

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

MODESTA BRINKMAN, DAVID)
BRINKMAN, JAMES COLEMAN, CARL)
FOSTER, KAREN FOSTER, ROBERT)
COLLINS, PAMELA COLLINS,)

Civil Action No. 2015-CP-40-5598

Plaintiffs,

**ORDER GRANTING DEFENDANT
NORTH AMERICAN PIPELINE
MANAGEMENT'S MOTION FOR
SUMMARY JUDGMENT AS TO
PLAINTIFFS' ARCHAEOLOGY
CLAIMS PURSUANT TO S.C. CODE
ANN. SECTION 16-11-780**

vs.

WESTON & SAMPSON ENGINEERS,)
INC., CITY OF COLUMBIA, SOUTH)
CAROLINA, NORTH AMERICAN)
PIPELINE MANAGEMENT AND)
LAYNE INLINER,)

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Defendants.

SC Court of Appeals

This matter comes before the Court upon Defendant North American Pipeline Management ("Defendant" or "NAPM") Motion for Summary Judgment as to Plaintiffs Modesta Brinkman, David Brinkman, James Coleman, Carl Foster, Karen Foster, Robert Collins and Pamela Collins' (collectively "Plaintiffs") archaeology claims for destruction of archaeological structures pursuant to S.C. Code Ann. § 16-11-780(I) (Supp. 2017).

A hearing was held before the undersigned on May 8, 2018 in Columbia, South Carolina. Present at the hearing were: 1) counsel for NAPM, R. Trippett Boineau, III, Esquire; 2) counsel for Layne Inliner, Rett Kendall, Esquire and Brandon Gottschall, Esquire; 3) counsel for Weston & Sampson Engineers, Inc., Amy H. Wooten, Esquire; and 4) counsel for the City of Columbia, South Carolina, Mike Hemlepp, Esquire. Plaintiffs were represented by John Adams Hodge, Esquire and Geoffrey K. Chambers.

After considering Defendant's Motion, Memorandum in Support and other supporting documents and hearing arguments on the matter, for the reasons stated below, I find that there exists no genuine issue of material fact and Defendant is entitled to judgment as a matter of law on Plaintiffs' claims pursuant to S.C. Code Ann. § 16-11-780(I). Therefore, Defendant's Motion for Summary Judgment is hereby **granted**.

STATEMENT OF FACTS

This real property dispute arises out of alleged damage to Plaintiffs' properties resulting from a City of Columbia construction project to evaluate and repair the West Columbia Basin Sanitary Sewer System.

In 2007, Plaintiff David Brinkman discovered some large rock arrangements, which he believes to have been old bridge abutments, on his property located at 154 Castle Road, Columbia, South Carolina. In order to gather more information, Mr. Brinkman contacted Dr. Jonathan Leader, South Carolina's State Archaeologist, to come and inspect the rocks. Thereafter, Mr. Brinkman and Dr. Leader continued to keep in contact on a professional and social basis.

In May 2008, in response to Mr. Brinkman's request for the bridge abutments to be considered for listing on the National Registry, the South Carolina Archives and History Center declined the request stating, in short, "that a great deal more research and archaeological investigation and assessment will be necessary. . . ." More specifically, the State Historic Preservation Office questioned "whether there is a sufficient amount of physical remains from the ferry and bridge site to convey in any tangible way the history of this area of the river before, during and immediately following the Civil War" despite an "abundance of documentary material" compiled and submitted by Mr. Brinkman.

In or around 2012, The City of Columbia (“the City”) began a construction project to evaluate and repair the West Columbia Basin Sanitary Sewer System. The City engaged Weston & Sampson Engineers, Inc. (“Weston and Sampson”) to provide certain services on the project including reviewing CCTV footage of the sewer lines and helping identify manholes requiring repair. The City also contracted with Layne Inliner to serve as the contractor for the project. Layne Inliner, in turn, engaged NAPM to assist with the work. In order to access several manholes located along Plaintiffs’ properties, NAPM needed to create access along the City’s sewer line easement. Plaintiffs allege that the creation of this means of access to repair the sewer line disturbed and/or destroyed the rock arrangements found by Mr. Brinkman.

Plaintiffs contend NAPM and Layne Inliner, at and upon the recommendation of Weston and Sampson, built a “road”¹ across their properties that exceeded the scope and purpose of the City’s sewer line easement. Plaintiffs further allege that some of their properties contained archaeological structures that were destroyed by the construction of this road.

As a result, Plaintiffs filed suit against Weston and Sampson, the City, NAPM and Layne Inliner alleging various causes of action, including one for the destruction of archaeological structures pursuant to S.C. Code Ann. § 16-11-780(I).

However, despite Plaintiffs’ allegations to the contrary, NAPM alleges it was never aware of any historical structures, has never seen any documentation of any historical structures and began its work without any knowledge of the area in question having a historical designation. Further, NAPM alleges it neither intentionally, maliciously or recklessly destroyed any historical structure nor did NAPM ever knowingly or maliciously move or displace any

¹ This “road” was a temporary dirt access way and not an established, paved public road.

rocks allegedly part of a historical structure. Finally, NAPM alleges it did not enter Plaintiffs property(ies) for the purpose of destroying or defacing any historical or archaeological resource.

STANDARD OF REVIEW

A motion for summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Staubes v. City of Folly Beach*, 331 S.C. 192, 500 S.E.2d 160 (1998); *Summer v. Carpenter*, 328 S.C. 336, 492 S.E.2d 55 (1997). A motion for summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Standard Fire Insurance Co. v. Marine Contracting and Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990).

In determining whether any triable issues of fact exists, as would preclude summary judgment, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the non-moving party. *Koester v. Carolina Rental Center, Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994). If triable issues exist, those issues must go to the jury. A party opposing a properly supported motion for summary judgment may not rest on the mere allegations or denials of the pleading, but must set forth or point to specific facts showing there is a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party's response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If that party does not so respond, summary judgment should be entered against that party. *Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449 (Ct.App. 1988). Moreover, the existence of a mere scintilla of evidence in support of the non-moving

party's position is not sufficient to overcome a motion for summary judgment. *Dickert v. Metropolitan Insurance Co.*, 306 S.C. 311, 411 S.E.2d 672, 673, (Ct.App. 1991), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700 (1993).

In a motion for summary judgment, the evidence and all reasonable inferences thereof must be viewed in the light most favorable to the non-moving party. *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857 (2002)(citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NAPM asserts there exists no genuine issue of material fact and it is entitled to judgment as a matter of law because: 1) NAPM did not willfully, knowingly or maliciously enter Plaintiffs' property(ies) for the sole purpose of discovering, uncovering, moving, removing or attempting to remove an archeological resource; and 2) to date, the archeological resource/archaeological structure(s) at issue have not been designated as historic by any applicable and/or governing preservation and/or conservation authority(ies).

I. BASED ON THE PLAIN LANGUAGE OF THE STATUTE, S.C. CODE ANN. § 16-11-780 IS INAPPLICABLE IN THIS CASE.

By way of background and to provide context for the statute at issue, the South Carolina General Assembly enacted S.C. Code Ann. § 16-11-780 as part of South Carolina's criminal code. The statute is located in Chapter 11 of Title 16 (Crimes and Offenses of the South Carolina Code of Laws) for "Offenses Against Property." Section 16-11-780(C) provides:

it is unlawful for a person to willfully, knowingly, or maliciously enter upon the lands of another or the posted lands of the State and disturb or excavate a prehistoric or historic site *for the purpose of discovering, uncovering, moving, removing, or attempting to remove an archaeological resource.* . . .

S.C. Code Ann. § 16-11-780(C) (Supp. 2016)(emphasis added). Further, § 16-11-780(I) provides that a “landowner, in the case of private lands, . . . may bring a civil action for a violation of this section to recover the greater of the archaeological resource’s archaeological value or commercial value, and the cost of restoration and repair of the site where the archaeological resource was located, plus attorney’s fees and court costs.” S.C. Code Ann. § 16-11-780(I). More importantly, § 16-11-780(K)(3) contains an exception to the above cited rules and provides that nothing outlined in § 16-11-780 “shall limit or interfere with . . . the lawful acts of a utility worker acting in the scope of and in the course of his employment. . . .” S.C. Code Ann. § 16-11-780(K)(3).

In applying the statute to this case, the court find that it must first look to the rules of statutory construction for guidance in determining whether or not Plaintiffs actually have a civil claim under the statute. In doing so, the court is persuaded that the statute is inapplicable to the facts of this case and, therefore, NAPM is entitled to judgment as a matter of law.²

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court’s place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election*

² The court notes that Plaintiffs’ request to have appoint the State Archaeologist as an expert under S.C. Code Ann. § 16-11-780(B) was denied by Order filed September 10, 2017. In its Order, this court specifically interpreted “this statute to allow appointment of the State Archaeologist *in a criminal matter involving a violation of Section 16-11-780.*” (emphasis added).

Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). Further and more importantly, “[w]hat 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.” *Hodges v. Rainery*, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)).

“[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.” *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). The statutory language must be construed in light of the intended purpose of the statute. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). “A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quotation marks and citation omitted). “In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose.” *Roberts*, 393 S.C. at 342, 713 S.E.2d at 283.

“In offenses at common law, and under statutes which do not disclose a contrary legislative purpose, to constitute a crime, the act must be accompanied by a criminal intent, or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to a criminal intent.” *State v. Ferguson*, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990) (quoting *State v. Am. Agric. Chem. Co.*, 118 S.C. 333, 337, 110 S.E. 800, 802 (1922)). “Therefore, whether knowledge and intent are necessary elements of a statutory crime must be determined from the language of the statute, construed in the light of its purpose and design.” *Guinyard v. State*, 260 S.C. 220, 227, 195 S.E.2d 392, 395 (1973). In a criminal case in South Carolina, the State cannot rely on civil concepts of negligence and recklessness, i.e. statutory

violations, to meet its burden of proving a defendant's state of mind; the import of the terms negligence and recklessness as used in civil law and in criminal law are neither equivalent nor interchangeable. *State v. Rowell*, 326 S.C. 313, 317, 487 S.E.2d 185, 187 (1997).

In reading the plain language of § 16-11-780(C), it is clear that the legislature intended this criminal statute to apply in situations where a person *willfully, knowingly or maliciously* enters another's lands *for the sole purpose* of discovering, uncovering, moving, removing or attempting to remove an archeological resource. Therefore, reading the plain and unambiguous language of § 16-11-780(C), based on the record presented, there is no evidence NAPM entered upon Plaintiffs' properties for the sole purpose of finding and removing—to any degree—an archaeological resource. As noted above, the only reason NAPM was in and about Plaintiffs' properties was to evaluate and repair the West Columbia Basin Sanitary Sewer System. If Plaintiffs cannot point to any evidence that the above named Defendants were on their properties only to find and disturb an archaeological resource, then there cannot be a violation of the statute.

NAPM was never aware of any historical structures, has never seen any documentation of any historical structures and began its work without any knowledge of the area in question having a historical designation. (Affidavit of Shannon Herford, ¶¶ 2-3, 7). Further, NAPM neither intentionally, maliciously or recklessly destroyed any historical structure nor did NAPM ever knowingly or maliciously move or displace any rocks allegedly part of a historical structure. (*Id.* at ¶¶ 4-5). Finally, NAPM did not enter Plaintiffs property(ies) for the purpose of destroying or defacing any historical or archaeological resource. (*Id.* at ¶ 6).

Based on the above, it is clear the plain language of S.C. Code Ann. § 16-11-780(C) and the legislative intent behind the statute requires some level of intent before the statute can apply

to the facts of this case. Since this criminal statute requires an intent to enter Plaintiffs' property(ies) for the sole purpose of disturbing/destroying a known historical/archaeological resource, Plaintiffs must come forth with some evidence that NAPM knowingly violated the terms of the statute. However, no such evidence is available from the record before the court; therefore, S.C. Code Ann. § 16-11-780 is inapplicable in this case and NAPM is entitled to judgment as a matter of law on Plaintiffs' claims pursuant to S.C. Code Ann. § 16-11-780(I).

II. TO DATE, THE ARCHEOLOGICAL RESOURCE/ARCHAEOLOGICAL STRUCTURE(S) AT ISSUE HAVE NOT BEEN DESIGNATED AS HISTORIC BY ANY APPLICABLE AND/OR GOVERNING PRESERVATION AND/OR CONSERVATION AUTHORITY(IES).

As outlined above, in 2007, Plaintiff David Brinkman discovered large rock arrangements on his property which he believes to have been old bridge abutments. In order to gather more information, Mr. Brinkman contacted Dr. Jonathan Leader, South Carolina's State Archaeologist, to come and inspect the rocks. Thereafter, in May 2008, in response to Mr. Brinkman's request for a listing on the National Registry, the South Carolina Archives and History Center - State Historic Preservation Office determined, among other things, additional research and other steps needed to be complete before the site could be eligible for consideration. (*See generally* Letter to David Brinkman from State Historic Preservation Office, May 30, 2008). More specifically, the State Historic Preservation Office questioned "whether there is a sufficient amount of physical remains from the ferry and bridge site to convey in any tangible way the history of this area of the river before, during and immediately following the Civil War" despite an "abundance of documentary material" compiled and submitted by Mr. Brinkman. (*Id.*). As a result, the State Historic Preservation Office did "not believe the site is eligible for the National Register" and could not "recommend that a formal nomination be prepared." (*Id.*).

Therefore, based on the above, Plaintiffs cannot point to any evidence that the alleged archeological resource/archaeological structure(s) at issue have been designated as historic by any applicable and/or governing preservation and/or conservation authority(ies). As a result, their claims under S.C. Code Ann. § 16-11-780 fail as a matter of law.

Since no authoritative body has designated this site as historically significant and Plaintiffs' own archaeological expert believes additional archaeological work and research are needed, Plaintiffs' claims under Section 16-11-780 fail as a matter of law. As a result, NAPM is entitled to summary judgment on Plaintiffs' claims pursuant to S.C. Code Ann. § 16-11-780(I).

III. EVEN IF S.C. CODE § 16-11-780 APPLIED, NAPM FALLS UNDER THE UTILITY WORKER EXCEPTION FOUND IN § 16-11-780(K)(3).

Even if the court were to assume, *arguendo*, that S.C. Code Ann. § 16-11-780(C) and the legislative intent behind the statute *did not* require some level of intent before the statute can apply in this case and that an authoritative body has designated the site at issue as historically significant, NAPM's work falls under the utility worker exception found in the statute. Section 16-11-780(K)(3) contains an exception to liability and provides that nothing outlined in § 16-11-780 "shall limit or interfere with . . . the lawful acts of a utility worker acting in the scope of and in the course of his employment. . . ." S.C. Code Ann. § 16-11-780(K)(3). As outlined above, the work performed by NAPM at issue was part of a larger project to evaluate and repair the West Columbia Basin Sanitary Sewer System. During arguments, Plaintiffs acknowledged NAPM was on their property(ies) for the purpose of doing utility work. Thus, NAPM's presence on Plaintiffs' property(ies) was in the course and scope of their employment as a utility worker. As a result, NAPM cannot be liable for any alleged damage to any archaeological resource(s) located on Plaintiffs' property(ies) under the terms of § 16-11-780(K)(3). Therefore, even assuming § 16-11-780 applies to the facts of this case, Plaintiffs' claims for destruction of

archaeological structures pursuant to S.C. Code Ann. § 16-11-780(I) fail as a matter of law as to NAPM.

CONCLUSION

In viewing the facts in the light most favorable to Plaintiffs, there remains no genuine issue of material fact and NAPM is, therefore, entitled to summary judgment on Plaintiffs' claims pursuant to S.C. Code Ann. § 16-11-780(I). It is clear the plain language of S.C. Code Ann. § 16-11-780(C) and the legislative intent behind the statute requires some level of intent before the statute can apply to the facts of this case. Since this criminal statute requires an intent to enter Plaintiffs' property(ies) for the sole purpose of disturbing/destroying a known historical/archaeological resource, Plaintiffs must come forth with some evidence that NAPM knowingly violated the terms of the statute. However, no such evidence is available from the record before the court; therefore, S.C. Code Ann. § 16-11-780 is inapplicable in this case.

Further, no authoritative body has designated this site as historically significant and Plaintiffs' own archaeological expert believes additional archaeological work and research are needed. Finally, even assuming the legislative intent behind the statute *did not* require some level of intent before the statute can apply in this case and that an authoritative body has designated the site at issue as historically significant, NAPM's work falls under the utility worker exception found in § 16-11-780(K)(3). As a result, NAPM is entitled to judgment as a matter of law on Plaintiffs' claims for pursuant to S.C. Code Ann. § 16-11-780(I).

IT IS THEREFORE ORDERED that Defendant North American Pipeline Management's Motion for Summary Judgment as to Plaintiffs' claims under S.C. Code Ann. § 16-11-780 is hereby **GRANTED** for the reasons outlined hereinabove.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Presiding Judge
Fifth Judicial Circuit

_____, 2018
Columbia, South Carolina



Richland Common Pleas

Case Caption: Modesta Brinkman , plaintiff, et al vs Weston And Sampson Inc ,
defendant, et al
Case Number: 2015CP4005598
Type: Order/Summary Judgment

So Ordered

s/ Honorable G. Thomas Cooper, Jr. Circuit
Judge 2126