

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 19, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0776

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

HOWARD CABLE LOCK TV,

Plaintiff-Appellant,

v.

GREAT LAKES CONSTRUCTION,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed.*

CANE, P.J. Howard Cable Lock TV appeals the trial court's judgment dismissing its complaint for damages to its transmission cables allegedly caused by Great Lakes Construction when filling a ditch with dirt and tree stumps. The trial court concluded that the activity of filling in a ditch with debris did not constitute "excavation" or "demolition" and therefore Great Lakes was not required to locate transmission cables in that ditch area or perform other precautions required under § 182.0175(2), STATS. The trial court also concluded that although Great Lakes' activity damaged the transmission cables located underground in the ditch, it could not determine negligence of the respective parties based on the evidence before it.

The issues are whether the activity of filling a ditch with debris such as dirt and stumps constitutes excavation or demolition within the meaning of § 182.0175, STATS., and whether Howard Cable failed to meet its burden of proof that Great Lakes acted negligently under the circumstances. Because Great Lakes' activity did not constitute excavation or demolition and because Howard Cable failed to present any evidence of negligence, the judgment is affirmed.

Great Lakes was digging dirt and stumps from around a house. The owners of the property directed Great Lakes to then haul this debris to a nearby ditch located along their private driveway and next to a railroad track. Great Lakes used a bulldozer to move the dumped debris into the ditch. Unknown to Great Lakes, Howard Cable's transmission cable was located underground in the ditch area near the railroad tracks. Although Great Lakes had called the Digger's Hot Line to locate any transmission facilities near the house, it made no attempts to locate any transmission facilities in the ditch area where it was dumping the debris from the house. Filling the ditch damaged Howard Cable's transmission lines located underground in the ditch area.

The first issue is whether filling the ditch with dirt and tree stumps constitutes excavation or demolition within the meaning of § 182.0175, STATS. A statutory interpretation is a question of law that this court reviews de novo. *State v. Anderson*, 178 Wis.2d 103, 107, 503 N.W.2d 366, 368 (Ct. App. 1993).

Section 182.0175(1)(b), STATS., defines excavation as any "operation in which earth, rock or other material in or on the ground is moved, removed or otherwise displaced by means of any tools, equipment or explosives and includes grading, trenching, digging, ditching, drilling, augering, tunneling, scraping, cable or pipe plowing, and driving." Section 182.0175(1)(a), STATS., defines demolition as any "operation by which a structure or mass of material is wrecked, razed, rended, moved or removed by means of any tools, equipment or explosives."

Howard Cable contends that although Great Lakes was not doing any digging, it was still engaged in excavation because it was moving and displacing earth when the bulldozer filled the ditch and then graded and scraped the dumped debris in the ditch. It also reasons that because Great

Lakes was knocking down trees at the house and then transporting them down the driveway to the ditch near the railroad tracks, its activity constituted demolition. This court is not persuaded. Quite simply, when Great Lakes filled the ditch, it did not demolish, wreck or raze any structure or mass. No material in or on the ground was moved, removed or otherwise displaced within the meaning of § 182.0175, STATS. The statute appears directed at persons who are digging or displacing the present landscape and requiring them to plan the excavation or demolition to avoid interference with any possible existing transmission facilities in that area. Here, Great Lakes added additional layers of soil to an already existing ditch. It was not excavating or demolishing existing landscape.

Because Howard Cable relied solely on this statute at the trial to prove that Great Lakes had a duty to first learn of any possible transmission facilities in the ditch area, it failed to present any other evidence which would demonstrate negligence on the part of Great Lakes. At the trial, Howard Cable had the burden to prove negligence on the part of Great Lakes. A review of the record shows that Great Lakes took the necessary precautions to learn of any possible transmission facilities around the house where it was excavating and simply dumped this debris in a ditch along the private roadway next to the railroad tracks. It had absolutely no notice that a TV transmission cable was running underground along the ditch or its depth. Consequently, the trial court could reasonably conclude that Howard Cable had failed to introduce sufficient evidence to demonstrate that Great Lakes had acted negligently when depositing debris in a ditch along a private roadway.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.