulkweigher for Farmers at an unspecified future date. Barcus' role in the project was limited to installation of the AugerPile foundation.

Frisbie's work on the project included construction of a pit in which grain would be dumped and then elevated for loading at the top of the bins. The pit was to be located between and slightly to the east of the bins. Frisbie's operations manager called the one-call center on July 1, 2004, to provide notification that Frisbie would be constructing the pit. He advised

the one-call center that the maximum depth of the excavation would be 14 feet. Frisbie began work on the pit during the first week of July. No underground facilities were marked in the vicinity of the pit when excavation commenced. No sewer pipe was encountered during the excavation for the pit, which was completed in less than 1 day. The concrete floor of the pit was completed approximately 3 days after excavation began. Frisbie did no other excavation on the project.

Barcus arrived at the jobsite on July 20, 2004, and began installing AugerPiles on July 23. McPherson marked the locations for the 200 AugerPiles which would form the foundations of the bins, and a Frisbie employee marked the locations for the four AugerPiles which would form the foundation for the bulkweigher. Barcus employees did not notify the one-call center before commencing installation of the AugerPiles, because they did not consider such notification to be within the scope of their work. Rather, they considered such notification to be the responsibility of the general contractor, which in this case was McPherson. The Barcus foreman testified that he had "no idea" whether any other contractor notified the one-call center, but he observed no markings indicating the existence of underground facilities in the area where the AugerPiles were to be driven.

Barcus installed the four AugerPiles for the bulkweigher on July 30, 2004. Each of the four AugerPiles was 72 feet long and placed in a hole drilled to a depth of 73 feet, so that the top of each of the AugerPiles was beneath the surface of the ground. Barcus completed its work on the project and left the jobsite on August 10. Barcus' foreman recalled that one of the AugerPiles on the Farmers project required more grout than usual, but he testified that this was not uncommon and could have been caused by several factors.

On or about August 23, 2004, Hallam began receiving reports that sewage was backing up into homes and businesses located west of the Farmers site. An attempt to clear the sewer obstruction with water jet flushing was unsuccessful, so a camera inspection was undertaken. The inspection video revealed that the blockage was caused by concrete and broken sewer pipe.

Hallam then consulted Hevlin's firm, an engineering and architectural consulting group, to develop a plan for repairing or replacing the damaged portion of the sewer line. Hevlin determined and advised Hallam that because of the nature and extent of the blockage, the sewer line could not be repaired and would need to be rerouted. Hallam accepted Hevlin's advice and rerouted the sewer system based upon plans and specifications developed by Hevlin. Hallam incurred fair and reasonable costs in the amount of $96,007.74 as a consequence of the damage to its sanitary sewer.

Hallam filed suit to recover these costs against Farmers, McPherson, Barcus, and Frisbie in the district court for Lancaster County. It alleged that all four of the defendants were negligent and that Barcus and McPherson were strictly liable under the Act because they failed to notify the one-call center before installing the AugerPile foundation. In its answer, Barcus denied any liability on its part and affirmatively alleged that Hallam was contributorily negligent in several respects, including failure to comply with provisions of the Act that require operators of underground facilities to furnish certain information to the one-call center.

Hallam retained Hevlin as an expert witness regarding the cause of the obstruction of its sanitary sewer in 2004. Based upon excavations undertaken in 2008, Hevlin determined the location of the four AugerPiles installed by Barcus as the foundation for the bulkweigher, the location of the pit constructed by Frisbie, and the location of the sewer line as it existed in 2004. Drawings prepared under Hevlin's supervision show two of the AugerPiles and one corner of the pit near the underlying sewer line. Based upon this information and his review of discovery documents from the litigation, Hevlin opined to "a reasonable degree of certainty as a professional engineer" that the auger used by Barcus during the installation of the AugerPiles damaged the sewer line and introduced grout which caused the obstruction. Hevlin further opined, to the same degree of certainty, that Frisbie's construction of the pit did not cause the damage, because the elevation of the bottom of the pit was higher than the sewer line.

Hallam moved for summary judgment on its strict liability claim against Barcus. The motion was supported by Hevlin's affidavit stating the opinions summarized above and other affidavits, depositions, and documents produced during discovery. The district court sustained the motion and entered judgment against Barcus in the amount of $96,007.74. The court determined that Barcus was an "excavator" as defined by the Act and that its installation of the AugerPiles constituted an "excavation" as defined by the Act.[3] The court further determined that Hallam was an "operator" of an underground facility as defined by the Act.[4] The court reasoned that the fact that Hallam had not become a member of and had not participated in the one-call center was not a defense to its strict liability claim based upon Barcus' failure to call the one-call center before commencing excavation.[5] The court concluded that Barcus, not McPherson or Frisbie, was obligated to give the notice required by the Act; that it was "clear . . . that the excavation engaged in by Barcus resulted in damage to . . . Hallam's sewer line"; and that there was no factual dispute as to the amount of the damages. The district court directed entry of a final judgment pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008).

The Nebraska Court of Appeals dismissed Barcus' appeal from the district court's order, and this court denied a petition for further review. Following remand, the action was dismissed as to Farmers, McPherson, and Frisbie pursuant to a stipulation. Subsequently, the district court determined that Hallam's damages were subject to pro tanto reduction in the amount of $30,000, and it entered final judgment against Barcus in the amount of $66,007.74. Barcus appealed, and we granted its petition to bypass.

II. ASSIGNMENTS OF ERROR

Barcus assigns, summarized and restated, that the district court erred in (1) its construction and application of the Act,

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[3] See §§ 76-2308 and 76-2309.

[4] See § 76-2313.

[5] See § 76-2324.

(2) not concluding that Hallam was barred as a matter of law from asserting a remedy through its own noncompliance with the Act, (3) receiving Hevlin's affidavit without sufficient foundation, and (4) concluding that there was no genuine issue of material fact regarding the proximate cause of Hallam's claimed damages.

III. STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[6] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[7]

[3] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.[8]

A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.[9]

IV. ANALYSIS

1. Statutory Liability

(a) Effect of Hallam's Noncompliance With the Act

[4,5] Barcus argues that Hallam had no remedy under the Act as a matter of law, because it had not complied with the provisions of the Act applicable to operators of underground

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[6] *Tolbert v. Jamison, ante* p. 206, 794 N.W.2d 877 (2011).

[7] *Id.*

[8] *Shepherd v. Chambers, ante* p. 57, 794 N.W.2d 678 (2011); *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

[9] *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010); *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008).

facilities. Familiar general principles guide our analysis of this issue. Statutory language is to be given its plain and ordinary meaning, and our duty in discerning the meaning of a statute is to determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[10] When possible, an appellate court determines the legislative intent from the language of the statute itself.[11]

The Act states that it was intended "to establish a means by which excavators may notify operators of underground facilities in an excavation area so that operators have the opportunity to identify and locate the underground facilities prior to excavation."[12] The stated purpose of the Act is "to aid the public by preventing injury to persons and damage to property and the interruption of utility services resulting from accidents caused by damage to underground facilities."[13]

The Act defines "excavator" as "a person who engages in excavation in this state."[14] "Excavation" is defined in the Act as "any activity in which earth, rock, or other material in or on the ground is moved or otherwise displaced by means of tools, equipment, or explosives and shall include . . . drilling [and] augering."[15] It is undisputed that Barcus used an auger to drill the holes in the ground in which the AugerPiles were placed. Barcus was an "excavator" within the meaning of the Act.

The Act defines "underground facility" as "any item of personal property buried or placed below ground for use in connection with the storage or conveyance of . . . sewage, . . .

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[10] See, *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010); *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009).

[11] *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal., ante* p. 93, 798 N.W.2d 823 (2011).

[12] § 76-2302(1). Accord *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

[13] § 76-2302(2). Accord, *Hughes v. Omaha Pub. Power Dist., supra* note 12; *Galaxy Telecom v. J.P. Theisen & Sons*, 265 Neb. 270, 656 N.W.2d 444 (2003).

[14] § 76-2309.

[15] § 76-2308.

including . . . sewers."[16] An "operator" is "a person who manages or controls the functions of an underground facility."[17] It is beyond question that Hallam's sanitary sewer system was an underground facility and that the village was its operator as those terms are defined by the Act. The Act requires that "[o]perators of underground facilities shall become members of and participate in the statewide one-call . . . center"[18] and provide information regarding the location of underground facilities.[19] There is no evidence that Hallam complied with these provisions.

Persons are required by the Act to give notice to the one-call center at least 2 full business days but no more than 10 business days before commencing any excavation, and such notice "shall be deemed notice to all operators."[20] This triggers a process by which the one-call center informs operators of underground facilities in the vicinity of the proposed excavation, and the operators in turn advise the excavator of the approximate location of the facilities by the use of marking devices.[21] It is undisputed that Barcus did not notify the one-call center before commencing excavation.

The liability provisions of the Act pertinent to this case are set forth in the first two sentences of § 76-2324:

> An excavator who fails to give notice of an excavation pursuant to section 76-2321 and who damages an underground facility by such excavation shall be strictly liable to the operator of the underground facility for the cost of all repairs to the underground facility. An excavator who gives the notice and who damages an underground facility shall be liable to the operator for the cost of all repairs to the underground facility unless the damage to

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[16] § 76-2317.

[17] § 76-2313.

[18] § 76-2318.

[19] See § 76-2320.

[20] § 76-2321(1).

[21] See §§ 76-2322 and 76-2323.

the underground facility was due to the operator's failure to comply with section 76-2323.

Barcus argues that Hallam cannot be considered an "operator" within the meaning of these provisions, because it had not complied with the provisions of the Act requiring operators of underground facilities to "become members of and participate in the statewide one-call . . . center."[22] But we find no language in § 76-2324 or the statutory definition of "operator" in § 76-2313 which could be read in the manner that Barcus urges. We agree with the reasoning of the district court that Hallam's right to recover under § 76-2324 depends on its status as an "operator" of an underground facility, not on whether it has taken steps to become a "member" of the one-call center. The uncontroverted facts are that Barcus was an "excavator" and that Hallam was an "operator" as defined by the Act, but neither complied with its substantive provisions. The question of law before us is how the liability provisions of § 76-2324 should be applied in this circumstance.

The answer is apparent from the plain language of § 76-2324. The first sentence unambiguously states that an excavator who does not give notice of an excavation as required by § 76-2321 is strictly liable for damage to an underground facility caused by the excavation. The second sentence states that an excavator who gives the required notice of an excavation *may* be liable for damage to an underground facility, unless the damage was due to the operator's failure to identify and mark the underground facility. Thus, the statute provides a defense based upon the facility operator's failure to comply with § 76-2323. Reading these two sentences together, it is clear that an operator's noncompliance with § 76-2323 is a defense available to an excavator who gives the required notification, but not to the excavator who fails to give notice required by § 76-2321.

This construction is entirely consistent with the Legislature's intent "to establish a means by which excavators may notify operators of underground facilities in an excavation area so that operators have the opportunity to identify and locate

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[22] § 76-2318.

the underground facilities prior to excavation."[23] Had the Legislature intended to excuse noncomplying excavators from liability based upon the failure of a facility operator to identify and mark the underground facilities, it could have placed language in the first sentence of § 76-2324 similar to that used in the second sentence. The fact that it did not do so leads to only one possible conclusion: The Legislature intended to hold an excavator who does not give the required notification strictly liable for any damage it causes to an underground facility without regard to the conduct of the facility operator.

(b) Delegation of Duty

Barcus also argues that in accordance with "the custom and practice of the construction industry," it complied with the Act by delegating its duty to notify the one-call center of its proposed excavation to others.[24] In their depositions, the vice president of Barcus' pile division and Barcus' foreman on the Farmers project testified that under their understanding of their standard subcontract, it was the responsibility of the general contractor, in this case McPherson, to notify the one-call center regarding the installation of piles. In a subsequent affidavit, the Barcus foreman took a more expansive position, stating that according to the custom and practice of the industry, the obligation fell on the "general contractor or general contractors," and that Barcus relied "on its co-worker Frisbie . . . to perform all necessary notification, permitting, or contact with Local or State authorities." From this, Barcus argues in its brief that Barcus and Frisbie acted "in a joint fashion to meet all requirements of the One-Call statute."[25]

Barcus provides no authority for its premise that a party can avoid a statutory duty by delegating it to another in accordance with the custom and practice of an industry. But even if the premise is sound, an issue we do not decide, it is clear from the record that Frisbie's actions did not satisfy Barcus' duty under the Act. Frisbie clearly was not acting on behalf

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[23] § 76-2302(1).

[24] Brief for appellant at 23.

[25] *Id.* at 14.

of Barcus when it notified the one-call center of its plans to excavate for the pit. Barcus contracted with McPherson; there was no contract between McPherson and Frisbie or Barcus and Frisbie. Frisbie's operations manager called the one-call center on July 1, 2004, more than 10 days before Barcus commenced installation of the AugerPiles. This call would not have been timely notice of the AugerPile excavation even if otherwise sufficient.[26] A review of the recording of the conversation and the written record made by the one-call center shows that Frisbie gave notice of its proposed excavation for the 14-foot-deep pit, but made no mention of Barcus or the work which it was to perform under its subcontract with McPherson. And Frisbie's operations manager testified unequivocally that he never contacted the one-call center on behalf of Barcus or McPherson.

The Act places the duty to notify the one-call center squarely on the "excavator" whose work could damage an underground facility. Frisbie was the excavator of the pit, and Barcus was the excavator with respect to the AugerPiles. Barcus cannot rely on Frisbie's compliance with the Act to excuse its own noncompliance.

2. Expert Opinion

At the summary judgment hearing, Hallam offered the affidavit of Hevlin, an engineer who had provided professional services to Hallam since 1998. Barcus objected to paragraph 21 of the affidavit as an opinion for which there was insufficient foundation. In that paragraph, Hevlin stated:

> It is my opinion, based on a reasonable degree of certainty as a professional engineer, that the auger used during the construction of the concrete auger piles by [Barcus] did damage to the sewer line . . . and, when installing the concrete (also referred to as "grout") for the pile, concrete was introduced into the sewer line and created the blockage.

The district court took the objection under advisement. Although we find no subsequent ruling on the objection, the

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[26] See, § 76-2321(1); *Galaxy Telecom v. J.P. Theisen & Sons, supra* note 13.

district court referred to the substance of the opinion in its order, noting that the affidavit included "detailed statements regarding the information which [Hevlin] relied on in forming his opinion, and the basis for his opinion." We therefore assume that the district court overruled the objection and received the opinion, and we turn to Barcus' argument that the court abused its discretion in doing so.

[6,7] An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2008) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.[27] It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his opinion about an issue in question.[28]

Hevlin is a professional civil engineer licensed in Nebraska and several other states. He had provided engineering services to Hallam since 1998 and provided technical assistance to Hallam to locate obstructions in the sewer and to determine the nature and extent of damage to the sewer system as a consequence of the 2004 tornado. His opinion regarding causation was stated with "a reasonable degree of certainty as a professional engineer" and was based upon his professional training and experience, his knowledge of Hallam's sewer system, his review of documents produced in discovery by Barcus and McPherson, his review of depositions taken in this case, and his own efforts to determine the precise location of various structures in relation to the sanitary sewer.

Barcus did not assert a *Daubert*/*Schafersman*[29] objection in the district court.[30] Its foundational objection was based upon an assertion that Hevlin lacked "any special knowledge about

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[27] *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

[28] *Liberty Dev. Corp. v. Metropolitan Util. Dist., supra* note 9.

[29] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[30] See *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

grout or hydraulic concrete" and that he did not have "any special training in auger bore, pile formation or construction practices." Hevlin stated in his affidavit that after he was retained by the village to determine the cause of the obstruction in the sewer system, he supervised excavations to determine the precise locations of the AugerPiles installed by Barcus and the pit constructed by Frisbie in relation to the sewer system. He learned the depth of the AugerPiles from discovery documents which were provided to him. Thus, Hevlin undertook what was essentially a series of measurements to determine the relative locations of the AugerPiles, the pit, and the sewer line, from which he concluded that the sewer line was damaged during the installation of the AugerPiles, not during the construction of the pit. This methodology did not require any specialized knowledge regarding the technology of installing AugerPiles other than what was set forth in the documents produced by Barcus and others, which documents Hevlin reviewed in formulating his opinion. There was sufficient foundation for Hevlin to express a causation opinion based upon such measurements, and the district court did not abuse its discretion in overruling Barcus' foundational objection.

3. Existence of Genuine Issue of Material Fact

[8,9] Barcus contends that there was a genuine issue of material fact as to the cause of the obstruction. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.[31] After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[32]

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[31] *Tolbert v. Jamison, supra* note 6.

[32] *Id.*

The evidence reflects that the damage to the sanitary sewer occurred sometime between June 26, 2004, when the inspection revealed that the sewer in the vicinity of the Farmers property was unobstructed, and August 23, when a similar inspection disclosed the obstruction. Terracon conducted its soil borings between June 15 and 17, more than 1 week before the first inspection disclosed that the sewer was unobstructed. Frisbie's excavation of the pit occurred during the first week of July. Its employee testified that the sewer line was not encountered during the excavation, and there is evidence that the pit excavation did not reach the depth of the sewer line. Barcus conducted the AugerPile excavations between July 23 and August 10. The sewer obstruction was discovered on August 23. These facts together with Hevlin's expert opinion are sufficient to create a reasonable inference that the Barcus excavation struck and damaged the sewer. There is no basis for a reasonable inference that some other instrumentality caused the damage.

Barcus argues that an inference can be drawn that Frisbie was negligent in marking the location of the AugerPiles for the bulkweigher. Assuming that is so, it does not negate the evidence showing that Barcus' excavation damaged the sewer line, which is all that is necessary to establish liability under the Act where the excavator has not given the required notification prior to commencing excavation. Barcus also argues that it could not have caused the damage to the sewer, based upon the distance between the AugerPile excavations and the point at which the obstruction was eventually discovered. But even if we accept Barcus' calculations as to this distance, there is no evidence regarding its significance to the issue of causation. On this record, we agree with the district court that there is no genuine issue of material fact as to the cause of the damage to the sewer line.

V. CONCLUSION

For the reasons discussed, we find no merit in any of the assignments of error and therefore affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.