

**THE CITY OF OKLAHOMA CITY
OFFICE OF
THE MUNICIPAL COUNSELOR**

Council Agenda
Item No. IX. BO
1/30/2024

TO: Mayor and City Council

FROM: Kenneth Jordan
Municipal Counselor

Resolution authorizing the Municipal Counselor to waive service of process and to confess judgment without admission of liability in the amount of \$5,059 and all the costs of the action in the Oklahoma County District Court in the claim filed by Cox Communications, TCC. Ward 7.

Claimant's address:
PO Box 47604
Plymouth, MN 55447

This office acknowledges receipt of a claim from the above-referenced claimant in which claimant alleges that on October 16, 2023, claimant's buried cable was damaged by a Utilities crew while working to repair a water line at or near 2604 NW 121st Street in Oklahoma City. Claimant alleges damages in the amount of \$5,559.34, the cost of repairing the cable. Claimant has provided documentation in support of this amount. After negotiation, the Municipal Counselor's Office has agreed to recommend, and claimant has agreed to accept, \$5,059 as full and final settlement of claimant's claims.

Section 153(A) of the Governmental Tort Claims Act provides:

A. The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment subject to the limitations and exceptions specified in The Governmental Tort Claims Act and only where the state or political subdivision, if a private person or entity, would be liable for money damages under the laws of this state. The state or a political subdivision shall not be liable under the provisions of The Governmental Tort Claims Act for any act or omission of an employee acting outside the scope of the employee's employment.

51 O.S. 2023 Supp. §153(A).

According to the Oklahoma Supreme Court, a prima facie case of negligence is established by showing the following: "(1) a duty owed by the defendant to protect the plaintiff from injury, (2) a failure to properly exercise or perform that duty and (3) the plaintiff's injuries are proximately caused by the defendant's failure to exercise his duty of care." *McKellips v. Saint Francis Hospital, Inc.*, 741 P.2d 467, 470 (Okla. 1987) (citations omitted).

Proximate cause has two components - legal causation and cause in fact. *Id.* Cause in fact

is determined by the "but for" test: "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct." *Id.* (citations omitted). "Proximate cause" is also a synonym for "legal cause." BLACK'S LAW DICTIONARY, 1225 (6th Ed. 1990). To clarify this issue, the Oklahoma Supreme Court has further defined proximate cause: "The proximate cause of an event must be that which in a natural and continuous sequence, unbroken by an independent cause, produces the event and without which the event would not have occurred." *Gaines v. Providence Apartments*, 750 P.2d 125, 126-27 (Okla. 1987) (citations omitted).

The State of Oklahoma has promulgated the Underground Facilities Damage Prevention Act (UFDPA), 63 O.S. §§142.1-142.11, to govern excavations done on or near the location of any underground facility. The UFDPA purports to set out the duties of the facilities owners and those who would excavate around underground facilities. The Act requires:

Before an excavator shall demolish a structure, discharge any explosive or commence to excavate in a highway, street, alley or other public ground or way, on or near the location of an operator's underground facilities, or a private easement, such excavator shall first notify all operators . . . to determine whether any operators have underground facilities in or near the proposed area of excavation or demolition; Notice shall be given no less than forty-eight (48) hours, excluding the date of notification, Saturdays, Sundays and legal holidays, prior to the commencement of the excavation or demolition.

63 O.S. 2023 Supp. §142.6(A). Section 142.7 goes on to provide:

A. Except as provided in subsection B of this section, powered or mechanized equipment shall not be used directly over marked routes of underground facilities until the precise location of the underground facilities has been determined by the excavator, and then only after the facilities have been exposed and properly protected to avoid damage to them. If the precise location of the underground facilities cannot be determined by the excavator, the operator thereof shall be notified by the excavator so that the operator can determine the precise location of the underground facilities prior to continuing excavation or demolition.

63 O.S. 2023 Supp. §142.7(A).

In any case where excavation is done around underground facilities, whether or not the operator of those facilities has been asked to locate their facilities, the excavator must exercise reasonable care to prevent damage to those underground facilities.

This office is in receipt of information from the Line Maintenance Division of the Utilities Department regarding this incident. This information indicates that on or about the date alleged, a City water main broke, likely causing damage to the claimant's cable. During the City's repair of its main, the damaged cable was discovered; however, the claimant was not notified of the discovery. The buried lines were properly located.

Based on the above information and applicable Oklahoma law, it is the opinion of this office that this claim should be approved and that the Municipal Counselor should be authorized to confess judgment without admission of liability in the amount of \$5,059 and all costs of the action in the District Court. If Council agrees, a Resolution to that effect has been prepared.

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