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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

1. Through the relief it seeks on appeal, does Chandler ask this Court to issue an advisory opinion based on facts not in this record?

2. Did the trial court properly find that the plain language of the Underground Facility Damage Prevention Act does not specify that operators must disclose the material comprising the pipe encasing the facility?

3. Did the trial court properly find as a matter of law that AT&T fulfilled its duties under the Underground Damage Prevention Act?

4. Is Chandler barred from asserting that it would have employed a different excavation technique because it prevailed on AT&T's counterclaim for negligence and that ruling was not appealed?

STATEMENT OF THE CASE

On June 2, 2020, Chandler Construction Services, Inc. ("Chandler"), filed a declaratory judgment action under the Uniform Declaratory Judgment Act, S.C. Code Ann. § 15-53-10 et seq., against Bell South Telecommunications d/b/a AT&T South Carolina, (or "AT&T"), to resolve a controversy stemming from damage to AT&T's underground facility.[1]

Chandler sought a declaration of the rights and obligations of the parties under the South Carolina Underground Facility Damage Prevention Act ("the Act"), codified at S.C. Code Ann. § 58-36-10 *et seq*. AT&T counterclaimed for negligence and sought payment for the damage sustained to its facilities by the excavation work done by Chandler and for the payment that AT&T previously demanded in its May 4, 2020, letter to Chandler.

A virtual bench trial was held on January 28, 2022, before The Honorable Jennifer B. McCoy in the State of South Carolina Court of Common Pleas for the County of Charleston. Upon hearing evidence from both parties, the trial court requested proposed orders. Ultimately the Court entered its own order and found that AT&T had fulfilled its statutory obligations to Chandler and denied the relief Chandler sought via its declaratory judgment complaint. (R. pp. 2-4). The Court then granted judgment for Chandler on AT&T's counterclaim for negligence. (*Id.*). On July 22, 2022, the trial court entered a Form 4 Order containing its judgment. (*Id.*).

[1] "Facility" means any underground line, underground system, or underground infrastructure used for producing, storing, conveying, transmitting, or distributing communication, electricity, gas, petroleum, petroleum products, hazardous liquids, water, steam, or sewerage. Provided there is no encroachment on any operator's right-of-way, easement, or permitted use and for purposes of this act, the following are not considered as an underground "facility": petroleum storage systems subject to regulation pursuant to Chapter 2, Title 44; septic tanks as regulated by Chapter 55, Title 44; swimming pools and irrigation systems. For purposes of this act, and provided there is no encroachment on any operator's right-of-way, easement, or permitted use, liquefied petroleum gas "systems" as defined in Section 40-82-20(8) do not constitute an underground "facility" unless such a system is subject to Title 49 C.F.R. Part 192. S.C. Code Ann. § 58-36-20

Chandler filed and served its Notice of Appeal on August 19, 2022. Chandler appeals the judgment in favor of AT&T on the declaratory judgment action and the Court's findings that the Act does not require disclosure of the duct encasement material, challenges the trial court's interpretation of the Act as erroneous, and further seeks for this Court to find that AT&T failed to fulfill its statutory obligations. Chandler does not appeal the trial court's judgment in Chandler's favor on AT&T's counterclaim for negligence.

STATEMENT OF FACTS

Chandler is a construction company that installs underground facilities and is an "excavator" as defined by the Act.[2] (Appellant Br. at 4). Prior to conducting its excavation for the laying of an underground waterline, Chandler, notified the operators[3] of underground facilities in the area so that those facilities could be marked pursuant to the Act. (R. pp. 35-36); *see also* S.C. Code Ann. § 58-36-70(A).

AT&T was one of the operators of facilities in the area where Chandler would be excavating. (R. pp. 190-192). AT&T contracted with the US Infrastructure Company ("USIC") to mark the location of underground AT&T cables and identify them as telecommunications cables. (*Id.*). AT&T provided USIC with location and description information so that the cable location could be properly marked, and the facility identified as telecommunications cables encased in a duct-bank. (R. pp. 103-104). AT&T complied with the statutory requirements within the three-working day[4] statutorily imposed time limit (*see* R. pp. 190-192) and Chandler commenced its underground excavation on or around March 13, 2020. (Appellant Br. at 6).

Specifically, USIC marked the AT&T facilities on February 21, 2020, by marking the location of the underground facilities in orange spray paint, to indicate that the facilities were telecommunications cables (R. pp. 190-192) and used industry standard diamond markings to

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[2] "Excavator" means any person engaged in excavation or demolition. S.C. Code Ann. § 58-36-20

[3] "Operator" means any person, public utility, communications and cable service provider, municipality, electrical utility, electric and telephone cooperatives, and the South Carolina Public Service Authority as defined in Titles 5, 6, 33, and 58, Code of Laws of South Carolina, 1976, who owns or operates a facility for commercial purposes in the State of South Carolina. S.C. Code Ann. § 58-36-20

[4] "Working day" means every day, except Saturday, Sunday, and legal holidays as defined by South Carolina law. S.C. Code Ann. § 58-36-20

communicate to Chandler that the facilities were encased in a "duct-bank."[5] (*See* R. p. 196). Pursuant to industry standard guidance, the size of the diamond marking indicating the presence of a duct-bank did not need to reflect the exact width of the duct-bank. (R. p. 195). USIC marked the general width of the duct-bank through an orange diamond mark, and flanked the marking on either side, indicating a width of approximately eighteen inches. (R. p. 204). The below exhibit from trial shows these markings:

[5] Chandler testified to the definition of "duct-bank" at trial. "It's a grouping, it's a bank, so it's more than one, it's a grouping of typically conduit which has some type of cable on the inside. It's transmitting something on the inside. So it's a casing, a rock, to protect – protective casing around the buried facilities." (R. p. 69).

(Def. Ex. 3 photo 6; R. 204).

Chandler acknowledged the markings and began its excavation of the area surrounding AT&T's facilities using a probe-rod [6] and shovels. (R. 73, 76). Chandler testified that it assumed the duct-bank was concrete, when in fact, the duct-bank was made of terracotta. (R. 40). Though original terracotta casings are still widely used throughout the United States, Chandler was unfamiliar with them. (R. pp. 77-78, 122-123). After completing the excavation and vacating the site, Chandler was notified later that evening by AT&T that there was damage to the telecommunications cables. (R. pp. 42-43). AT&T was notified of the damage by an alarm that monitored the interior pressure of the conduit that encases the cables. (R. 122). Upon inspection of the terracotta facility a day later, small puncture holes were found in the terracotta, which caused air to leak out of the conduit, rendering the pressurized cables useless, and allowing water to seep into the area that encased the cables. (; R. pp. 128-129). AT&T demanded Chandler reimburse it for the damages sustained by its facilities during Chandler's excavation through a May 4, 2020, demand letter. (R. pp. 163-165). Chandler subsequently denied its responsibility for the facility damage and initiated its declaratory judgment action on June 2, 2020. (*See* R. p. 7).

[6] At trial, Chandler did not testify to the physical composition of the probe-rod used. Industry standard probe-rods are long, metal rods with a t-like handle at one end and a sharp point at the other end that is used to penetrate soil and ground silt. *See generally* www.google.com, "What is a probe rod?" (last searched February 8, 2023).

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable but is determined by the nature of the underlying issue. *Nationwide Mut. Fire Ins. Co. v. Walls*, 433 S.C. 206, 211–12, 858 S.E.2d 150, 153 (2021), *reh'g denied* (June 3, 2021). "To determine the standard of review for a claim brought under the Declaratory Judgment Act, we look to the main purpose of the complaint, as reflected by the character of the claims, evidence, and relief sought." *Baugh v. Columbia Heart Clinic, P.A.,* 402 S.C. 1, 11–12, 738 S.E.2d 480, 486 (Ct. App. 2013). "An issue regarding statutory interpretation is a question of law." *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 789 S.E.2d 555, 558 (2017).

Further, in cases involving statutory interpretation, "[d]etermining the proper interpretation of a statute is a question of law, and this Court reviews questions of law *de novo*." *State Farm Mut. Auto. Ins. Co. v. Windham*, No. 2020-001693, 2022 WL 16627087, at *1 (S.C. Nov. 2, 2022) (citing *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). "The statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.d2d 877, 881 (2011) (*quoting S.C. State Ports Auth. v. Jasper Cnty.,* 368 S.C. 388, 398, 629 S.E. 624, 629 (2006)). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

"In an action at law tried without a jury the appellate court's standard of review extends only to the correction of errors of law." *Burton v. York Cnty. Sheriff's Dep't,* 358 S.C. 339, 346, 594 S.E.2d 888, 892 (Ct. App. 2004). "[T]he appellate court will not disturb the trial court's

findings of fact unless there is no evidence to reasonably support them." *Bell v. Progressive Direct Ins. Co*., 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014).

ARGUMENT

I. Through this appeal Chandler seeks for this Court to issue an advisory opinion on hypothetical matters not present on this Record.

As a threshold matter, by bringing this action under the Uniform Declaratory Judgments Act, Chandler bound the Court to only consider the justiciable controversy before it and could not seek to bind all operators in hypothetical future situations through an advisory opinion. *Accord Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593, S.E.2d 462, 466 (S.C. 2004) ("An adjudication that would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the Uniform Declaratory Judgments Act."); *see also Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (S.C. 2013) ("The Declaratory Judgments Act does not eliminate the case-or-controversy requirement."); *see also Pond Place Partners, Inc. v. Poole* 351 S.C. 1, 16, 567 S.E.2d 881, 889 (S.C.App. 2002) ("To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy; 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."); *see also Richland Cnty. Sch. Dist. 2 v. Lucas,* 434 S.C. 299, 306, 862 S.E.2d 920, 924 (2021) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions") (internal citation omitted)).

Chandler testified that it sought a "bigger picture" ruling that would impact "future cases." (R. pp. 80-81). Chandler went on to expound on the safety concerns surrounding the

possibility of hitting a gas line[7] that had an improper location marked while a school bus was driving by, and that it was "looking forward" to hold somebody accountable. (R. p. 90). But there was no gas line that was improperly marked in this instance, no school bus driving by, and no erroneous surface markings that mismatched the location or description of the facilities underground. The rights that Chandler seeks to enforce under the Declaratory Judgments Act are that of itself and AT&T, based on the facts of this excavation.

As detailed *infra*, AT&T properly marked the location of its facilities, properly identified them as being telecommunications cables, and further described them as being encased in a duct-bank. *See generally* Sec. II (A). Insofar as Chandler seeks additions, amendments, or uniformity to statutory language that would bind future actions of operators, or even future actions of AT&T outside of the instant action, then the proper venue for such action is the statehouse, not the courtroom.

II. The Circuit Court properly found that the plain language of the Act does not require disclosure of encasement material.

Chandler seeks a declaratory judgment regarding the duty of AT&T to provide the composition material of a duct-bank under interpretation of the Underground Facility Prevention Act. S.C. Code Ann. § 58-36-70 (A). The Act governs the relationship between operators and excavators and sets forth the duties of each when excavators are preforming subterranean work near operator facilities. As defined by the Act, AT&T is an "operator" and Chandler is an "excavator." *See supra* p. 4 n. 2-3.

A. <u>The Circuit Court did not err as a matter of law in finding that AT&T complied with its statutory requirements</u>.

[7] Nothing in the Record indicates that gas lines are ever encased in a duct-bank.

"[C]ourts are bound to give effect to the expressed intent of the legislature. While it is true that the purpose of an enactment will prevail over the literal import of the statute, this does not mean that this Court can completely rewrite a plain statute." *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 11, 760 S.E.2d 785, 790 (2014) (internal citation omitted). Though Appellants argue that the Court does not have to employ the cannons of statutory interpretation, reading the words as they are codified is necessary.

As the Circuit Court properly found, there is no express statutory requirement for operators to identify the materials that comprise the encasement of the facilities and finding otherwise would be reading language into the statute. (R. pp. 2-4). The statute is unambiguous insofar as it does not require disclosure of the material the encasements are made of. Though Chandler asserts that "the Court must give the words found in the statute their 'plain and ordinary meaning without resort to subtle or forced construction…" (Appellant Br. at 9), Chandler reads its composition material requirement into S.C. Code Ann. § 58-36-70 (A)(2). That section requires disclosure of "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)(2) (emphasis added). Here, AT&T provided all the information necessary for Chandler to identify the subterranean facilities. Once the facilities were properly marked by AT&T and identified by Chandler, by using the location and description information provided by AT&T, the duty to safely excavate around the facility using proper excavation tools as to not damage the facility fell to Chandler.

S.C. Code Ann. § 58-36-60 (E)(9) sets forth requirements that excavators must follow in the excavation process. Specifically, that only "non-invasive equipment specifically designed or intended to protect the integrity of the facility within in the marked tolerance zone…" may be

used. S.C. Code Ann. § 58-36-60 (E)(9)(a). This section also states that "reasonable precautions are taken to avoid any substantial weakening of the facility's structural or lateral support, or both, or penetration or destruction of the facilities *or their protective coatings.*" S.C. Code Ann. § 58-36-60 (E)(9)(a)(ii) (emphasis added). This language demonstrates that excavators know, or should know, that the use of penetrative tools, such as probe-rods, can cause damage to a facility's protective encasement—regardless of composition material.

When AT&T contracted with USIC to accurately mark the horizontal location of its facilities, describe the type of facility through proper spray paint color, and further identify that the cables are encased in a duct-bank, AT&T fulfilled its statutory requirement of providing location, description, and other information to identify the facilities so Chandler could avoid damage.

B. <u>When reading the Act as a whole, the Circuit Court properly found that AT&T complied with the Act</u>.

Precedent requires that "[t]he statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect. [The Court] should therefore not concentrate on isolated phrases within the statute. Instead, [the Court] read[s] the statute as a whole and in a manner consonant and in harmony with its purpose." *CFRE,* 395 S.C. 67, 74, 716 S.E.2d 877, 881 (internal citations omitted). Though Chandler outlines in its brief, "[s]ection 58-36-70(a)(2) does not exist in a vacuum" (Appellant's Br. at 10), it nevertheless urges this Court to look to a singular clause to find that AT&T did not comply with its statutory requirements.

AT&T does not urge the Court to look solely at S.C. Code Ann. § 58-36-70 (A)(2) to inform its analysis. When looking at the Act as a whole, the Court will find that the legislature

contemplated instances in which excavators would be provided with the type of information that Chandler seeks the Court to insert into S.C. Code Ann. § 56-38-70 (A).

In subsequent sections, the Act draws a distinction between the operator requirements set forth in S.C. Code §58-36-70 and the providing of historical data that could unveil the composition material of the facilities. 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).

Facially, this section differentiates between the identification requirements in S.C. Code Ann. § 58-36-70 and "the best available description…include[ing] [sic] other facility records maintained by the operator." S.C. Code Ann. § 58-36-100 (B)(1)-(2). Notably, the "best available description" language is accompanied by a statutorily imposed time frame that is five times longer than the timeline imposed by S.C. Code Ann. § 58-36-70. *See* S.C. Code Ann. § 58-36-100 (B).

Had the legislature sought to require that operators provide excavators with the "the best available description" including historical facility materials records maintained by the operator,

then it easily could have made these requirements uniform across the Act. In the above instances where the legislature required more specificity, it provided operators more time to provide the information. Contrasted with the section at issue in this matter, the legislature allowed more general information but on a shorter time frame. This Court cannot replace its will for that of the General Assembly. Had the General Assembly wanted the specificity Chandler seeks this Court to impose, it would have been more specific and provided more time as it did in other code sections in the Act. As a matter of law, the legislature did not do what Chandler now wants. Lawmaking rests with the legislature and here AT&T complied with that law as it exists.

S.C. Code Ann. § 58-36-100(B)(1) further provides insight as to what the legislature intends for S. C. Code Ann § 58-36-70(A) to do, which is "designate the location of all facilities within the area of the proposed excavation." Importantly, this section illuminates for the Court that the purpose of 58-36-70(A) is to *designate the location* of the subterranean facilities. When reading the Act as a whole, AT&T's compliance with its statutory duties is clear, and the Circuit Court's finding that AT&T complied, as a matter of law, with its duties under the Act should remain undisturbed.

C. Reliance on Mr. Barnes' interpretation of the statute was properly disregarded by the Circuit Court.

South Carolina courts have long held that testimony regarding the negotiations preceding legislative enactment is inapposite when ascertaining the intent of the legislature. "It is a settled principle in the interpretation of statutes that even where there is some ambiguity or some uncertainty in the language used, resort cannot be had to the opinions of legislators or of others concerned in the enactment of the law, for the purpose of ascertaining the intent of the legislature." *Kennedy v. S.C. Ret. Sys*., 345 S.C. 339, 353–54, 549 S.E.2d 243, 250 (2001) (*quoting Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 371, 20 S.E.2d 813, 817 (1942)).

Chandler's reliance on Mr. Barnes' participation in drafting negotiations for the Act to ascertain the intent of the legislature does not matter. Even if Mr. Barnes was privy to the negotiations at the statehouse when this legislation was being considered, the statutory language is unambiguous, and the Court need not delve further into the interpretation of the legislative intent. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Rainey*, 341 S.C. at 85, 533 S.E.2d at 581 (*citing*, Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992). Importantly, South Carolina appellate courts have repeatedly reiterated that "[The Court] do[es] not sit as a super-legislature to second guess the wisdom or folly of decisions of the General Assembly." *Keyserling v. Beasley,* 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996).

III. AT&T put forth sufficient evidence for the court to find that it complied with its duties under the Act as a matter of law.

"In an action at law tried without a jury the appellate court's standard of review extends only to the correction of errors of law." *Burton,* 358 S.C., at 346, 594 S.E.2d, at 892. "[T]he appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Bell v. Progressive Direct Ins. Co*., 407 S.C., at 576, 757 S.E.2d, at 404. Chandler argues that the Circuit Court erred as a matter of law by finding that AT&T complied with its duties under the Act, but this argument fails in light of the evidence AT&T presented at trial.

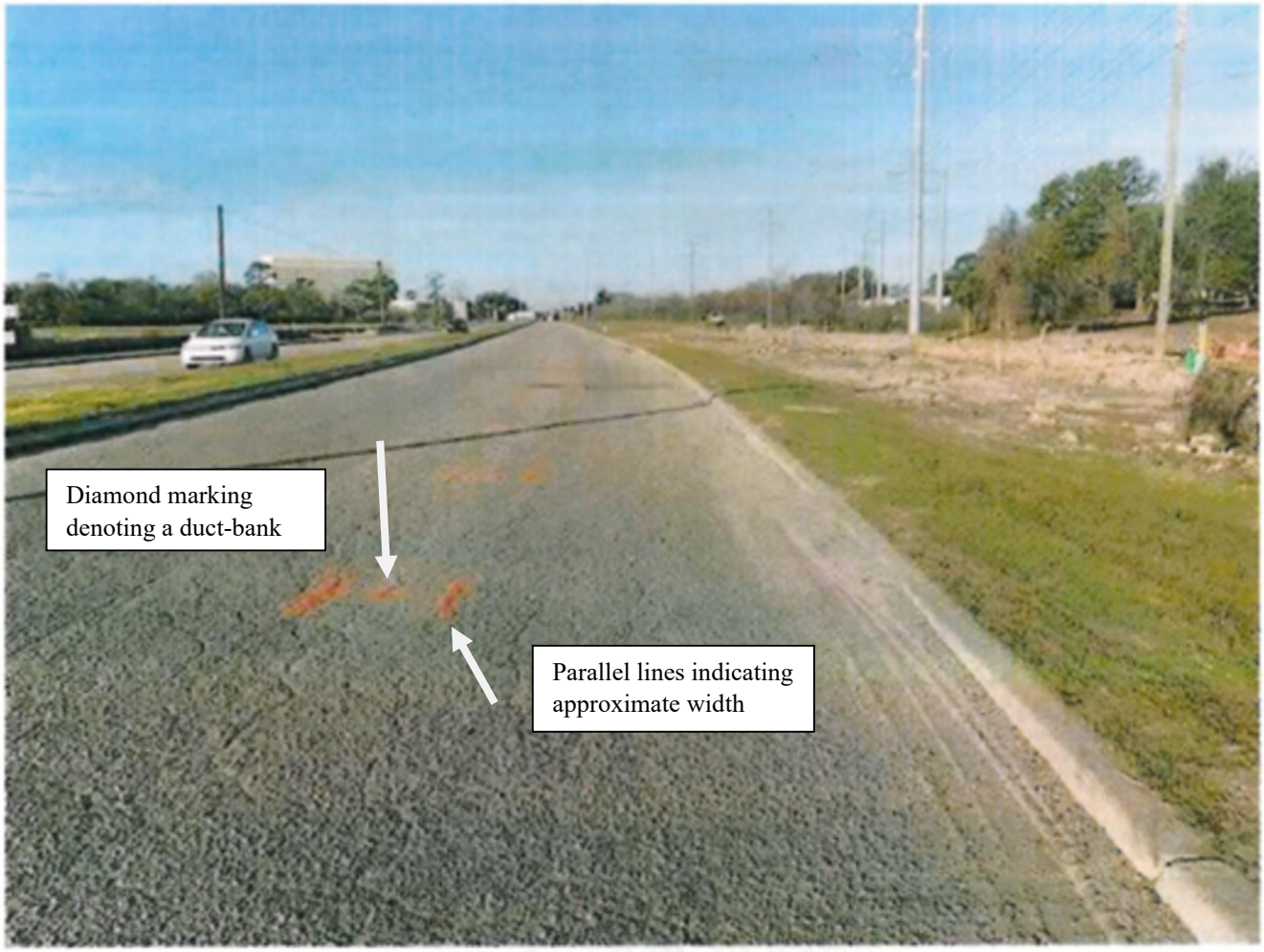
The Act provides:

> (A) 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 or demolition. The location shall be marked by stakes, paint, flags, or any combination thereof as appropriate depending on the site

> conditions of the proposed excavation or demolition using the APWA Uniform Color Code. If the diameter or width of the facility is greater than three inches, the dimension of the facility will be indicated at least every twenty-five feet in the area of the proposed excavation or demolition. Operators who operate multiple facilities in the same trench shall locate each facility individually.
>
> (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)(1)-(2).

AT&T identified the facility as telecommunications cables by marking the pavement with orange spray paint; AT&T also provided Chandler with the horizontal location of its facilities and approximate width by using parallel surface markings, and further described, through industry standard symbols, that the telecommunications cables were encased in a duct-bank. (*See* R. p. 204).



(*Id*.) (with notes and arrows inserted for demonstrative purpose).

It is undisputed that Chandler identified the underground facilities based on the information that was provided by AT&T. (R. pp. 76-77). Chandler testified to this fact at trial and confirmed that it used the information provided by AT&T to locate and identify the underground facilities. Chandler's witness described this process on direct examination:

> Q. Looking at (A)(1), we looked at the photo that showed identification markings on the pavement. From color standpoint, it was orange which represents telecommunications.
>
> A. That's correct.

(R. pp. 76).

Chandler further testified that the additional information, the diamond marking, was indicative of a duct-bank (R. pp. 77). Nevertheless, Chandler maintains that the Circuit Court erroneously found that AT&T complied with the Act. Chandler further testified that they had never encountered a terracotta facility so there is not a sufficient basis for the assertion that such information would have assisted in avoiding damage.[8] (; R. pp. 77, 78).

Chandler has provided no evidence that AT&T knew at the time of the request that the encasement was made of terracotta and subsequently would have been able to provide that information within the statutorily imposed timeframe. *See* S.C. Code Ann. § 58-36-70 (B)(1).

Conversely, AT&T offered evidence that information regarding the composition material of the duct-bank was not readily available to it and therefore it did not have access to that information within the statutorily imposed response timeframe. Kelly Crews testified to the following for AT&T:

> Q: All right. How could it possibly cause delay is you had to provide that information to the excavators?
>
> 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 looks at, it doesn't generally tell us the material that was used in the – on the cable. … But not generally the material. That would be quite the 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 have been terracotta
> [sic]
>
> A: … I suspected it would be terracotta. But to find the words, took quite a bit of effort.

[8] Chandler also testified that they would have employed a hydro excavation had they known that the facility was terracotta, but nothing in the record demonstrates that this is company policy for terracotta facilities. (R. p. 47). Chandler further testified that hydro excavation is not a standard excavation procedure due of the cost and time involved. (*Id.*).

(R. pp. 148-149).

This testimony, coupled with AT&T's affirmative response of properly marking the location and describing the type of facility and its encasement, is reasonably sufficient evidence for the Circuit Court to find that AT&T complied with its statutory duties. Because Chandler has not shown by a preponderance of the evidence that there was any additional information that could have been shared before the operator's marking deadline, they fail to meet the threshold evidentiary requirement that could warrant overturning the Circuit Court's evidentiary findings that form the basis of its ruling that AT&T complied with the Act as a matter of law.

As indicated by the Locate Request, AT&T properly complied with the Act by marking its underground facilities on February 21, 220, which was within the statutory timeframe. (*See* R. pp. 190-192). If AT&T had delayed its response by not responding within the statutorily imposed timeframe, it could have faced civil penalties brought by the state at the request of Chandler under a *parens patriae* action, as allowed under the Act. S.C. Code Ann. § 58-36-120.

Therefore, AT&T provided the available information for Chandler to identify, locate and know the description of AT&T's facilities within the three-day limit as to not expose itself to action on behalf of the state for not complying with the Act. However, other operators in the excavation area had not properly complied with the Act and information for those facilities was outstanding up to and until the day of excavation. (*See* R. pp. 190-192). The timeline of response times compared to when Chandler commenced its excavation of the site demonstrates that Chandler had ample opportunity to request any additional information from AT&T if it determined that the information provided by AT&T was insufficient to identify and locate the facilities.

Within the surface markings that indicated the location and description of the facilities, AT&T maintained a manhole for access to those facilities. (R. p. 148). Had Chandler questioned the sufficiency of the information that was provided by AT&T when it began its excavation, Chandler could have contacted AT&T through the telephone number engraved on the manhole at the excavation site. The manhole provided a direct contact line to AT&T for information regarding these facilities, as testified to by Kelly Crews for AT&T:

> A: There was a manhole there. If they worried about what might be under there they could of called the number…. You can call an engineer to come out, you know, if you're interested in not, you know, doing the damage…

(R. p. 148).

(*See also* R. p. 205) (as indicated by inserted arrow marking).

Where AT&T has shown that there was evidence to reasonably support the findings of fact and interpretation of the Act as a matter of law by the Circuit Court, this Court should affirm

the Circuit Court and find that there is sufficient evidence to show that AT&T complied with its duties under the Act as a matter of law.

IV. Chandler is prohibited from asserting that it would have employed a different excavation technique because it was successful in defending AT&T's negligence claim.

"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.,* 405 S.C. at 598, 748 S.E.2d at 788 (2013).

Here, Chandler has taken inconsistent positions regarding their duties under the Act. At trial, Chandler maintained its position that it fulfilled its statutory obligations and that it "didn't do anything wrong." (R. p. 67). On appeal, however, Chandler maintains that the excavation technique it employed would have been different if it knew the encasement material, even though at trial it categorized the probe-rod and shovels as "non-mechanized" hand equipment that was safe for the excavation. (R. p. 71). Chandler was successful in its position at trial and received the benefit of prevailing in the negligence counterclaim brought by AT&T. This inconsistency misleads the Court to believe that they did not know of a safer alternative at the

time of excavation, when in fact Chandler did know of a safer alternative excavation method but chose to not employ it due to "cost and time." (R. p. 47). These positions are totally inconsistent insofar as they are opposite of one another. Chandler either knew that there was a safer alternative for excavation around the telecommunications facilities, or they didn't. The negligence ruling is final, as it has not been appealed, and Chandler may not now assert that their excavation technique would have been different when they were successful at the trial court level in maintaining that they "did everything right." Therefore, Chandler should be estopped from its reliance on this position.

CONCLUSION

Chandler seeks for this Court to bind future operators for hypothetical controversies that are outside the scope of this case. It further seeks this Court to overturn the Circuit Court's plain reading of the Act as an erroneous application of law and determine that AT&T did not comply with its statutory duties. This Court should disregard these positions as being outside the scope of this controversy, contrary to the plain text of the Act, against how this Court interprets statutes as whole, and against the weight of the evidence.

Additionally, Chandler's position that it would have employed a different excavation technique are in opposition to the lower court's finding that it was not negligent in its excavation. This Court should judicially estop Chandler from asserting this position.

AT&T respectfully asks that this Court uphold the Circuit Court in finding that it complied with its duties under the Act, and that the Act does not require disclosure of duct-bank encasement material if that information is not within the reach of operators within their statutorily imposed timeframe to respond to an excavator's locate request.

Respectfully submitted,

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May 16, 2023
Columbia, South Carolina

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 No. 2020-CP-10-02430
Appellate Case No. 2022-001170

Chandler Construction Services, Inc .....

Appellant,

v.

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

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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Proof of Service

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for Bellsouth Telecommunications, LLC d/b/a AT&T South Carolina, do hereby certify that I have served all counsel and/or parties in this action with a copy of the pleading(s) hereinbelow by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

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