THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge
Jocelyn Newman, Circuit Judge

APPELLATE CASE NO. 2018-000948
CASE NO. 2015-CP-40-5598

Modesta Brinkman, David Brinkman, James Coleman, Carl Foster, Karen Foster, Robert Collins, Appellants,

v.

City of Columbia, South Carolina, North American Pipeline Management and Layne Inliner, Respondents.

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STATEMENT OF ISSUES ON APPEAL

I. **Did the Circuit Court err in issuing summary judgment finding that S.C. Code Ann. § 16-11-780 is inapplicable to this case?**

II. **Even if the Court of Appeals determines that the Circuit Court's interpretation is permissible, are the Defendants still liable through actual and constructive knowledge of the existence of historical and archaeological resources on the Plaintiffs' properties?**

III. **Did the Circuit Court err in issuing summary judgment that no preservation or conservation authorities had designated the bridge abutments on Plaintiffs' properties as archaeological resource(s) or archaeological structure(s)?**

IV. **Did the Circuit Court err in concluding that designation on the National Register of Historic Places was a requirement for S.C. Code Ann. § 16-11-780 to be applicable to this case?**

V. **Is the Circuit Court's misstatement of the law grounds for reversal?**

VI. **Did the Circuit Court err in issuing summary judgment that the Defendants NAPM and the City of Columbia were immune from liability for the destruction of archaeological resources because of the "utility worker exception" in S.C. Code Ann. § 16-11-780 (K)(3)?**

STATEMENT OF THE CASE

This case is an appeal of an Order of the Circuit Court granting summary judgment to the Defendants NAPM and the City of Columbia regarding the applicability of S.C. Code Ann. § 16-11-780. The matter deals with the entry by the Defendants on lands of the Plaintiffs and the excavation and the destruction of archaeological resources that were outside of an easement that had been granted to the Defendant City. The Plaintiffs filed suit against the Defendants on grounds of disturbance and "destruction of archaeological structures," nuisance, trespass, taking, negligence, and negligence *per se.* This appeal addresses only the claim regarding the private right of action that is allowed pursuant to S.C. Code Ann. § 16-11-780 (I).

Plaintiffs filed their Complaint on September 11, 2015, an Amended Complaint on December 16, 2015, and a Second Amended Complaint on January 13, 2016. The Plaintiffs are the owners of real property on Castle Road: Plaintiffs Modesta and David Brinkman own the property and reside at 154 Castle Road; Plaintiff James Coleman owns the property and resides at 150 Castle Road; Plaintiffs Carl and Karen Foster own the property and reside at 142 Castle Road; and Plaintiff Robert Collins owns the real property located at 156 Castle Road, which is undeveloped, but does not reside there. The Defendants that remain in the case are the City of Columbia ("the City") that holds a permanent easement across the Plaintiffs' land for the purpose of maintaining a sewer line, Layne Inliner ("Layne") is a company that was awarded a contract by the City to place a lining in its sewer pipes, and North America Pipeline Management ("NAPM") is a company hired by Layne to perform land clearing and grading along the easement in preparation for Layne's work.

Both parties filed numerous motions during the pendency of the case. Most notably, the Defendant Weston and Sampson filed a Motion for Summary Judgment on October 30, 2017 that was granted in part dismissing several Weston and Sampson corporate defendants.

The Plaintiffs filed a Motion for Summary Judgment on the trespass cause of action on January 8, 2018. The Motion was denied on grounds that there remained issues of fact regarding the presence of some of the Defendants outside of the easement, but the Court ruled that any temporary construction easement that may have existed across the Plaintiffs' property expired when the sewer line that is the subject of this case was built

in the 1980s. The Court confirmed that a permanent easement of fifteen (15) feet exists across the Plaintiffs' properties.

The Defendant Layne Inliner filed Motion for Summary Judgment alleging multiple grounds, which was denied, and partial summary judgment was granted to the Defendant Weston and Sampson Engineers, Inc. The Plaintiffs have since settled with Weston and Sampson Engineers, Inc.

On October 20, 2017, the City of Columbia filed a Motion for Summary Judgment. On May 23, 2017, the Court granted partial summary judgment dismissing the Plaintiff Pamela Collins from the action, because she was not a record owner of real property with her husband Robert Collins. Additionally, relying wholly on the Order of Judge Cooper (the other Order that is the subject of this appeal) which dismissed claims against NAPM under S.C. Code Ann. § 16-11-780, Judge Newman also dismissed the claims against the City of Columbia pursuant to S.C. Code Ann. § 16-11-780. This appeal addresses both Judge Cooper's and Judge Newman's dismissal of the S.C. Code Ann. § 16-11-780 claims that were brought by the Plaintiffs against NAPM and the City of Columbia, respectively.

STATEMENT OF THE FACTS

In the 1790s, a French engineer named John Compty built two bridges that were the first to cross the Broad River, thus connecting Columbia with the frontier to the north and west. The first bridge was built on the lands now owned by the Plaintiff James Coleman. A flood washed that bridge away, and a few years later, a second bridge was constructed on the lands now owned by the Plaintiffs David and Modesta Brinkman.

After that bridge was destroyed in another flood, Mr. Compty operated a ferry service that connected Columbia with the frontier to the west. (Tr ___)

In 1985 through 1987, the City of Columbia acquired easements along the Broad River and constructed a sewer line across lands that were later acquired by the Plaintiffs. In approximately 2004, Plaintiff David Brinkman determined that a stone structure on his property was man-made. At first, he believed that the structure was part of an old ferry crossing. In 2007, the South Carolina State Archaeologist, Dr. Jonathan Leader, identified the structure as a bridge abutment. (Tr ___) Plaintiff David Brinkman conducted historical research, and he initially hypothesized that the abutment was related to a bridge that General Sherman used to enter Columbia for the purpose of occupying and burning the City in February 1865. (Tr ___) In 2007, Mr. Brinkman contacted the South Carolina Department of Archives and History for the purpose of having the bridge abutments nominated for listing on the National Register of Historic Places (National Register). Mr. Brinkman received a letter from Mr. Andrew W. Chandler in February 2008 that referred to Mr. Brinkman's work as "impressive," but declined to include the site for nomination to the National Register because further evaluation was necessary. (Tr ___) At this time, Mr. Brinkman believed that his and Dr. Coleman's property contained the remains of the Sherman Bridge.

Later in 2008, Mr. Brinkman determined that the Sherman Bridge was located elsewhere, and this finding was subsequently confirmed by the State Archaeologist. (Tr ___) This story was featured on the PBS show History Detectives. (Tr ___) Mr. Brinkman subsequently identified the abutments on his and Plaintiff Coleman's property

as the John Compty bridge abutments that date from much earlier in the 1790s. The State Archaeologist concurred with Mr. Brinkman's findings. (Tr ___)

As part of a sewer maintenance plan to evaluate and upgrade the City's sewer pipes, the City of Columbia developed a "2020 Plan." The 2020 Plan was in part the result of the United States Environmental Protection Agency's oversight of discharge of effluent from municipal sewer systems. (Tr ___) In 2014, the City entered into a contract with the Defendant Layne Inliner to place a synthetic liner into certain sewer pipes that were owned by the City. Layne Inliner then hired the Defendant North American Pipeline Management (NAPM) for the purpose of land clearing in preparation for this maintenance work.

In a September 2014 meeting, each of the Defendants discussed building an access road across the Plaintiffs' properties for the purpose of the aforementioned sewer maintenance project. (Tr ___) The memorandum memorializing the meeting states that the road was intended to be constructed within the fifteen (15) foot permanent easement that existed across the Plaintiffs' properties. Defendant Layne Inliner was on record as recommending that this access road be constructed, and a budget was developed that included extra funds for the removal of rock. (Tr ___)There is a dispute of fact as to whether the road and maintenance work was actually needed, as discovery produced by the Defendants stated that the work was not needed in the vicinity of Plaintiffs' property, but it was unspent money in the budget that could be applied toward this work. (Tr ___)

On or about February 5, 2015, the Defendants, without any notice whatsoever to the Plaintiffs, began land clearing and excavation activities in their backyards.

Defendant NAPM was identified as the operator of earth moving equipment that cut a road into the steep bank on the Plaintiffs' properties. The clearing and excavation exceeded the existing fifteen-foot permanent easement, and extended to between thirty to as much as fifty feet in width. (Tr ___) It is undisputed that the two Compty Bridge abutments were located outside of the fifteen-foot easement. (Tr ___) At the time that this work was ongoing, personnel from the Defendant City were plainly aware that the work exceeded the dimensions of the easement. (Tr ___) While the land disturbance was ongoing, an NAPM official indicated to one of the Plaintiffs that he was not sure of the width of the easement. (Tr ___) NAPM representatives were present during the September 2014 meeting in which the fifteen (15) foot width was discussed and memorialized in a construction memo. (Tr ___)

The Plaintiff James Coleman pointed out the bridge abutment and advised the NAPM crew that the bridge abutment on his property was a historic structure that should be avoided. (Tr ___) Nevertheless, when he returned to his property, the bridge abutment had been destroyed despite his warning. Prior to its destruction, NAPM was provided specific notice that the abutment on Dr. Coleman's property was historical in nature. (Tr ___) Earth moving equipment that was operated by the Defendant NAPM knocked over and destroyed both of the Compty Bridge Abutments. These structures were outside of the permanent easement. (Tr ___) Based upon citizen complaints, the work was stopped by the City on February 12, 2015.

It is undisputed that neither the Defendant City of Columbia nor the other Defendants obtained any permits for the work that was undertaken. The remains of the Compty Abutment were deposited in jurisdictional wetlands that are regulated by the

United States Army Corps of Engineers, and The Corps found that a violation of Section 404 of the Clean Water Act, 33 U.S.C. § 1344, had occurred. (Tr ___) It is further undisputed that none of the Defendants conducted a cultural or historical resources survey prior to the commencement of their work on the Plaintiffs' property.

Pursuant to his duties as South Carolina State Archaeologist, Dr. Jonathan Leader conducted a damage assessment of the archaeological resources on the property of the Brinkman and Coleman Plaintiffs. Dr. Leader documented that the Plaintiffs' properties were a "multi-cultural" site and that archaeological resources including the Compty Bridge Abutments were disturbed at the site, and he computed the cost of rehabilitating and repairing the Compty Abutments. (Tr ___)

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Moriarty v. Garden Sanctuary Church of God,* 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000), *holding modified on other grounds by State v. Cherry,* 361 S.C. 588, 606 S.E.2d 475 (2004), *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013). Rule 56 provides that the trial court shall grant summary judgment if "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." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland,* 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (internal quotation marks omitted). "Summary judgment is not appropriate when further inquiry into the facts of the case is

desirable to clarify the application of the law." *Carolina Chloride, Inc. v. S.C. Dept. of Transportation,* 391 S.C. 429, 434, 706 S.E. 2d 501, 504 (2011). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Id.* "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Id. McAlhany v. Carter*, 415 S.C. 54 62-63, 781 S.E. 2d 105 (S.C. App., 2015)

ARGUMENTS

I. THE COURT WAS IN ERROR IN ITS STATUTORY INTERPRETATION THAT S.C. CODE Ann. § 16-11-780(C) WAS INAPPLICABLE IN THIS CASE.

A. The Circuit Court failed to properly apply the rules of statutory construction.

The Orders that granted NAPM and the City Summary Judgment incorrectly applied the adverbs "willfully, knowingly or maliciously" to sections of the statute beyond the verb modified by these adverbs. S.C. Code Ann. § 16-11-780(c) reads as follows:

> 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. Each unlawful entry and act of disturbance or excavation of a prehistoric or historic site constitutes a separate and distinct offense.

The Court made a fundamental error in finding that a person must have precise knowledge that they entered the land of another with the sole intent to disturb a site that

they knew was an archaeological resource. Statutory construction using the words "willfully, knowingly or maliciously" only modify entering the lands of another. These adverbs in the statute do not require knowledge of the archeological resource.

Both the Court of Appeals and the Fourth Circuit have previously addressed this issue and answered the question of whether "knowingly" applies to all details of a statute after the verb. *State v. Miles* 805 S.E. 2d 204 (S.C. App., 2017), *United States v. Jones*, 471 F. 3d 535 (4th Cir. 2006) The answer is clearly 'no'. The intent adverb only modifies the following verb. For example, in *Miles,* a defendant only needs to know that he is transporting drugs, but does not need to know the actual weight of the drugs or that the drug is oxycodone. Similarly, in *Jones,* a defendant can be found guilty of sex trafficking of minors if he knows that he is transporting a person. "Knowingly" does not extend beyond the verb and apply to the defendant knowing the victim is under eighteen years of age. Based upon *Miles* and *Jones*, *supra.*, a reasonable plain language reading of the statute does not require that persons know that the site which they disturbing is a historic or prehistoric site or that it is an archaeological resource. What they must know is that they are excavating and disturbing something on the lands of another.

The cardinal rule of statutory construction is to ascertain and effectuate the legislature's intent. *State v. Smith,* 330 S.C. 237, 498 S.E.2d 648 (Ct.App.1998). In construing a statute, words must be given their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. *Id.* If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation, and this court has no right to look for or impose another meaning. *Id.* Where a statute is complete and

unambiguous, legislative intent must be determined from the plain language of the statute. *Id.* The statute's text "must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose." *Cabiness v. Town of James Island,* 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011) (citation and internal quotations omitted). "The primary rule of statutory construction is that the Court must ascertain the intention of the legislature." *Cooper v. Moore*, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002). "In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "Subtle or forced construction of statutory words for the purpose of expanding a statute's operation is prohibited." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).

The Circuit Court's Order erroneously insists that "willfully, knowingly or maliciously" must apply to other aspects of the statute beyond "entering the lands of another." This contention becomes absurd when the Court makes the claim that the person violating this statute must have prior knowledge that the thing being disturbed is an archeological resource. The construction of the statute by the Circuit Court, which required advance knowledge that artifacts such as the Compty Bridge Abutments were archaeological resources, does not comport with the rules of statutory construction or interpretation by case law. On its face, the statute does not require that one have advance knowledge that a site is an archaeological resource or that one's actions must necessarily be malicious. When the Court used he terms "knowingly, willfully, and "maliciously"

as modifying the words “a historic site” or “for the purpose of”, the result is nonsensical. “Willfully, knowingly, and maliciously” only make sense in modifying a verb such as “enter” and “excavate”. Under the rules of grammar, a person can willfully excavate without knowing what they are excavating. Such activity often occurs in discovery of buried antiquities.

The word “discovering” in the second part of the statute demonstrates the flaw in the Circuit Court’s apparent reasoning. The statue places liability on one who “willfully, knowingly, or maliciously enters the lands of another…and disturb or excavate a prehistoric site for the purpose of discovering…an archaeological resource.” One cannot discover something if they already have knowledge of it. The Circuit Court’s Order makes no sense when its interpretation is read literally.

The second part of the statute has is its own separate requirement of *mens rea* in “for the purpose of.” This *mens rea* requirement modifies a list of verbs that follows. “For the purpose of moving an archeological resource” is very different from “knowingly moving an archeological resource that is known to the defendant.” An object can be purposefully moved without knowledge of details and specifications of the object itself. The statutory language can apply without any modification to a situation where a historical resource is merely moved because it is in someone’s way.

The South Carolina Legislature has been very specific in other criminal statutes applying *mens rea* when it intends facts beyond the verb to be modified with the same *mens rea*. Examples include statutes prohibiting attacking a law enforcement officer and transporting stolen timber.

> It is unlawful for a person to **knowingly and willfully** ... assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person **knows or reasonably should know** is a law enforcement officer, whether under process or not. S.C.Code Ann. § 16-9-320(B). (emphasis added)

and

> It is unlawful for a person to **knowingly and willfully** transport forest products if the person **knows** that the forest products have been cut, removed, obtained, or acquired from the property of a landowner in violation of the provisions of this subsection. S.C.Code Ann. § 16-11-580(A)(4). (emphasis added)

The Circuit Court's Order is based on faulty logic that has been rejected by courts. The 4th Circuit rejected this same argument in a case involving sex trafficking of minors. The defendant argued that "knowingly" applied beyond transporting to knowledge of the age of the person transported. The 4th Circuit held:

> [C]onstruction of the statute demonstrates that it does not require proof of the defendant's knowledge of the victim's minority. It is clear from the grammatical structure of [18 U.S.C.] § 2423(a) that the adverb "knowingly" modifies the verb "transports." Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil. We see nothing on the face of this statute to suggest that the modifying force of "knowingly" extends beyond the verb to other components of the offense. *United States v. Jones* , 471 F.3d 535, 538 (4th Cir. 2006) (brackets added)

Similarly, South Carolina Courts have found that a person only know that he is transporting something illegal and 'knowingly' does not extend beyond the verb 'transporting' to the exact type of drug and the quantity of drug being transported. *State v. Miles* 805 S.E.2d 204 (S.C. App., 2017)

Defendants knew that they were outside of the easement, and being outside of the easement was done voluntarily and with intent. Defendants knew that they were excavating, and excavating was done voluntarily and with intent. Moving bridge abutments out of the way of an access road was intentional and allegedly necessary for the Defendants to build a road through the bridge abutments. Moving these stone structures was no accident. Using the statutory construction applied to other similar statutes, Defendants had to have actual or constructive knowledge that they were outside of the easement. Defendants had to know that they were excavating or intended to excavate, which with a trackhoe, was obvious. Contrary to the Court's finding, the material facts in the record strongly demonstrates that these elements were met, thus Summary Judgment was improper.

B. Willfulness is Established by the Defendants' Conduct

Here, willfulness is established by the Defendants' admitted and undisputed failure to obtain any permits for their land disturbing activity. Had they obtained permits, they would have been required to conduct a cultural resources survey. As demonstrated in Section III herein, a simple internet search would have revealed the presence of the historic bridge abutments. The proper procedure after checking a public database would be to follow up by contacting the Office of the State Archaeologist to determine the nature of the site indicated on the online mapping. The Defendants cannot be willfully blind to such requirements. South Carolina Courts have held that willful activity does not mean that the party knows that their action is illegal, only that they were aware of what they were doing. "Conduct is willful within the meaning of S.C. Code Ann. § 35–1–508 if the person acts intentionally, that is, he is aware of what he is

doing. "Willful means only that the person's conduct was intentional, not that his state of mind was evil or that he intended to violate..." the statute. *State v. Sterling*, 396 S.C. 599, 616, 723 S.E. 2d 176, 184, 185 (S.C. 2012)

While the term "willful" is not defined in S.C. Code Ann. § 16-11-780, willful has been defined in common law to mean intentional. *Reeves v. Carolina Foundry & Machine Works*, 194 S.C. 403, 9 S.E.2d 919, 921 (S.C. 1940), *Cummings v. McCoy*, 192 S.C. 469, 7 S.E. 2d 222 (1940). A number of South Carolina statutes have also interpreted willful to mean, "the person acts intentionally, that he is aware of what he is doing. Willfulness does not require the person to act with an evil motive or with the intent or knowledge that the law...is being violated." *State v. Sterling*, 396 S.C. 599, 614, 723 S.E. 2d 176, 184 (S.C. 2012) In *Sterling*, the Court found that "Knowledge or intent that his conduct violated the securities law is not required..." *Id.* In reviewing liability under the South Carolina Unfair Trade Practices Act, willful is defined as "when a party knew or should have known that his conduct was a violation of [the UTPA]." S.C. Code Ann. § 39-5-140 (d). If a person of ordinary prudence who was engaged in trade or commerce could have ascertained that his conduct violated the UTPA, such conduct is willful within the meaning of the statute. *Wright v. Croft*, 373 S.C. 1, 23-24, 640 S.E. 2d 486 (Ct. App. 2006), *Maybank v. BB&T*, 416 S.C. 541, 578 787 S.E. 2d 498, 517 (S.C. 2015)

While S.C. Code Ann. § 16-11-780 does not define the term willfulness, in the context of criminal statutes governing securities laws, South Carolina Courts have held that conduct is willful if a defendant "should have known" that his conduct was illegal based upon due diligence. This Court may adopt this definition, or at a minimum the

common law standard.

> At common law, the term "willful" connotes a determination to exercise one's own will in spite of and in defiance of the law. *State v. Alexander*, 48 S.C.L. (14 Rich.) 247 (1867). Conduct committed with a deliberate intention under such circumstances that a person of ordinary prudence would be conscious of it as an invasion of another's rights is "willful." *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258 (1958). The intent to violate the law or another's rights may be proved by circumstantial evidence. Cf., *State v. Carroll*, 277 S.C. 306, 286 S.E.2d 382 (1982).

Conduct has been defined as willful if a defendant should have known that the conduct was illegal based upon ordinary due diligence. The *Nest Egg* case describes both the common law and statutory concepts of willfulness under the South Carolina Unfair Trade Practices Act as:

> Ordinarily, the word "willful" as used in a statute has the same meaning as it has at common law. *Reeves v. Carolina Foundry & Machine Works, 194 S.C. 403*, 9 S.E.2d 919 (1940). Accordingly, Nest Egg contends that the circuit court should have applied the common law definition of willfulness to the facts of this case. In view of the plain language of the Unfair Trade Practices Act, however, we are unable to sustain this contention.
>
> Section 39-5-110(c) states:
>
> For the purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of § 39-5-20.
>
> We hold that this definition creates a statutory standard of willfulness different from the common law standard. For purposes of Section 39-5-110, conduct is "willful" if the defendant "should have known" it violates Section 39-5-20. The standard is not one of actual knowledge, but of constructive knowledge. If, in the exercise of due diligence, a person of ordinary prudence engaged in trade or commerce could have ascertained that his conduct violates the Act, then such conduct is "willful" within the meaning of the statute.

> Applying this standard of willfulness to the facts of the case, we think it is clear the defendants' violation of Section 39-5-20 was "willful." A person who exercised due diligence to ascertain whether the Nest Egg membership [290 S.C. 129] program violates the law in South Carolina would have no doubt that it is a prohibited pyramid plan...Since Section 39-5-30 declares such devices or plans a violation, per se, of Section 39-5-20, any person of ordinary understanding would know the Nest Egg program is unlawful. We, therefore, reject the defendants' contention that, as a matter of law, they were not guilty of a "willful" violation of the statute.
>
> *State ex rel. Medlock v. Nest Egg Soc. Today, Inc.*, 348 S.E.2d 381, 383-384, 290 S.C. 124, 128 (S.C. App., 1986)

In this case, willfulness is demonstrated by working outside of the easement when NAPM and the City knew or should have known that they did not have a right to disturb the Plaintiffs' properties outside of the easement. Willfulness is demonstrated by failing to perform a cultural resources study. The Defendants' acts were intentional, as they had actual knowledge of the dimensions of the easement as evidenced in the preconstruction meeting minutes. (Tr ___) In spite of such knowledge, they intentionally exceeded the bounds of the easement and destroyed the Compty Bridge Abutments. Willfulness is further exhibited by the undisputed failure of the City or the other Defendants to obtain or seek to obtain any required permits for their intended activity. Willfulness is further demonstrated by the failure to obtain permits was an intentional act. In the budget for the proposed road was a line item for permitting. (Tr ___) Had they obtained environmental permits such as a Section 404 Permit from the US Army Corps of Engineers for their activity, they would have been required to conduct a cultural resources survey which, under normal due diligence, would have discovered the existence of the historical bridge abutments on the Plaintiffs' properties. 33 U.S.C. §

1344, 33 CFR § 320.4(a), 33 CFR § 320.4 (e), 33 CFR § 320.4(j)(4). After the destruction of the bridge abutments by NAPM, the Corps of Engineers ascertained that the City and NAPM had violated Section 404 of the Clean Water Act.[1] (Tr ___)

C. Knowing is also established by The Defendants' Conduct

In addition to the willful conduct in which the Defendants NAPM and the City of Columbia knew or should have known that the standing stones were historic structures and that the location was an archaeological resource, the Defendants also had prior knowledge of the existence of the fifteen-foot easement that was memorialized in the September 16, 2014 construction memorandum. (Tr ___) Accordingly, they knew or should have known that they had no legal right to operate where they were outside of the easement.

The correct statutory interpretation of S.C. Code Ann. § 16-11-780(C) is that the Defendants had to willfully enter the land of another. The Defendants knew that they entered the land of another. This is evidenced by the deposition of Gene Pierce, P.E. Mr. Pierce testified that the personnel on site knew they had an easement, it was 15 feet wide, and that it was being exceeded.

Q: Was there any -- do you recall any discussion of an easement prior to, prior to the commencement of the clearing work or the grading work?

A: Yes.

Q: Tell me about that discussion.

A: We knew we had one. The plan that we found stated that it was 15 feet wide.

---

[1] The enforcement action is currently ongoing.

(Tr ___)

Q: So you believe that everybody out there knew that that easement was being exceeded when it -- when that road was being built?

MS. WOOTEN: Object to the form.
MR. GOTTSCHALL: Object to the form.

A: I think we were aware that the easement was being exceeded.

(Tr ___)

Similarly, Michael Sheu, P.E., an engineer with the Defendant City of Columbia, further testified that it was known to the Defendants that the easement had been exceeded.

Q: Uh-huh. Was the clearing wider than the 15-foot easement?

A: Yes.

Q: You know about how -- how much wider?

A: It varied. It goes up slope and down slope.

(Tr ___)

Q: So is it your testimony today that you believe it was acceptable to go outside the easement during this work?

A: In certain physical conditions it's inevitable that it will go outside the easements. It's a small amount that's why we do the repair work.

Q: Did the City have the landowners permission to operate outside the easement?

A: No specific permission. No.

Q: But you believe that the City had a right to operate outside the easement?

A: I believe it did operate outside the easement.

(Tr ___)

Mr. Shue testified that City's on-site inspector Alan Cockrill had also noted that the easement was exceeded:

> Q: Well, let me just re-phrase it. Was anybody on site to ensure that work was being done within the boundaries of the easement?
>
> A: Alan was on site and did note that it was outside the 15-foot easement for the clearing. Since that's a temporary operation -- that sometimes happens on jobs especially in overgrown terrain that happens.

Although NAPM was operating the earth moving equipment, it is undisputed that Shue and Cockrill of the City and Pierce were present at times and were aware that the easement was being exceeded.

In addition, prior to the destruction of the Compty Abutment on the lands of Dr. James Coleman, the NAPM equipment operator and another employee were specifically told by Dr. Coleman not to disturb the abutment and that it was a historical structure. In spite of such warnings, NAPM proceeded to topple and destroy the historic abutment. (Tr ___)

The aforementioned testimony was before the Court, but these material facts were ignored in the Order. (Tr ___) In the case of a person convicted for issuing fictitious driver's licenses under S.C. Code Ann. § 56-1-515 (1), the Supreme Court construed a violation of the statute occurs "if knowingly done" and which is whether the defendant "knew or should have known" that the information provided to issue the license was fictitious. *State v. Taylor,* 355 S.C. 392, 395 585 S.E. 2d 303 (S.C. 2003)

The actions and conduct of NAPM and the City were knowing, and there was a sufficient issue of fact before the Court that it should not have granted Summary Judgment to NAPM and the City.

D. Legislative intent is established by the testimony of the South Carolina State Archaeologist

In addition to the aforementioned authorities regarding statutory interpretation and the context of what makes grammatical sense, the testimony of the State Archeologist regarding a statute for which he has responsibility and oversight provides guidance regarding the legislative intent. In his deposition, Dr. Leader testified:

> Q. Do you have an opinion as to whether a party that willfully entered someone else's land has to know that an object that they might impact would be an archaeological structure --
>
> MR. KENDALL: Object to the form.
> MS. WOOTEN: Object to the form.
> MR. STEWART: Same objection.
>
> BY MR. HODGE:
>
> Q. To be liable under this act?
>
> A. Given the discussion that occurred at--with the folks at the legislature when they were putting the act together, and the specific case which kicked the whole thing off, the answer is no.
>
> All they have to do or have done was caused the damage. They do not have to know that the hill they were going up and down was a mound. They do not have to know that the thing was a burial, they simply have had to cause the damage. (Tr ___)

In contrast to the testimony of the State Archaeologist, the Order incorrectly divined apparent legislative intent on page eight without any supporting evidence. There are no facts or authorities cited in the Order in which the Circuit Court could reasonably ascertain *any* legislative intent. The Circuit Court's claim of legislative intent without supporting facts or evidence is tantamount to speculation. In contrast, in its

memorandum and at oral argument, the Plaintiffs cited the testimony of the South Carolina State Archaeologist, who testified that he had worked with the Legislature in the drafting of S.C. Code Ann. § 16-11-780 (C). The testimony of the State Archaeologist speaks closer to the actual intent of the Legislature than the unsupported claim of intent enumerated by the Court in its Order.

The Office of the State Archaeologist is charged by law with responsibility for and oversight of the historical and archaeological artifacts and resources within the State of South Carolina. S.C. Code Ann. § 60-13-210. The State Archaeologist is also, in part, responsible for the administration of S.C. Code Ann. § 16-11-780. The interpretation of this statute by the State Archaeologist is afforded deference as a matter of law. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting *Dunton v. S.C. Bd. of Examiners in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Oakwood Landfill, Inc. v. DHEC,* 671 S.E. 2d 646, 653 381 SC 120 (S.C. App. 2009).

E. The purpose of the Defendants' excavation was to move the standing stones of the Compty Bridge Abutments for their road construction project.

The area excavated by the Defendants was an archeological site pursuant to the testimony of the South Carolina State Archaeologist. (See Arguments III and IV herein)

The Defendants' excavation was for the purpose of moving the standing stones that were part of the archeological resource out of the way for road construction. (Tr ___)

"For the purpose of" does not convey a required *mens rea* that the Defendants know that they are moving an archaeological resource. The Defendants in this case only need have the purpose of moving the object. The Defendants had the purpose of getting these structures out of the way of their road. The statute does not require that the Defendants know what the structures were. The Court erroneously conveyed the requirement that a person must have the *sole* purpose of harming an archaeological resource is not contained in the plain language of the Legislature. (See Argument V, below) The statue simply requires that the person knows he or she is entering the land of another, and while on that land excavates an archaeological resource for the purpose of moving, removing, or attempting to remove an archaeological resource. That is exactly what occurred here. Otherwise, claiming ignorance of an archaeological resource would always be exculpatory, and the statute would be ineffective and pointless. Those seeking to discover archaeological resources would be impossible to convict, because they do not know of the existence of an archaeological resource if they are attempting to discover one.

In the case at hand, the Defendants intended to build a road that extended outside of the 15-foot easement. It is clear that the Defendants knew they were limited to a 15-foot easement from meeting minutes and deposition testimony. (Tr ___) It is also clear that they knew they exceeded the easement. (Tr ___) They knowingly entered the lands of another. (Tr ___)The Defendants did in fact excavate to build a road, and they excavated the Plaintiffs' land with the purpose of removing rock structures to make way

for the road. We know from deposition testimony of the State Archaeologist that those rock structures were in fact archaeological resources. (Tr ___)

The Circuit Court erred in interpreting the statute. Under the correct interpretation, the Defendants willfully and knowingly entered the lands of another, the Defendants excavated an archaeological site, and a purpose of that excavation was to remove rock that was in fact an archaeological resource. For the purpose of reviewing the Order of the Circuit Court, there is a dispute of material fact that is sufficient to reverse the Circuit Court's grant of Summary Judgment to NAPM and the City.

The Defendants clearly knew that they were exceeding a 15-foot easement and were entering the lands of another. (Tr ___) The Defendants excavated and disturbed an archaeological site. The purpose of excavating the archaeological site was to move it out of the way of their road. For these reasons, there is a dispute of material fact as to whether Defendants violated S.C. Code Ann. § 16-11-780(C), and the archaeological causes of action should not have been dismissed.

II. EVEN IF THE COURT OF APPEALS DETERMINES THAT THE CIRCUIT COURT'S INTERPRETATIONS ARE PERMISSIBLE, THE DEFENDANTS ARE STILL LIABLE THROUGH ACTUAL AND CONSTRUCTIVE KNOWLEDGE OF THE EXISTENCE OF HISTORICAL AND ARCHAEOLOGICAL RESOURCES ON PLAINTIFFS' PROPERTIES.

When read in accordance with the rules of statutory construction and existing case law cited herein, S.C. Code Ann. § 16-11-780 (C) does not require that a party know in advance that a site which is disturbed is an archaeological resource. While a party committing the acts that are unlawful under S.C. Code Ann. § 16-11-780 (C) may know

that he is disturbing an archaeological resource, such knowledge is not a prerequisite for liability under the statute. Liability may apply to situations where that party "willfully, knowingly, or maliciously" enters the lands of another with or without knowledge that the site that is excavated is a historic or prehistoric site containing an archaeological resource. Under the common law, conduct that is willful has been recognized by South Carolina Courts to mean "intentional." *Reeves, supra.* 921. In a statutory context, willful conduct has been extended to actual or constructive knowledge where defendants "knew or should have known" what they was doing was not permitted. *Nest Egg, supra.* 383.

In either case, the Defendants engaged in land disturbing activities outside of the easement that resulted in the destruction of the Compty Abutments. Such action was in and of itself intentional. They intended to operate heavy excavation equipment outside of the easement either knowingly or willfully blind to its dimensions. It is fundamental that the City of Columbia obtained these easements from the Plaintiffs' predecessors in title, and that the Defendant NAPM knew of the dimensions of the easement from the preconstruction meeting. (Tr ___) These Defendants intentionally operated outside of the easement. They had actual knowledge of the easement, but ignored it. (Tr ___) Had they stayed within the easement, they would not have damaged the historic Compty Abutments.

It is further undisputed that none of the Defendants in this case made any attempt to check for cultural resources prior to entry upon the Plaintiffs' land. Dr. Leader testified that had they called his office or used the ArchSite website, the presence of the historic bridge abutments would have been easily found. (Tr ___) At the hearing on the

Defendant NAPM's Motion for Summary Judgment, a printout from the ArchSite database was presented to the Court which clearly showed that the Plaintiffs' properties contained historic sites and archaeological resources. (Tr ___) The failure of the Defendants to conduct *any* due diligence regarding the potential presence of historic sites and archaeological rèsources was intentional, and such action ensured their willful blindness to what should have been an obvious inquiry had they sought permits or made a cursory review.

If this Court believes that a person must have *a priori* knowledge that a site is an archaeological resource to be liable under S.C. Code Ann. § 16-11-780(C), then such knowledge must include actual or constructive knowledge where a party knew or should have known that a site was historic and contained archaeological resources. In addition, a party must not escape liability because of willful acts which include an intentional failure to perform *any* due diligence or to obtain proper permits.

Since the Plaintiff James Coleman warned NAPM that the abutment on his property was a historical structure and to avoid it, NAPM had actual knowledge of the historical nature of the site. If NAPM didn't understand Dr. Coleman's warning, they it had constructive knowledge that they should have avoided the historical site on his property.

III. THE COURT WAS IN ERROR IN CLAIMING THAT ANY APPLICABLE GOVERNING, PRESERVATION, OR CONSERVATION AUTHORITIES HAD NOT DESIGNATED THE ARCHAEOLOGICAL RESOURCES AS SUCH ON THE PLAINTIFFS' PROPERTY.

The applicability of S.C. Code Ann. § 16-11-780 to the Plaintiffs' lawsuit depends upon whether the Plaintiffs' properties contained "Archaeological Resources"

as defined in S.C. Code Ann. § 16-11-780 (A)(1). Rather than make the requisite analysis, the Court accepted the Defendant NAPM's argument that there was no genuine issue of material fact that the archaeological resources on the Plaintiffs' properties had not been designated as such by a relevant agency or historic or conservation authority.

The Court erroneously ruled that the Compty Bridge Abutments characterized in the Order as "archaeological resource/archaeological structure(s) had not been designated as historic by any applicable and/or governing preservation and/or conservation authority(ies)." (Tr ___) In its response to NAPM's Motion for Summary Judgment, the Plaintiffs' Exhibit C that was presented to the Circuit Court was a screen shot from the ArchSite website that is maintained by the South Carolina Department of Archives and History in conjunction with the Office of the State Archaeologist. (Tr ___) The South Carolina Department of Archives and History is an agency of the state and maintains a website, shpo.sc.gov. Had these Defendants entered their job location into the ArchSite query form, they would have immediately known that it was the site of historic bridge abutments. The first page of the website has a "Quick Links" section that takes one to the "ArchSite (GIS)" database. Once one clicks on the address of the Plaintiffs, a polygon appears that indicates that a historic site exists over the Plaintiffs' properties. Exhibit C is the screenshot of the identification of the bridge abutments. (Tr ___) Archsite indicates that there are bridge abutments adjacent to Castle Road and the Broad River on the two properties owned by the Plaintiffs. The pubic database identifies the Plaintiffs' property at "**Historic Areas: Broad River Ferry and Bridge Site**...Date of Resource: 1791-1900." (Tr ___)

The notation references that the site is not eligible for the National Register of Historic Places but "further evaluation is required." A copy of this polygon was presented to the Circuit Court as part of the Plaintiffs' Memorandum in Opposition to NAPM's Motion for Summary Judgment. The historic determination by the Department of Archives and History was presented to the Court at oral argument. (Tr ___)

In addition to the ArchSite exhibit, in deposition, Dr. Jonathan Leader, South Carolina State Archaeologist testified regarding the documentation of these bridge abutments in the records of the SC Department of Archives and History and in the South Carolina Institute of Archaeology and Anthropology. In his deposition, Dr. Leader testified:

> Q. Okay. Okay. You earlier testified that the bridge abutment has been determined to be a historical site pursuant to the State file --the State site files, correct?
>
> A. Pursuant to the Office of the State Archaeologist, it is a historic site.
>
> Q. Okay. When – when was that determined?
>
> A. Basically when we first got to it. It's been considered a historic site since day one.
>
> Q. Would that have been in 2007?
>
> A. Yeah. As soon as it was found on private property, it was protected -- we thought or believed at that time. And since it was a historic structure with materials demonstrating from a historic period, we considered it to be a historic site from that time period on private property.
> (Tr ___)

The Court apparently accepted NAPM's misrepresentation of the State Archaeologist's testimony. NAPM incorrectly claimed that Dr. Leader had not done any

independent research or other activity that would result in any governing authority issuing a historic designation for the Plaintiffs' properties. It further claims that Dr. Leader's opinions are based upon an *assumption* that the location is a historical site. (Tr___) The record does not support NAPM's assertions which the Court erroneously accepted where genuine issues of material fact contradict such statements.

First, Dr. Leader made it very clear that he made six site visits to the Plaintiffs' properties. (Tr___) He found pottery shards that are both prehistoric and historic. The location of the historic bridge abutments have been correlated based upon historical documents as being located on the Plaintiffs' properties. (Tr___) Dr. Leader had identified the formerly standing stones on-site as bridge abutments (Tr___). In his deposition on February 16, 2018, Dr. Leader was asked:

> Q: Just to summarize again why you believe that the location identified in Exhibits 24 and 25 [on the Plaintiffs' property] is an archaeological site?
>
> A: I believe that the area is an archaeological site based on the identification of artifacts on the site that are prehistoric and historic in nature. In both cases primarily pottery plus additional information dealing with the placement of bridge abutments which are based on historical documents, maps, and GIS and remnants of what I have identified as bridge abutments.
>
> (Tr___)
>
> Q: What is the significance of this site to the Native American artifacts that you have apparently identified?
>
> A: Well, I think it's significant. You're dealing with at least in this location is a Deptford site with is early Woodland which is that point where people were no longer hunter, fishers, foragers, but moved to small hamlets, horticulture and sedentary life. So what you're talking about is the potential for a Native American hamlet in the area. It could be other things there as well. And basically,

Columbia is a good place to live and people have been living there for millennia is what it comes down to. So it is of importance.

The other thing to keep in mind especially when it comes to Woodland period hamlets and the rest, and not infrequently the burials are in the buildings themselves. So potentially there were burials in the area. I didn't see any burials, but as an anthropologist, specifically as an archaeologist, it will be something that I would have on my tick off sheet to keep track of.

Q. Moving on to Mr. Brinkman's work, do you have any reason to doubt the conclusions that Mr. Brinkman came up regarding those abutments named John Compty's Bridges?

A. No. I think that he [David Brinkman] has done a tremendous amount of work. I think that his GIS work is very, very good. My only concern is it's a multicomponent site. There are other components need to be dealt with.

Q. Okay. Does the professional archaeological community in South Carolina accept Mr. Brinkman's work?

A. They have, yes.

(Tr___)

Q. Okay. In your opinion, has that assessment been definitively determined, that these remains are, in fact, part of the first bridge by John Compty?

A. Given the location of the abutment on the Brinkman property, given the overlay of the maps, which I have yet to see, but the maps showing the location in line going across, given the information provided me to the materials inside -- interior to the river itself in line going across, my professional assessment is that they are indeed part and parcel of a bridge, okay, of the appropriate time period.

(Tr___)

The Office of State Archaeologist is part of the South Carolina Institute of Archaeology, an agency of the State of South Carolina pursuant to S.C. Code Ann. § 60-13-210. Contrary to the findings of the Court, these are governing authorities and the South Carolina Department of Archives and History did in fact recognize the historical significance of the Native American artifacts *and* the Compty Bridge Abutments on the Plaintiffs' properties.

The Court's basis for its erroneous finding that the site had not been designated as historical as argued by NAPM was based upon a letter dated in 2008 to the Plaintiff David Brinkman stating that at that time, the site was not eligible for inclusion onto the National Register of Historic Places because additional evaluation needed to be done. (Tr___) Mr. Andrew W. Chandler, an employee of the SC Department of Archives and History, wrote the letter to Plaintiff David Brinkman. While the letter described Mr. Brinkman's work as "impressive," the designation was left open for future review and evaluation.

At the time that Mr. Brinkman sought the National Register designation, he believed that the bridge abutments might be from a bridge that General Sherman used to enter Columbia during the latter part of the Civil War. Based upon research that Mr. Brinkman performed after receipt of the letter from Mr. Chandler, he determined that the bridge abutments were actually about 70 years older and corresponded to the site of the first bridge over the Broad River in the Midlands. Mr. Brinkman determined that these were abutments that were built by John Compty, a French Engineer, in the 1790s. In his testimony, Dr. Leader testified that the professional archaeological community in South Carolina has accepted Mr. Brinkman's finding that the bridge abutments are the Compty

Bridge Abutments from the 1790s. (Tr___) As State Archaeologist, he further testified that his agency accepts Mr. Brinkman's findings as accurate. (Tr___) Dr. Leader further emphasized the historical nature of the bridge abutments by testifying, "I think it is pretty clear, at least from my point of view, the historic and cultural resources have been impacted." (Tr___)

> My determination was that it was a historic abutment from the appropriate time period and that given the additional research attached to it, it was likely to be the Compty bridge abutment.
> (Tr___)

It is undisputed that Mr. Brinkman applied for National Register designation in 2008 and such status was not granted based upon the need for further evaluation. The Court ignored in its Order the obvious designation of the site as historic by the South Carolina Department of Archives and History as demonstrated in the Archsite database and polygon notation. In addition, the Court ignored the plain testimony of the State Archaeologist that the abutments were identified archaeological resources that were covered under S.C. Code Ann. § 16-11-780 *et seq.*

IV. THE CIRCUIT COURT ERRED IN CONCLUDING THAT DESIGNATION ON THE NATIONAL REGISTER OF HISTORIC PLACES WAS A REQUIREMENT FOR S.C. CODE Ann. § 16-11-780 TO BE APPLICABLE TO THIS CASE.

S.C. Code Ann. § 16-11-780 does not require that a site be on the National Register of Historic Places to be an "Archaeological Resource" as defined in S.C. Code Ann. § 16-11-780 (A)(1). This paragraph defines an Archaeological Resource:

> "Archaeological resource" means all artifacts, relics, burial objects, or material remains of past human life or activities that are at least one

> hundred years old and possess either archaeological or commercial value, including pieces of pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, rock paintings, rock carving, intaglios, graves, or human skeletal materials.

As a matter of law, nowhere is inclusion in the National Register required for S.C. Code Ann. § 16-11-780 to be applicable. The Court's reliance on the 2008 letter from Mr. Chandler to Mr. Brinkman is misplaced. Even though in 2008 the nomination was not forthcoming because further study needed to be done, this letter does not eviscerate the application of the Statute.

Dr. Leader emphasized that just because the Plaintiffs' properties were not deemed to be eligible in 2008 for nomination to the National Register of Historic Places did disqualify the site from being historically important. Dr. Leader testified that:

> "One of the things I've stated several times today, and which I stand on, is you have an archaeological site with is important and which required additional work, okay? So "requires evaluation" comes underneath the general rubric of additional work...Doesn't mean it's not important. The "not eligible" side of things references underneath the criteria specifically to the National, you know, Register, which is a very specific tool, which does not cover, you know, reality of most archaeology.
>
> The National Registry was not designed initially for archaeology. It was designed for built environments, for houses and architecture."
>
> (Tr___)

> Q. Okay. And just in general terms, can you describe what the significance of the John Compty abutments are?
>
> A. Well, the bridges coming into Columbia were the lifeblood of Columbia. I mean, you had the river, obviously, and people did take vessels up and down it from earliest times, Native Americans through, but having

roads to the interior and Columbia was the interior at that time -- and having bridges that were available regardless of whether -- although, given what happened with the flood, perhaps not -- but the concept of doing that was instrumental for the -- for the history of Columbia as a city.

Had there not been those bridges in place, Columbia's growth would have been stunted, the people coming into Columbia would have then had a serious obstacle. The history of Columbia would have been quite different.

So I would put the bridges, any one or all of them, into the category of being of very serious importance to South Carolina and to the history of the State. [emphasis added]

Q. Were the Compty bridge abutments the first bridges -- are the Compty bridges the very first bridges over the Broad River?

A. Yeah. You had ferries, but the Compty bridges were the first two.

(Tr___)

Both the ArchSite notice by the Department of Archives and History and Dr. Leader's testimony demonstrate that the Plaintiffs' property contained archaeological resources - the historic bridge abutments. The contents of the 2008 letter do not affect the finding that the Plaintiffs' property contains archaeological resources as defined under S.C. Code Ann. § 16-11-780 (A)(1). Thus, the Court was in error in claiming that the bridge abutments had not been designated as historic by "governing preservation and/or conservation authorities." (Argument III, above) At oral argument before the Circuit Court, counsel demonstrated that National Register designation was not a requirement for coverage under S.C. Code Ann. § 16-11-780, and that both the South Carolina Department of Archives and History and the South Carolina State Archaeologist had

declared the Plaintiffs' properties to be historic sites that meet the definition of an Archaeological Resource under the Code. (Tr___) In finding otherwise, the Court's determination was clearly erroneous, arbitrary, and capricious.

In addition, this Court can take judicial notice that the location of the Plaintiffs' properties is within the "Broad River Historic District," which is listed on the National Register of Historic Places. (Tr___) In spite of the 2008 letter that Mr. Brinkman received, the location is designated under the National Register of Historic Places as part of the "Broad River Historic District."

V. THE COURT'S MISSTATEMENT OF THE LAW IS GROUNDS FOR REVERSAL

On page eight of the Court's Order granting NAPM Summary Judgment, it clearly misstates and misquotes the text of S.C. Code Ann. § 16-11-780 (C). This error is grounds for reversal in and of itself. The Order states that "In reading the plain language of S.C. Code Ann. § 16-11-780 (C), it is clear that the legislature intended this criminal statute to apply 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 archaeological resource." The Order misquotes the applicable statute by inserting the erroneous statement that the entry must be "for the sole purpose." The statute does not require the entry to be "for the sole purpose." In making this statement, the Court is in error for misstating and misapplying the controlling statute. Nowhere in S.C. Code Ann. § 16-11-780 (C) does the statute require the entry onto the lands of others to be "for the sole purpose" of disturbing an archaeological resource.

The statute premises liability upon three components:

(1) Willfully, knowingly, or maliciously entering the lands of another,

(2) And disturb or excavate a prehistoric or historic site,

(3) For the purpose of discovering, uncovering, moving, removing, or attempting to remove and archaeological resource.

The Order is further in error when it concludes on page 8 that "'...there is no evidence NAPM entered upon Plaintiffs' properties for the *sole* purpose of finding and removing...an archaeological resource." In making this claim, the Court relied upon a misreading of the statute as discussed above. The Court's reliance on an obvious misreading of the statute is, as a matter of law, grounds for reversal. *State of Ohio v. Goodwin*, 2013 Ohio 4591 (Ohio App, 2013).

Also, the Order on page 8 further misquotes S.C. Code Ann. § 16-11-780 (C) when it states that '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." The aforementioned statute does not use the words "intentional" or "reckless" as the Court apparently believed; however, S.C. Code Ann. § 16-11-780 (C) states that "It is unlawful for a person to willfully, knowingly, or maliciously enter the lands of another..." This section does not premise liability upon "knowingly or maliciously" moving or displacing historical structures.

When read properly, the statute does not require that a party know in advance that a site which is disturbed is an archaeological resource. A party committing the acts that are prohibited by S.C. Code Ann. § 16-11-780 (C) may know that he is disturbing an

archaeological resource, but such knowledge is not required by the statute. Liability may apply to situations where that party "willfully, knowingly, or maliciously" enters the lands of another with or without knowledge that the site that is excavated is a historic or prehistoric site containing an archaeological resource.

The Circuit Court further ignored the testimony of Plaintiff Dr. James Coleman that he warned two NAPM workers to avoid the historic bridge abutments on his property prior to their destruction. (Tr___) This testimony demonstrates that NAPM was warned and knew or should have known that there were archaeological resources on Dr. Coleman's property. This evidence, *inter alia*, presented by the Plaintiffs in opposition to NAPM's Motion for Summary Judgment presented genuine issues of material fact that does not support a grant of Summary Judgment to NAPM and the City of Columbia.

IV. THE COURT WAS IN ERROR IN APPLYING THE "UTILITY WORKER EXCEPTION" IN S.C. CODE Ann. § 16-11-780 TO THE DEFENDANTS. THE EXCEPTION APPLIES TO WORKERS, NOT CORPORATIONS.

The Circuit Court erred in accepting the Defendants' arguments that neither NAPM nor the City of Columbia were liable for disturbance and destruction of the Compty Bridge Abutments, because **they** were exempted pursuant to S.C. Code Ann. § 16-11-780 (K) (3). Specifically, the aforementioned statute states that:

> (K) Nothing contained in this section shall limit or interfere with:
> (3) the lawful acts of a utility worker acting in the scope of and in the course of his employment;

The plain language reading of the statute indicates that it applies to the personal liability of utility workers who are engaged in and acting within the scope and course of their employment. Neither NAPM nor the City are "utility workers" as intended by the statute. The statute uses the pronoun "his," which cannot apply to an entity, but only to

an actual person. As a matter of law, the Court's interpretation that this part of the Archaeological Code shields the municipal and corporate Defendants is not conveyed by the statute. On its face, the so-called "utility worker exception" applies to individual employees who are working for a utility company, but it does not grant immunity or an exception to liability to the utility, municipality, or corporation. In finding that NAPM and the City are covered by this exception, the Court went beyond the scope of the exception. Not only was the Court's interpretation that the statute applied to entities other than utility workers facially incorrect, it was an arbitrary and capricious decision to extend the application of the statue to NAPM and the City, as neither are "utility workers." NAPM is a corporation that was retained as a subcontractor to perform land-clearing work within an easement in advance of a sewer maintenance contract. While this work was apparently in furtherance of a planned sewer maintenance project, NAPM as a corporation is not a utility worker as provided for under the aforementioned statute.

Presumably, the Legislature enacted the "utility worker exception" to shield individual employees from criminal liability for the destruction of archaeological resources as long as they were acting within the scope of their employment. It did not extend the protection of workers who were acting in the scope of their duties to shield corporations and municipalities. Since the statute covers "the lawful acts of a utility worker acting within the scope of and course of his employment," it cannot cover employees whether they work for contractors like NAPM or municipalities such as the City of Columbia. It is plain and clear that the exception refers to a utility worker as a single person from the use of the pronoun "his." This choice of pronoun does not make grammatical sense to apply to the City of Columbia or NAPM, and these entities are not

covered. Any other reading of the statue would be unreasonable, absurd, and well beyond the plain language in the statute.

Even if the Court were to disagree with the Plaintiffs and find NAPM and the City to be "utility workers," when NAPM went outside of the easement and destroyed the Compty Bridge Abutments, it was no longer engaged in a lawful act. As a contractor, NAPM had no permission to operate outside of the easement. The City had no authority to allow NAPM to operate outside of the easement. These operations were clearly beyond the scope of the protections of the utility worker exception. (Tr___) It is further undisputed that NAPM was operating outside of the easement. (Tr___) Since NAPM operated outside of the easement, and the City was aware at the time of NAPM's operations that the work was performed outside of the easement, the acts of these Defendants were not "lawful acts" as allowed in S.C. Code Ann. § 16-11-780 (K) (3). In operating outside of the easement, NAPM's actions were beyond the scope of its employment.

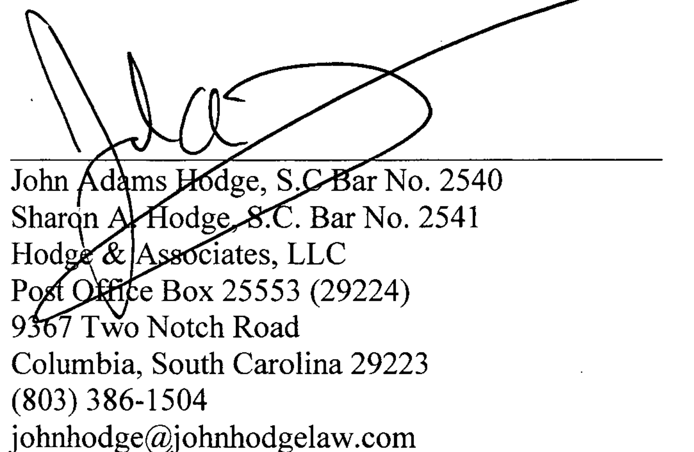
CONCLUSION

The Circuit Court erred in granting Summary Judgment to NAPM and the City of Columbia that the archaeological statute, S.C. Code Ann. § 16-11-780 was inapplicable in this case. While Defendants claim that they did not have actual knowledge of the archaeological sites on the Plaintiff's properties, the statute does not require actual knowledge. If there is any doubt that the Order of the Circuit Court is defective, the word "discovery" in the statute demonstrates that knowledge is not required, as one cannot have knowledge of something that they are trying to discover. Knowledge is not necessary for the plain language of the statute to apply. There only

needs be intent to enter the land, intent to excavate, and a purpose of moving the bridge abutments out of the way. There are material facts that Defendants should have known and did in fact know that the property was an archaeological site because the Plaintiff James Coleman informed them. Even if one were to accept the Court's incorrect interpretation of the archaeological statute, it would still apply based upon the actual or constructive knowledge of NAPM and the City. The Court further erroneously concluded that designation on the National Register of Historic Places was a requirement for coverage under S.C. Code Ann. § 16-11-780 when the statute contains no such requirement. The Court also erred in holding that the Defendants NAPM and the City were immune from liability since neither is a "utility worker" as required under the statute.

Sufficient evidence was presented that a dispute of material facts exists regarding the Defendants' actual or constructive knowledge and intent of the to exceed the easement, enter the lands of the Plaintiffs without permission, and excavate, disturb, move, or remove an archaeological resource. Because there is a dispute of material facts, summary judgment was improper.

Respectfully submitted,



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Counsel for Appellants

October 22, 2018

PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge
Jocelyn Newman, Circuit Court Judge

APPELLATE CASE NO. 2018-000948
Case No. 2015-CP-40-5598

Modesta Brinkman, David Brinkman, James Coleman, Carl Foster, Karen Foster, Robert Collins, Appellants,

v.

City of Columbia, South Carolina, North American Pipeline Management and Layne Inliner, Respondents.

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I certify that I have served the Initial Brief of Appellants and Designation of Matter to be Included in the Record of Appeal on Respondents and the Intervenor by depositing a copy of it in the United States Mail, postage prepaid, on October 22, 2018, addressed to the Clerk of Court and the following attorneys of record:

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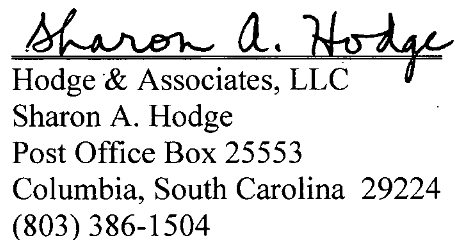
October 22, 2018



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Re: Brinkman v. City of Columbia et al., Appellate Case No. 2018-000948

Dear Ms. Kitchings:

Please find enclosed a copy of the Initial Brief of the Appellants, Designation of Matter to Be Included in the Record on Appeal, and a Certificate of Service.

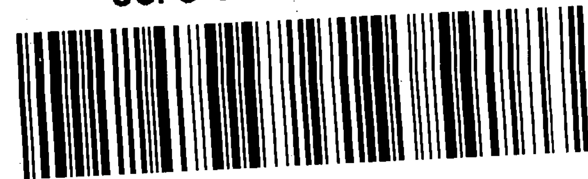
By copy of this letter, we are also notifying counsel of record. Please feel free to contact my co-counsel, Geoff Chambers, or me should you have questions concerning this matter. Thank you very much.

Very truly yours,

John Adams Hodge

cc: Counsel of Record

EXPECTED DELIVERY DAY: 10/23/2018



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