THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jennifer B. McCoy, Circuit Judge

Court of Common Pleas Case No. 2020-CP-10-02430
Appellate Court Case No. 2022-001170

Chandler Construction Services, Inc.,

Appellant,

v.

Bellsouth Telecommunication, LLC d/b/a AT&T South Carolina,

Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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Appellant respectfully submits this Reply to Respondent's Initial Brief in support of its appeal in this matter.

ARGUMENTS

I. APPELLANT HAS DEMONSTRATED A JUSTICIABLE CONTROVERSY.

"Before any action can be maintained, a justiciable controversy must be present." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App.2003). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983); *see also Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (holding a justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights, and a positive legal duty which is denied by the adverse party).

The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy. *Waller v. Waller*, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951). The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. The Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationship. *Graham*, 319 S.C. at 71, 459 S.E.2d at 845; *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970); *Waller*, 220 S.C. at 223, 66 S.E.2d at 882; *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 16, 567 S.E.2d 881, 888–89 (Ct. App. 2002).

Appellant seeks a declaratory judgment regarding the effect and meaning of the South Carolina Underground Facility Damage Prevention Act (the "Act") codified at S.C. Code Ann. § 58-36-10, *et seq.* Appellant is an "excavator" and Respondent is an "operator" as defined by the Act. S.C. Code Ann. § 58-36-20 (10) & (17). The Act sets forth responsibilities and duties of operators of underground facilities and excavators performing work in the vicinity of existing underground facilities. As to operators, like AT&T, the Act provides in pertinent part two express obligations: "An operator or designated representative must provide to an excavator the following information: (1) The horizontal location and description of all of its facilities in the area of the proposed excavation and demolition. . . . and (2) *Any other information that would assist the excavator to identify, and thereby avoid damage to, the marked facilities*. S.C. Code Ann. § 58-36-70(a) (emphasis added).

"The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." *Sloan*, 356 S.C. at 547, 590 S.E.2d at 346. This matter satisfies all three doctrines of ripeness, mootness, and standing. "In determining a ripeness issue under the 'case or controversy' requirement of Article III of the United States Constitution, federal courts use a two-factor test: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Waters v. S.C. Land Res. Conservation Comm'n,* 321 S.C. 219, 227–28, 467 S.E.2d 913, 918 (1996). Here, the issue regarding the interpretation of the Act has become sufficiently crystalized to warrant judicial resolution, and there is nothing to be gained by refraining from exercising jurisdiction at this time.

As discussed in depth in Appellant's Brief, the obligations of the excavators imposed by the Act need interpretation to provide clear guidance to Appellant and Respondent as to the duties imposed upon them by the Legislature. The issues and facts set forth in this case are not

unique or singular in nature. This Court's consideration of the issues and facts of this matter would transcend this case and affect all "Excavators" and "Operators" regulated by the Act. This Court failing to exercise jurisdiction over the issues set forth in this appeal would impose hardship on Appellant, other excavators, and the judicial system because leaving the Act uninterpreted will result in unnecessary lawsuits and waste the resources of the parties and the judicial system.

" 'A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.'" *Seabrook v. City of Folly Beach*, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999) (*quoting Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). "In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001); see also Byrd, 321 S.C. at 431–32, 468 S.E.2d at 864 (clarifying that South Carolina recognizes an exception to the mootness doctrine allowing the court to retain jurisdiction when an issue is capable of repetition, yet evading review). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596. "Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Id.*

"Our courts have found the existence of a justiciable controversy, for example, in determining whether a vehicle insurance policy should be reformed to include underinsured motorist coverage, *Graham, supra;* in determining whether the consolidation of two

municipalities resulted in the merger of municipally owned utility systems, [*City of Columbia v. Sanders,* 231 S.C. 61, 68, 97 S.E. 2d 210, 213 (1957)]*;* in the determination of heirs' contingent or vested interest under a will, *Waller, supra;* in deciding whether the court should issue a writ of mandamus directing the sheriff to accept a non-cash bid at a judicial sale, [*Holden v. Cribb,* 349 S.C. 132, 137, 561 S.E. 2d 634, 637 (Ct. App. 2002)]*;* and in a dispute involving homeowners' challenge to amendments of their subdivision's restrictive covenants, *Pond Place Partners, supra." Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423–24, 593 S.E.2d 462, 466–67 (2004).

While the declaratory finding requested by Appellant would not provide Appellant with an award of damages in this case, the issues raised by Appellant are "capable of repetition, yet evading review,' and will affect the future conduct of the parties and others engaged in the business of underground utilities. Not only does the Act affect the Appellant and Respondent economically and in their day-to-day business operations, but the Act also governs the duties and obligations of Excavators and Operators throughout the State of South Carolina. Operators and Excavators rely on the Act to guide them in best practices to avoid controversy and damage to underground utilities. When the Act is interpreted incorrectly or inconsistently, operators, excavators and the general public are affected, potentially dangerously. Thus, a declaratory finding in this case is imperative to establish a rule for future conduct and is a matter of public interest. The issues presented in this case fall within a well-recognized exception to the mootness doctrine and is properly before the Court of Appeals.

The controversy is real and substantial; it is not contingent, abstract, or hypothetical. The interpretation of the Act and the parties' obligations and duties under it as they presently exist will be resolved by this Court's decision.

II. APPELLANT IS REQUESTING A FAIR INTERPRETATION OF THE ACT.

The interpretation of a statute is a question of law, which an appellate court is free to decide without deference to the trial court. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. *Mid–State Auto Auction of Lexington, Inc. v. Altman,* 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "The first question of statutory interpretation is whether the statute's meaning is clear on its face." *Wade v. Berkeley County,* 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Hitachi Data Sys. Corp. v. Leatherman,* 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words." *Sloan v. South Carolina Bd. of Physical Therapy Exam'rs,* 370 S.C. 452, 468, 636 S.E.2d 598, 606–07 (2006).

Respondent contends that Appellant, through its appeal, is seeking an advisory opinion and "additions, amendments, or uniformity to statutory language." This argument is erroneous and not supported by the record or Appellant's arguments. Appellant is plainly requesting this Court interpret the plan and unambiguous language of the Act.

In this case, the Trial Court erred in its interpretation of Section 58-36-70(a) of the Act. The Trial Court found that because the Act does not expressly "specify that the material of the

pipe must be disclosed" the Respondent fulfilled its duties under the Act. *See* Order. This interpretation erroneously limits the duties imposed by the statute on the operator without considering or exploring the legislative intent of Section 58-36-70(a). Despite requesting proposed orders in lieu of closing arguments, the Trial Court issued a Form 4 Order consisting of two short paragraphs with no guidance as to the Court's findings. Transcript at 135; Order.

What is considered "any additional information" under the statute? The facts and evidence presented to the Trial Court support Appellant's argument that additional information existed that would have assisted the Appellant in identifying the marked facilities. Transcript pgs. 27-28. The type of casing, known to AT&T, affects the excavation method implemented by Appellant. *Id*. Because AT&T didn't provide this "additional information" to Chandler, Chandler used excavation techniques under the assumption that the duct bank was the typical industry recognized concrete encased cabling. *Id.* Those excavation techniques would have been different had Chandler been provided the "additional information" in AT&T's possession and the underground facility would not have been damaged. *Id.*

Appellant is not requesting an advisory opinion. Rather, Appellant is requesting this Court fairly and reasonably interpret the plain language of the Act which action is well within this Court's authority and jurisdiction.

A. THE RESPONDENT FAILED TO PUT FORTH SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO FIND THAT IT COMPLIED WITH ITS DUTIES UNDER THE ACT.

As discussed above and in Appellant's Brief, the Act provides in pertinent part: "An operator or designated representative must provide to an excavator the following information: (1) The horizontal location and description of all of its facilities in the area of the proposed excavation and demolition. . . . (2) *Any other information that would assist the excavator to*

identify, and thereby avoid damage to, the marked facilities. S.C. Code Ann. § 58-36-70(a) (emphasis added).

Chandler does not dispute that AT&T complied with the first sub-part of the Act by providing the horizontal location of the underground facility through orange paint markings in the roadway placed by AT&T's contracted locator, USIC. *Id.* at 19. However, the second sub-part of the Act imposes a duty on AT&T as the operator to provide "[a]ny other information that would assist the excavator to identify, and thereby avoid damage to, the marked facilities. . . ." AT&T failed to comply with the obligations of an operator under the second sub-part of the Act. S.C. Code Ann. § 58-36-70(a)(2). Appellant, in its Brief, provided testimony of its corporate representatives, Mr. Brinkley and Mr. Bares, along with the testimony of USIC's Mr. Hines, which proves through clear and convincing evidence that AT&T failed to meet the second obligation of an operator under the Act. In return, AT&T offered no evidence, exhibits, witness testimony or otherwise, to show that they complied with Section 58-36-70(a)(2) of the Act. The opposite is in fact true, the exhibits, witness testimony and otherwise show that AT&T did not comply with Section 58-36-70(a)(2) of the Act.

However, Respondent argues that Appellant should have called AT&T for further and additional information regarding the facility. Respondents Brief p. ___. *See also* Transcript pg. 123. The Act imposes no such duty or obligation upon any excavator, and instead, specifically imposes the duty to provide additional information upon the operator, AT&T. *See* S.C. Code Ann. § 58-36-70(a)(2). Respondent further argues that the information regarding the composition material of the conduit and utility could not be ascertained within the statutorily imposed response timeframe. Respondent's Brief p. ___. However, Ms. Crews's testimony does not

support this argument, and Respondent's argument is erroneous and misleading. In support of its argument Respondent sets forth the following testimony of Ms. Crews:

> Q. All right. How could it possibly cause a delay if you had to provide this information to the excavators?
>
> How readily available would this information be?
>
> A. Well, even in the records, the engineering that -- the engineering records that I look at and that they're the same ones that USIC look at, look at, it doesn't generally tell us the material that was used in the -- on that cable. It will tell us that there's ducts. It will tell us how many ducts. It will tell us how long those are or how, you know,
>
> what kind of cables are inside the ducts. But not generally the material.
>
> That would be quite a feat. I had to go and look in the actual created records for the job that placed this cable in 1964 to find that it would of been terracotta --
>
> Q. All right.
>
> A. -- though I suspected, when I looked at it at 1964 as the placement date, that I suspected that it would be terracotta. But to find the words was -- took, took quite a bit of effort.
>
> Q. All right. Ma'am, you're aware of the requirements under the statute that AT&T is suppose to provide all information to excavators to assist them in preventing damages to the underground cables?

A. Yes.
Q. In this case, would you have provided any information requested had you been requested?
A. I would of told them that there was a duct run with a 2,400 bare cable there. There's also some -- and, and, by the way, there's actually more cable underneath that duct run. I mean I would of told them there's also a 96 fiber and a 46 fiber.

Transcript pp. 129-130

Ms. Crews only testified that obtaining the information regarding the material of the ducts would take "effort." She provides no testimony regarding the time needed to obtain the information. Therefore, Respondent's statements that retrieving the information would take longer than the imposed timeframe is unfounded and mere speculation. Contrarily, Ms. Crews testified that she knew the utility was a pressurized cable and that it can easily be damaged but that information was not provided to Appellant.

Q. Okay. So it only takes a small -- a small puncture can do a lot of damage?
Is that possible?
A. Absolutely. With pressurized cables, as long as they are -- they're still widely used throughout the United States because a cable in the ground, as long as it's not disturbed, will work just fine. But it is a type of balloon technology. If it's stabbed or cracked or anything like that, it will pop like a balloon and allow the air to escape.

Transcript pg. 104.

Q. Okay. Do you know whether Chandler Construction was notified that the cables were pressurized?
A. They were notified that there was a duct.
Q. Okay. Were they given information other than the marking to show that this was a pressurized cable?
A. It was in what was considered in 1964 a duct bank. So it was labeled a duct bank and that's what generally all pressurized cables are labeled. You have single underground cables and you have ducts. And single is a direct buried and duct means you have something that contains facilities inside, whether it's PVC or concrete or terracotta.
Q. And you testified earlier that terracotta's extremely brittle?
A. No, that's what Mr. Hines said.
Q. Okay. Do you know whether -- wouldn't you agree that it's in -- it would of been valuable information to Chandler to know that the duct run was encased with terracotta, which is extremely brittle, and that the cables were pressurized inside of that terracotta casing?
A. My understanding is that the excavator identifies that there's a facility and exposes it and works around it. Whatever the facility may be, whether it's concrete, duct, or PVC, the pit -- the terracotta duct would of never been harmed or lost pressure had the work not being done on top of it.
Q. Okay. It---
A. So it's actually very common material and a damage that occurs pretty regularly. So, I -- it's not my first or even my one hundredth case where terracotta was in the ground. For that matter, PVC gets crushed and broken. So---

A. You know, I do think that terracotta is old and the advancements in technology certainly has made an improvement of it. But that doesn't mean that the facility that was in the ground worked any less while it was undisturbed.
Q. And you heard Mr. Brinkley's testimony that he would of used a vac truck potentially in this area had he known that it was a papered faced cable and brittle terracotta.

So you don't think that's valuable information to the contractor to know what is underground so that they can choose the proper mechanism to extricate the area?
A. I think if he'd been hand digging he probably wouldn't have poked it.
Q. Okay. And what evidence do you have that they weren't hand digging?
A. The law says that they were hand digging. So I assumed that they were.

Transcript pgs. 113- 115. Ms. Crews's testimony clearly evidences that Respondent has additional information that would have assisted Appellant in identifying, and thereby avoiding damage to, the marked facilities, and Respondent failed to provide the additional information to Appellant as required by the Act. *See* S.C. Code Ann. § 58-36-70(A)(2).

Furthermore, Respondent attempts to rely on Section 53-36-100 of the Act to justify its failure to provide Appellant with additional information as required by Section 58-36-70(A)(2). Section 58-36-100 requires that when responding to design requests, operators must:

> (B) Within fifteen working days after a design request has been submitted to the notification center for a proposed project, the operator shall respond by one of the following methods:
>
> (1) designate the location of all facilities within the area of the proposed excavation **pursuant to Section 58-36-70(A);**

(2) provide to the person submitting the design request the best available description of all facilities in the area of proposed excavation, which may include drawings of facilities already built in the area, or other facility records that are maintained by the operator; **or**

(3) allow the person submitting the design request or any other authorized person to inspect the drawings or other records for all facilities within the proposed area of excavation at an acceptable location.

S.C. Code Ann. § 58-36-100(B)(1)-(3) (emphasis added).

This Section does not eliminate the excavators' duties under Section 58-36-70(A)(2). It merely provides operators alternative methods to respond to the design requests. The Section clearly incorporates all the duties set forth in Section 58-36-70(A) when an excavator chooses the response method described in Section 58-36-100(B)(1) which is the method Respondent chose in the situation at issue. Section 58-36-70(a)(2) of the Act does not exist in a vacuum and must be considered within the broader purpose and policy of the law. Section § 58-36-70(a)(1) provides with specificity what information is to be provided to excavators: The horizontal location and description of all of its facilities in the area of the proposed excavation and demolition. . . ." The Act continues in part (2) to include: *"*Any other information that would assist the excavator to identify, and thereby avoid damage to, the marked facilities.*"* When considered in context, rather than isolation, part (2) demonstrates that the Legislature did not intend to limit the duty of the operator to provide the specific information set out in part (1), but rather the Legislature intended to extend the duty of the operator to provide *any other information* to the excavator that would assist the excavator to identify, and thereby avoid damage to, the marked facilities.

The Trial Court erred in finding that the Respondent fulfilled its obligations under the Act. Therefore, this court should reverse the Trial Courts findings.

III. APPELLANT DOES NOT RELY ON INCONSISTENT POSITIONS IN ITS ARGUMENT.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 597, 748 S.E.2d 781, 788 (2013) (*quoting Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004)). "For the doctrine of judicial estoppel to apply, the following elements must be satisfied: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent" *Id.* at 598, 748 S.E.2d at 788.

Judicial Estoppel is not an applicable doctrine in this case as Appellant's testimony and legal positions are consistent. Respondent erroneously argues that Appellant has taken inconsistent positions relating to its excavation techniques. Respondent is correct in arguing that Appellant testified that it followed all of the duties and obligations imposed upon it by the Act. However, in an attempt to discredit Appellant, Respondent relies on Appellant's testimony that it would have employed a different excavation technique had Respondent provided it information regarding the material of the conduit and utility.

This testimony is neither inconsistent nor contradictory. Appellant performed its excavation using non-invasive excavation techniques as required by the Act as it was excavating within the tolerance zone of the marked facility. These techniques included shovels and probe rods as required by the Act. Appellant's testimony regarding alternative excavation techniques is

in no way an attempt to mislead the Court. Instead, the testimony regarding the safer alternative supports Appellant's position that the information regarding the material of the underground facility that was not provided by Respondent would have *assist[ed] the excavator to identify, and thereby avoid damage to, the marked facilities*. S.C. Code Ann. § 58-36-70(a) (emphasis added).

Respondent did not provide the fact that the duct was terracotta conduit, which multiple witnesses testified to be extremely brittle, to Appellant. Further, Respondent failed to provide the fact that the cable within the conduit was pressurized and susceptible to damage from noninvasive excavation tools to Appellant. Shane Brinkley, Appellant's project manager, testified that he would have implemented different excavation techniques such as a vacuum truck had he been given information sufficient to notify him of the delicate nature of the underground facility. Transcript pgs. 27-28. The evidence presented at trial supports that these details would have assisted Chandler in identifying the facility and thereby avoiding or significantly reducing potential damage to the marked facility. If the fact that the cable was encased in a brittle terracotta (clay) material and the conduit was pressurized and susceptible to damage from noninvasive excavation tools is not "any additional information" that the operator has an obligation under the act to provide, then sub-part 2 of Section 58-36-70(a) is obsolete.

In sum, testimony provided by Appellant regarding alternative excavation techniques does not contradict Appellant's testimony that it fulfilled its duties and obligations under the Act. Therefore, judicial estoppel is inapplicable to Appellant's arguments.

CONCLUSION

For all of the above reasons, Appellant, Chandler Construction Services, Inc. respectfully requests that this Court reverse the Circuit Court's Order denying its declaratory judgment action.

Respectfully submitted,

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Respondent.

PROOF OF SERVICE

I hereby certify that on March 27, 2023, I have served the **Appellant's Reply Brief** by email, pursuant to The Supreme Court of South Carolina's Order, dated May 6, 2022, to the attorneys of record as follows:

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