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SC Court of Appeals

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 APPELLANT

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II. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN FINDING THAT AT&T FULFILLED ITS DUTIES UNDER THE ACT.

STATEMENT OF THE CASE

This is an appeal from the Circuit Court's denial of its claim for declaratory relief by Order dated July 20, 2022. (R. pp. 2-3) This claim was initiated by Chandler Construction Services, Inc. ("Appellant" or "Chandler") against Bellsouth Telecommunications LLC d/b/a AT&T South Carolina ("Respondent" or "AT&T") on June 2, 2020, under the Uniform Declaratory Judgment Act, S.C. Code Ann. §15-53-10 *et seq.* to determine and resolve questions of actual controversy related to obligations of an Operator and Excavator under the South Carolina Underground Facility Damage Prevention Act ("Act"), codified at S.C. CODE ANN. § 58-36-10, *et seq* and the application of those obligations to excavation performed by Chandler on or about March 13, 2020, along McMillan Ave. in North Charleston, South Carolina. *See* Complaint.

Chandler asserted it fully complied with the obligations of an Excavator under the Act and therefore cannot be held liable for property damage to AT&T's underground facility. (R. p. 9 ¶ 15). Chandler further sought declaratory judgment from the Court that AT&T did not comply with its obligations as an Operator under the Act and, therefore, could not seek recovery of property damages from Chandler, as an Excavator. (R. p. 9 ¶ 19). AT&T asserted counterclaims against Chandler for negligence claiming that Chandler damaged AT&T's underground utilities that had been properly located under the Act. (R. p. 14 ¶¶ 3-4). Chandler denied having damaged the underground utilities and any liability associated therewith. (R. pp. 17-19).

A hearing on the merits and oral arguments were heard in this matter by The Honorable Jennifer B. McCoy in a non-jury, virtual proceeding on January 28, 2022. In lieu of closing arguments, Judge McCoy requested each party submit Proposed Orders within twenty (20) days of the close of the hearing. (R. p. 135, lines 3-10). A Form 4 Order was entered by the Court on

July 22, 2022, denying Chandler's request for declaratory relief and denying AT&T's counterclaim for negligence. (R. pp. 2-3).

Chandler filed its Notice of Appeal on August 19, 2022, and served the same on counsel of record for AT&T. Chandler appeals the Circuit Court's ruling that Chandler failed to prove its material allegations by a preponderance of the evidence and the Court's finding that AT&T met its duties as an Operator under the Act is erroneous. Chandler further appeals the Circuit Court's interpretation of S.C. Code Ann. § 58-36-70(A)(2) finding that the Act does not require AT&T to provide the Excavator with additional information as to the type of casing around the underground facility when that additional information would assist the excavator in identifying, and thereby avoiding damage to, the marked facility. In this case, the Circuit Court determined that the Act does not specify that the material of the pipe must be disclosed. (R. p. 3). This limited interpretation of the Act is misconstrued and inconsistent with the intent of the Act and therefore is erroneous as a matter of law.

STATEMENT OF THE FACTS

Appellant is an underground utilities construction company. On or about March 13, 2020, Chandler was performing excavation work along McMillan Ave in North Charleston, South Carolina. (R. p. 8 ¶ 5). Pursuant to industry standards and the Underground Facilities Damage Prevention Act, S.C. Code Ann. § 58-36-10 et seq. (the "Act"), Chandler provided timely notice to all companies who may have underground facilities in the area of its intent to excavate by calling in a locate to the notification center. (R. p. 8 ¶ 6). In response to the notice given by Chandler, AT&T contracted US Infrastructure Company, LLC ("USIC") to mark the horizontal location of AT&T's underground facilities. (R. p. 101, line 1 – p. 104 line 9). Michael Hines of USIC testified that AT&T provided USIC with the location of AT&T's communication facility but did not provide information regarding the type of cable or conduit present at the location. (R. p. 109, lines 8-21). The pavement was marked in orange paint with markings that demonstrated the existence of a duct bank containing communications utilities. (R. p. 19, lines 6-19). However, the pavement marking in and of itself does not contain detail as to the identity of the communication company to which the utilities belonged, the type of casing around the duct bank, or the specific width of the duct bank. (R. p. 20, lines 2-16). AT&T did not provide any additional information to Chandler directly or through any other entity regarding the underground facility beyond the orange pavement markings indicating its horizontal location. (R. p. 20, lines 2-16); (R. p. 109, lines 8-21). AT&T admits to having information related to the type of casing around the duct bank, which was installed in 1964, that the Excavator was not privy to, including the fact that this duct bank was in a terracotta containment with air pressure cabling. (R. p. 122, lines 2-5). This knowledge withheld by AT&T from the Excavator is additional information which would assist an excavator in identifying, and thereby avoiding damage to, a

marked facility. (R. p. 46, line 22, p. 47 line 14). Such information is pertinent to the mechanism of excavation employed by the excavator in the marked location. *Id.* For example, terracotta is an extremely fragile material prone to cracking. (R. p. 109, lines 18-25). According to Shane Brinkley of Chandler, had he known that this was a terracotta facility with paper fibers inside of it instead of a traditional concrete duct bank as the identification markings showed, he would have used an all-hand excavation technique or hydro excavation with a Vac Truck. (R. p. 46, line 22, p. 47 line 14).

In reliance on the information that was provided by AT&T, Chandler commenced excavation using non-invasive equipment, which included shovels and a probe rod, as allowed by the Act. (R. p. 39, line 13 - p. 40, line 3). Chandler visually identified underground facilities near the locations marked by USIC which were contained in a terracotta casing and were approximately twelve (12) inches wide. (R. p. 40, lines 4-15); (R. p. 85, lines 1-10). Kelly Crews, a representative of AT&T, testified she was able to go back through AT&T's archive records to determine that the facility was installed in 1964 and was terracotta encased conduit containing an air pressure cable which can be damaged by noninvasive excavation tools such as shovels and probe rods. (R. p. 148, line 19 - p. 149, line 5). The information within Ms. Crews' knowledge would have assisted Chandler in its excavation to identify and avoid damage to the marked underground facility. (R. p. 46, line 22, p. 47 line 14). However, this additional information was not provided by AT&T to Chandler in accordance with the affirmative obligations AT&T has under the Act, as an Operator. AT&T admits that had Chandler been hand digging, it probably would not have poked the underground facility with a probe rod, which allegedly caused the damage. (R. p. 134, lines 5-12). Had Chandler known the information

within AT&T's knowledge, Chandler would have utilized hand digging as testified to by Shane Brinkley. (R. p. 46, line 22, p. 47 line 14).

Once Chandler visually identified what it believed to be the marked facilities, it proceeded with its work using reasonable precautions to not interfere with the existing facilities as required by the Act, including installation of a water line above the existing facility. (R. p. 40, line 23 – p. 42 line 23). Shane Brinkley, Chandler's project manager, testified he did not observe damage to the underground facility during or after Chandler's noninvasive excavation. (R. p. 43, line 24, p. 44, line 7). Kelly Crews, AT&T's representative, testified that an alarm sounded notifying AT&T of a failure indicative of damage to an underground facility at or around 11:13 a.m. on March 13, 2020, in an area she understood Chandler was working based on the sole fact that Chandler had called in a locate for that area. (R. p. 132, lines 1-16); (R. p. 136, line 21 - p. 138, line 4). The following day, AT&T employed subcontractors to travel to the location indicated by the alarm to excavate and patch any identified damage to AT&T facilities. (R. p. 43, line 16, p. 44, line 24). No subcontractor or AT&T employee testified as to where damage was found in the actual AT&T facility or the extent of the damage that had been identified. Michael Hines of USIC testified he was retained by AT&T to perform an investigation of the AT&T facility. (R. p. 104, lines 19 - 22). During his investigation, Mr. Hines took photos of the excavation site. (R. p. 110, line 24, p. 111, line 5). Mr. Hines did not document any visual damage to the AT&T facility and testified that he did not observe any damage to the AT&T facility. (R. p. 112, lines 2-22). Additionally, at the time of his investigation, AT&T's subcontractor had already begun excavation work in the area using invasive mechanical equipment. (R. p. 111, lines 9-12). Yet, on March 31, 2020, AT&T notified Chandler via letter that damage had occurred to its facility during Chandler's excavation process. (R. p. 162).

AT&T's notice did not include documentation evidencing the alleged damage AT&T indicated had been done to its underground facility. *Id.* Chandler disputed responsibility for damage to AT&T's facility. On or about May 4, 2020, Chandler received an invoice from AT&T demanding payment of Nine Thousand Four Hundred Fifty-Six And 42/100 ($9,456.42) Dollars for damages allegedly caused by Chandler during its March 13, 2020, excavation work along McMillan Ave. (R. pp. 163-165).

Chandler filed a complaint requesting a declaratory judgment that AT&T be barred from seeking damages from Chandler because AT&T failed to comply with the South Carolina Underground Facility Damage Prevention Act. (R. pp. 5-11). AT&T counterclaimed asserting negligence and seeking damages from Chandler in the amount of $9,456.42. (R. pp. 12-16). Chandler defends AT&T's counterclaim by requesting a declaration from the Court that an excavator, like Chandler, cannot be held liable to an operator, like AT&T, when the excavator fully complies with the requirements of the South Carolina Underground Facility Damage Prevention Act and the operator fails to fully comply with the operator's obligations under the same Act. (R. p. 9, ¶ 20).

STANDARD OF REVIEW

It is settled that the Declaratory Judgment Act, S.C. Code Ann. Section 15-53-10 *et seq.* is to be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights in relationships. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 801 (Ct. App. 2002). Where the declaratory judgment action seeks affirmative relief, plaintiff must prove its material allegations by a preponderance of the evidence. *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 446 S.E.2d 417, 421 (1994). "It is generally held that the jurisdiction to render a declaratory judgment is

discretionary, and should be exercised with great care, and with due regard to all the circumstances of the case." *Loadholt v. South Carolina State Budget & Cont. Bd.*, 339 S.C. 165, 528 S.E.2d 670, 672 (Ct. App. 2000); *Southern Ry. Co. v. Order of Ry. Conductors of America*, 210 S.C. 121, 134, 41 S.E.2d 774, 779 (1947). A suit for declaratory judgment is neither legal nor equitable but is determined by the nature of the underlying issues. *See Loadholt*, 528 S.E.2d at 672; *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781, 782 (1991).

This action seeks a declaratory judgment regarding the effect and meaning of a statute. S.C. Code Ann. Section 15-53-30 specifically provides for such an action:

> Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a *statute***,** municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, *statute***,** ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-30 (emphasis added). This action is an action of law which was tried without a jury.

Because declaratory judgment actions are neither legal nor equitable, the standard of review depends on the nature of the underlying issues. *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct.App.2003) (citations omitted). "The interpretation of a statute is a question of law." *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (*citing CFRE, L.L.C. v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, " '[w]hen an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts.' " *In re Estate of*

Boynton, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct.App.2003) (*quoting WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000)). In such a situation, the appellate court does not have to defer to the trial court's findings. *Id*. at 301–02, 584 S.E.2d at 155 (citations omitted).

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE RESPONDENT FULFILLED ITS DUTIES UNDER THE ACT DESPITE THE UNDISPUTED FACT THAT AT&T HAD INFORMATION WHICH WOULD ASSIST AN EXCAVATOR IN IDENTIFYING, AND THEREBY AVOIDING DAMAGE TO, A MARKED FACILITY.

Chandler sought 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.* Chandler is an "excavator" and AT&T 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 cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *CFRE,* , 395 S.C. at 74, 716 S.E.2d at 881 (*citing Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In doing so, the Court must give the words found in the statute their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id*. Thus, if the words are unambiguous, the Court must apply

their literal meaning. *Id*. "Assist" is not an ambiguous term. Each meaning of the term "assist" demonstrates an act of helping or providing supplementary support or aid. The act requires affirmative action on the part of the operator to provide the excavator any information, meaning all information, which provides supplementary support or aid that helps the excavator identify the underground facility and thereby avoid causing damage to it. S.C. Code Ann. § 58-36-70(a). AT&T provided no such information to Chandler, despite AT&T having information in its possession that would provide supplementary support or aid to Chandler and likely eliminated damage being caused to the underground facility. (R. p. 46, line 22, p. 47 line 14).

The plain language from the Legislature leaves no room for the courts to employ the rules of statutory construction to obfuscate the directive. *See State v. Sweat*, 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Ct. App. 2008) (courts should first look to the words used); *see also Univ. of S. Cal. v. Moran*, 365 S.C. 270, 275, 617 S.E.2d 135, 138 (Ct. App. 2005) ("The cardinal rule of statutory interpretation is to determine the intent of the legislature."). Thus, the trial court's implementation of the rules of statutory interpretation was neither necessary nor proper. *See Sweat*, 379 S.C. at 375, 665 S.E.2d at 650 ("If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning."); *see also Lazicki-Thomas v. S.C. Budget & Control Bd.*, 378 S.C. 72, 75, 661 S.E.2d 374, 375 (2008) (affirming there is "no need to resort to the rules of statutory construction to determine the meaning of [a] term [when] the language was clear, plain and unambiguous"). The Act is unambiguous and clear, which eliminates the trial court's need to find that the type of pipe is not required to be given by the operator to the excavator to fully comply with the operator's obligation under the Act. The type of pipe is clearly "additional

information" and information on the type is clearly useful for the excavator to plan the type of excavation method that will be employed.

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.

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. (R. pp. 2-4). 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. (R. p. 135, lines 3-10); (R. pp. 2-4).

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. (R. p. 45, line

22 - p. 46, line 10). 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. (R. p. 47, lines 8-14). 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.*

The Trial Court erred in its interpretation of the Act limiting the duties imposed upon the operator. Therefore, this court should reverse the Trial Courts findings.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT AT&T FULFILLED ITS DUTIES UNDER THE ACT.

As discussed above, 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). Chandler, through the testimony of its corporate representatives, Mr. Brinkley and Mr. Bares, along with the testimony of USIC's Mr. Hines,

proved through clear and convincing evidence that AT&T failed to meet the second obligation of an operator under the Act.

At trial, Mr. Brinkley testified as follows:

Q. And did AT&T or the operator of this utility provide you any additional information beyond these markings regarding the underground facility?
A. Absolutely not.
Q. And after you observed, visually observed these markings, how did you proceed at the site?
A. Removed the assault and the rock, started hand excavating down by probing and digging till we found the facility.
Q. And how did you perform that digging?
A. By shovel and probed rod.

(R. p. 39, lines 13-23).

Q. And when you were doing that, what we call noninvasive excavation, what were you expecting to find underneath?
A. A concrete duct bank.
Q. And what did you find during your excavation?
A. A terracotta facility.

(R. p. 40, lines 4-8).

the markings show.

Q. And if you had given this additional information regarding this terracotta facility and the pulp cable or paper fiber as you recall it, what would you have done differently during the excavation?

A. All hand excavation with shovels or either hydro excavation.

Q. What -- can you explain hydro excavation to me?

A. A shop vac on a truck that just sucks the dirt out and removes it.

(R. p. 47, lines 1-10).

At trial, Mr. Bares testified as follows:

A. The, the marks on the ground are important, and the accuracy of those marks are important. And what those marks tell our excavators are critical from a standpoint of us being able to properly physically locate what buried facilities we have to work around.

There are numerous occasions where marks do not reflect the accuracy of what's in the ground, and that information, that misleading information or incomplete information, can have catastrophic consequences. So, I wanted to stress the importance of the accuracy of what we have and the information of what we have is critical for us to safely do our job.

(R. p. 59, lines 2-13).

Q. And you heard Mr. Brinkley's testimony and you've seen

the pictures.

Is what was found in the, in the field represented by these orange markings?

A. Not in our experience.

Q. Why not?

A. It was a terra -- they keep saying terracotta. It's a clay vault basically, clay, clay run conduit or casing that we don't know what's inside of it. We just -- just like if it were an actual duct bank, we typically hit concrete or a bundle of conduit.

Q. And is there anything that you believe Chandler Constructions crew could have done differently?

A. No, sir.

(R. p. 71, line 25 – p. 72, line 13).

Q. All right. And now let's look at 15-36-70, responsibilities of the facility operators.

Okay?

A. Yes.

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

No dispute over that?

A. That's correct.

(R. p. 76, lines 9-18).

Q. In your experience in this industry, how common is terracotta casing?
A. I have never seen it.
Q. In Section 58-36-70(A)(2), was Chandler Construction provided with any other information from AT&T other than the pavement markings?
A. No.

(R. p. 78, lines 18-24).

Q. What additional information do you believe should of been provided to Chandler Construction as it relates to this marked facility?
A. That it was a -- clay encased, I don't even know the terminology, pulp -- whatever the bill said, pulp fiber or pulp cable, that could be easily damaged.
Q. And you testified earlier that you had paid AT&T in the past when there has been damage to underground facilities, correct?
A. That's correct.
Q. Why did you dispute this claim?
A. Cause we weren't at fault. There was no evidence of anything we did internally wrong and we fully complied with the law and the intent of the law.

(R. p. 79, lines 9-22).

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. The testimony of Ms. Crews and Mr. Hines confirms information AT&T provided to USIC and the notification center was limited to the location of the underground

facility and that it was contained within a duct complying with Section 58-36-70(a)(1) of the Act only. Outside of this information, no additional information was provided by AT&T to Chandler despite AT&T having additional information that would assist Chandler in identifying and avoiding damage to the underground facility.

At trial, Mr. Hines testified as follows:

Q. And what information is provided to you from AT&T whenever you're going to do a locate?
A. We have -- I'm not sure how we have it on our system. But we have the underground prints that will show us, you know, hey, there's a conduit package there and our access points and sometimes it will show what's underground inside that package.
Q. I believe you testified earlier that it doesn't tell you what type of material it is.
Is that right?
A. No, sir, from my understanding, terracotta is something used either before PX -- PVC was used or during. It's, it's a very fragile -- you know, it's clay. It can be cracked by probably stepping on it or, you know, I don't know.
Q. So is it---
A. So it's a very fragile material.

(R. p. 109, lines 8-23).

At trial, Ms. Crews testified as follows:

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.

(R. p. 123, lines 2-11).

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.

(R. p. 132, line 1 – p. 134, line 16).

The fact that the duct was terracotta conduit, which multiple witnesses testified to be extremely brittle, was not provided by AT&T to Chandler. Further, the fact that the cable within the conduit was pressurized and susceptible to damage from noninvasive excavation tools was not provided by AT&T to Chandler. Shane Brinkley, Chandler'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. (R. p. 45, line 22 - p. 46, line 10). 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. It would be hard pressed to identify a more glaring example of "additional information" that would assist the excavator in identifying and avoiding damage to an underground facility. Failing to provide this information to the excavator or the notification center when Chandler provided proper notice of its intent to excavate within the tolerance zone of AT&T's existing facilities is a clear and unequivocal violation of the operator's obligations under the Act.

At trial, AT&T argued Chandler should have called AT&T for further and additional information regarding the facility. (R. p. 142, lines 9-14). However, 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. The Trial Court erred in the finding that the Act does not require the operator to provide the excavator with information regarding the material of an underground facility when that information would assist the excavator in avoiding damage to the facility during its excavation.

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.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

s/Elizabeth F. Nicholson

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