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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
The Hon. Jennifer B. McCoy

Appellate Case No. 2022-001170

Civil Action No. 2020-CP-10-02430

Chandler Construction Services, Inc.,..... Appellant,

v.

Bellsouth Telecommunications, LLC, d/b/a AT&T

South Carolina,..... Respondent.

***AMICUS CURIAE BRIEF OF CAROLINAS AGC, INC.
IN SUPPORT OF APPELLANT CHANDLER CONSTRUCTION SERVICES, INC.***

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INTEREST OF THE AMICUS CURIAE

As a chapter of the Associated General Contractors of America, Carolinas AGC, Inc. (“CAGC”) is a non-profit construction industry trade association. The CAGC consists of contractors and industry professionals working on commercial construction projects within North and South Carolina.

STATEMENTS AND STANDARD OF REVIEW

Amicus Petitioner adopts the Statement of Issues on Appeal, Statement of the Case, and Standard of Review as set forth in the Initial Brief of Appellant by reference.

INTRODUCTION

South Carolina’s Underground Facility Damage Prevention Act, S.C. Code Ann. § 58-36-10 *et seq.*, requires underground utility companies to provide certain information regarding the location and nature of their underground facilities to contractors and property owners for the purpose of avoiding accidental damage to such utilities. Contractors are entitled to rely upon the information provided by utilities in compliance with the Act, and the Act appropriately delegates this responsibility to the party best suited to provide it. Contractors should not be required to undertake elaborate and costly field testing to determine whether an underground utility is particularly fragile or susceptible to damage when such information is readily available to the utility and should have been provided under the Act.

ARGUMENTS

I. The Trial Court's Order misinterprets S.C. Code Ann. § 58-36-10 *et seq.*

Simply put, the trial court's order is in error as the Appellee failed to fully comply with South Carolina's Underground Facility Damage Prevention Act, S.C. Code Ann. § 58-36-10 *et seq.* (the "Act"). The Act imposes certain obligations upon utility Operators¹ which are specifically and unambiguously set forth therein.. Appellant's position is consistent with both the plain meaning and the clear legislative intent of the Act. The trial court's erroneous interpretation of the Act upends its clear purpose and stands to have industry-wide impact in the underground utility industry in our state.

Specifically, the trial court's ruling is in error because: (1) it serves to "blue-pencil" the Act by ignoring subsection (2) of S.C. Code Ann. § 58-36-70(a);² and (2) it places a higher burden on the Excavator³ to determine information about construction work performed by others while excusing knowledgeable party (the Operator) from disclosing information that is in its sole possession, at the expense of safety and efficiency.

¹ The Act defines an "Operator" as "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(17).

² The operative portion of S.C. Code Ann. § 58-36-70 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.

³ The Act defines an "Excavator" as "any person engaged in excavation or demolition." S.C. Code Ann. § 58-36-20(10).

A. The Trial Court’s Order misinterprets the legislative intent of the Act.

“The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature.” *CFRE, L.L.C. v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (citing *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). Subsection (1) is highly specific in what the Operator must provide to the Excavator. Subsection (2) was included by the legislature with the obvious intent to be an all-encompassing “catch-all” to expand, rather than limit, the obligation of the Operator. This intent cannot be reconciled with the trial court’s ruling. If the legislature intended to specifically enumerate the operator’s obligations, Subsection (2) would simply not have been included in the Act.

The legislature’s intent to expand the Operator’s obligations was logical and practical. It stands to reason that the party who originally installs an underground utility is best positioned to have knowledge related to the utility’s location, depth, and construction methodology. Nonetheless, the trial court’s order imposes a burden on the construction industry as a whole to determine information regarding underground utilities that is readily available to the Operator, but inaccessible to the Excavator without field testing. By imposing additional obligations upon the Excavator that the legislature did not intend, the trial court’s order not only represents a significant cost impact upon the entire industry, but potentially impacts the interests of safety, efficiency, and environmental stewardship.

Conversely, the declaratory relief sought by the Appellant does not impose any new affirmative obligation upon utility operators to proactively determine information regarding construction methodology or the type of materials utilized in duct bank construction. Instead it provides that the Operator should have disclosed information already known and available to the

Operator in order to comply with the Act. In other words, Appellant’s interpretation of the Act does not alter the status quo by requiring additional inspection or field analysis work by Operators.

For the reasons above, Amicus Petitioner joins the Appellant in urging this Court to follow the clear legislative intent of the Act and reverse the Order of the trial court.

B. The Trial Court’s Order ignores clear and unambiguous language in the Act.

As Appellant’s Initial Brief accurately notes, the trial court’s decision essentially ignores the Act’s requirement that the Operator provide “[a]ny 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).

The Appellant succinctly and accurately asks the very obvious question – if the Operator need not disclose data in its possession regarding the atypical fragility of its underground facility, what constitutes “any other information”? The Record indicates the duct bank damaged by the Appellant was a brittle terracotta conduit and was pressurized and susceptible to damage. We strain to find a more applicable and on-point example of the type of information that would constitute “any other information that would assist the excavator to identify, and thereby avoid damage to” the Operator’s facility.

Thus, the trial court’s order simply ignores the existence of Subsection (2). For the reasons above, Amicus Petitioner joins the Appellant in urging this Court to apply the plain meaning of the Act and reverse the Order of the trial court.

CONCLUSION

The trial court’s decision is erroneous as it fails to consider the plain language of the Act and the clear intent of the South Carolina Legislature. Absent a meaningful enforcement of the

Act, the statutory provisions therein become a mere nullity. Accordingly, this Court should reverse the decision of the trial court.

Respectfully submitted,

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South Carolina,..... Respondent.

PROOF OF SERVICE

I hereby certify that on June 2, 2023 I have served the *Amicus Curiae Brief of The Carolinas AGC in Support of Appellant Chandler Construction Services, Inc*, pursuant to SCACR 262(c)(3) in the above-captioned action 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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Re: *Chandler Construction Services, Inc. v. Bellsouth Telecommunication, Inc. d/b/a AT&T South Carolina*
Court of Common Pleas Case No. 2020-CP-10-02430
Appellate Case No. 2022-001170

Dear Ms. Kitchings:

Please find enclosed a **Motion for Leave to File *Amicus Curiae* Brief in Support of Appellant on Behalf of Carolinas AGC in Support of Appellant Chandler Construction Services, Inc.,** and proof of service in the above-referenced matter.

Thank you for your assistance in this matter. Please do not hesitate to contact me with any questions or concerns.

Very truly yours,

ELMORE GOLDSMITH KELLEY & DEHOLL, P.A.



Bryan P. Kelley

BPK/kos
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