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.

REPLY BRIEF OF APPELLANTS TO THE CITY OF COLUMBIA

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PRELIMINARY STATEMENT

The Respondent City of Columbia ("City") set forth two issues on appeal: I. That the Circuit Court did not err in finding that §16-11-780 is inapplicable in this case, and II. That the "utility worker exception" of §16-11-780 (K)(3) provides immunity to the City of Columbia.

The City makes the erroneous claim in its Statement of Facts on page 3 of its Initial Brief that the Appellants' Initial Brief "falsely assumes the existence of archaeological resources on the property is not in dispute." In opposing Summary Judgment, the Appellants have argued consistently that there is a genuine issue of material fact regarding the City's (and other Respondents') denial that there are historic sites or archaeological resources on the Appellants' properties. It is obvious from the City's brief that it absurdly refuses to acknowledge or admit the site's historical significance in spite of the evidence in the record from the South Carolina Department of Archives and History's *Archsite* database, on which the Appellants' properties are identified as "Historic Areas: Broad River Ferry and Bridge Site," and the clear and convincing testimony of the South Carolina State Archaeologist to that effect. (Appellants' Initial Brief pp. 25-31, Tr___) The City's admission that there is a factual dispute demonstrates that there were genuine issues of material fact which should have led the Circuit Court to deny Summary Judgment.[1]

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[1] The City erroneously claims, "it is undisputed that the entire portion of the properties upon which NAPM was working was a wooded, overgrown portion of the property without improvements." While this assertion is facially incorrect, it is not germane to the outcome of this case.

ARGUMENTS

I. THE CITY'S ARGUMENTS ARE ABANDONED AS A MATTER OF LAW.

The City's brief makes no citations to the record in this case, nor do its Arguments II. through VI. cite any case law or other authority in support of the City's arguments. As a matter of law, the City's Arguments II. through VI. are deemed to be abandoned. These arguments are only conclusory statements that cite no evidence in the record of the case, nor do they cite any legal authority for support.

"An issue is deemed abandoned if the argument in the brief is only conclusory." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000); *see also State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned), *aff'd as modified on other grounds*, 337 S.C. 622, 525 S.E.2d 246 (2000). Further, "[o]ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR.

"An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76,81, 557 S.E.2d 689, 691 (Ct. App. 2001)

II. THE CITY FAILED TO APPLY THE RULES OF STATUTORY CONSTRUCTION AND FAILED TO REBUT APPELLANTS' ARGUMENTS.

The City did not rebut the Appellants' argument that the terms "willful, knowingly, or maliciously" in §16-11-780 apply to the phrase "enter upon the lands of another" and do not modify language beyond the verb "enter." The City did not address the issues raised by *State v. Miles*, 805 S.E.204 (Ct. App., 2017) and *U.S. v. Jones*, 471 F.3d 535 (4th Cir. 2006) which are relied upon by the Appellants. The City engaged in no analysis of the statute, its construction, or application to the facts in the record. Instead, the City paints the statute with a broad brush in an attempt to erroneously make it say what the City wants it to say. The *mens rea* in §16-11-780 is to "willfully, knowingly, or maliciously enter the lands of another." Without question, the City and its contractors admitted that they entered the Appellants' land and exceeded the boundaries of the permanent easement. (Tr___, Testimony of Gene Pierce, P.E. and Michael Shue, P.E., Appellants' Initial Brief, p.17-19) The second *mens rea* is that the act must be "for the purpose of moving an archaeological resource." An object can be purposefully moved without knowledge of details and specifications on the object itself. (Appellants' Initial Brief, p 11) §16-11-780 does not require that a person have knowledge that the object moved is an archaeological resource at the time of disturbance. The South Carolina State Archaeologist testified that one could be liable under the statute and not know that the thing that was disturbed was an archaeological resource. (Appellants' Initial Brief p 20, Tr____)

The City further makes reference to what it believes is "The legislature's intent in this act" without any supporting evidence. Such speculation is tantamount to what the City wants the legislature's intent to be, rather than what such intent actually is. In

contrast, the Appellants cite the testimony of the South Carolina State Archaeologist, who assisted and advised the legislature in the creation of §16-11-780, as evidence of legislative intent. (Appellants' Initial Brief pp 20-21, Tr___)

III. THE CITY ERRONEOUSLY ARGUES THAT THE RESPONDENTS' ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF ARCHAEOLOGICAL RESOURCES WAS NOT BEFORE THE COURT.

§16-11-780 of the Code places liability upon entities who "willfully, knowingly, or maliciously enter the lands of another...and disturb or excavate a prehistoric or historic site...for the purpose of discovering, uncovering, moving, removing, or attempting to move an archaeological resource." Knowledge that a site is historic or that a site is an archaeological resource is not required under the statute; however, should this Court conclude otherwise, willful and knowing is established by the Respondents' conduct. (Appellants' Initial Brief pp 13-19, Tr____)

The knowledge requirement of §16-11-780 was clearly before the Circuit Court.[2] The Appellants cited the testimony of the City's Professional Engineer, Michael Shue, who admitted that he knew that the City and its contractors were working outside of the easement on the Appellants' properties. Such admission was a knowing "entry upon the lands of another." NAPM submitted an affidavit that it was unaware that the standing stones on the Appellants' properties were historic structures. (Tr.___) The Appellants responded in their brief to the Circuit Court that the Respondents admitted that they made no effort to determine if there were any archaeological resources or historic sites on the Appellants' properties. Had the Respondents performed any due diligence, knowledge of

[2] The City cites §16-1-780 of the Code in support of its second argument in its brief; however, no such statute exists. Presumably, this cite is a typographical error.

the historic sites on the Appellants' properties was easily ascertainable. (Tr___.) The Appellants submitted a proposed order to the Circuit Court in which the issue of the Respondents' actual or constructive knowledge was central in opposition to the Motion for Summary Judgment. (Tr___) In addition, the Appellants' brief before the Circuit Court included the testimony of the State Archaeologist, who testified that one could be liable for damage to or destruction of an archaeological resource without having specific knowledge that the thing damaged was an archaeological structure. Appellants' Initial Brief, pp 20-21, Tr.___. The Appellants also argued these points before the Circuit Court. (Tr___) Other than vague and nonspecific allegations, the City has not pointed to anything in the record to support its second argument. The City's claim that the issue of the actual or constructive knowledge of the Respondents was not before the Court is patently incorrect when compared to the record.

IV. THE CITY'S THIRD ARGUMENT THAT THE ARCHAEOLOGICAL RESOURCES HAVE NEVER BEEN DESIGNATED AS HISTORIC IS CLEARLY ERRONEOUS.

In its Initial Brief, the City fails to rebut the Appellants' argument that the Compty Bridge Abutments were designated as historic by the South Carolina Department of Archives and History's *Archsite* public database and by the South Carolina State Archaeologist. The City pretends like these material facts do not exist when they incorrectly assert that it is only the Appellant David Brinkman's opinion that the bridge abutments dating from the 1790s are archaeological resources. Unfortunately, the Circuit Court also failed to address the material facts before it that both the Department of Archives and History and the Office of the State Archaeologist had designated the Bridge Abutments as archaeological resources.

V. THE CIRCUIT COURT'S ORDER ERRONEOUSLY FOUND THAT THE DEFERRAL IN NOMINATING THE APPELLANTS' PROPERTIES TO THE NATIONAL REGISTER OF HISTORIC PLACES RENDERED §11-16-780 INAPPLICABLE

The Circuit Court improperly relied upon a 2008 letter from the South Carolina Department of Archives and History to rule in May 2018 that §16-11-780 of the Code was inapplicable to this case. (Tr____) The letter stated that the Department of Archives and History chose not to nominate Appellant David Brinkman's property for inclusion into the National Register of Historic Places at that time because additional work was required prior to nomination. (Tr____) Just because additional work needed to be performed did not mean that the location was not a historic site. The Court's conclusion stands in opposition to the designation of the Appellants' properties as historic sites by the South Carolina Department of Archives and History on its *Archsite* public database and the designation by the South Carolina State Archaeologist of the same. (Appellants' Initial Brief pp 25-31, Tr____)

The Circuit Court's order granting NAPM Summary Judgment is based upon the 2008 letter declining to nominate the site to the National Register. The Court opined "Based upon the above [letter], Plaintiffs cannot point to any evidence that the alleged archaeological resource/archaeological structure(s) at issue have been designated as historic by any applicable...authorities." (Brackets added, Tr____) The Circuit Court's Orders and the City's arguments are clearly erroneous in light of the evidence in the record from the two authoritative sources, the South Carolina Department of Archives and History and the South Carolina State Archaeologist. The Circuit Court erroneously found that not having a National Register nomination was the basis for determining that §16-11-780 was inapplicable.

VI. THE CITY'S EXCUSE FOR THE CIRCUIT COURT'S MISSTATEMENT OF THE LAW DOES NOT WARRANT BASING AN ORDER ON A MISSTATEMENT OF LAW.

The Circuit Court's reliance on its misstatement of the statute resulted in an order that was clearly erroneous on its face. The City seeks to utilize this error to narrow the scope of "purpose" to something less than what is actually contained in the statutory language. The City attempts to justify the Court's obvious misstatement of the statute by claiming that "there was no purpose for the City to disturb a historical structure," as if the Court's error is insignificant. (City's Initial Brief, p. 15) On the next page of its brief, the City admits that the purpose of its actions "was to perform work on the sewer line..." The purpose of the disturbance and destruction of the historic Compty Bridge Abutments by the City and its contractors was moving the historic site out of the way of a planned sewer line access road. The destruction of the Compty Abutments was done outside of the easement, where both the City and its contractors had no lawful right to be performing land disturbing activities. (Tr___)

South Carolina courts have reversed the decisions of lower courts, administrative agencies, and municipal bodies such as zoning boards where their findings were clearly erroneous. *Foran v. Murphy*, 803 S.E.2d 311 (Ct. App., 2017), *Weathers v. Bolt*, 293 S.C. 486, 361 S.E.2d 779 (Ct. App., 1987), *Bonham v. Cave*, 102 S.C. 308, 86 S.E. 681 (S.C. 1915), *City of Aiken v. Koontz*, 368 S.C. 542, 629 S.E. 2d 686 (Ct. App., 2006), *State v. Dennis*, 402 S.C. 627, 742 S.E. 2d 21(Ct. App., 2013), *Osman v. S.C. Dep't of Labor Licensing, & Regulation*, 382 S.C. 244, 676 S.E. 2d 672 (2009) Although there are no reported cases where the Circuit Court in South Carolina incorrectly cited a controlling statute, there is ample authority for this court to overturn the decision of the Circuit Court

for misquoting a statute by placing words in it that do not exist. Such an error renders the decision clearly erroneous.

VII. THE CITY'S CONVOLUTED STATEMENTS DO NOT SUPPORT APPLICATION OF THE UTILITY WORKER EXCEPTION IN §16-11-780 (K)(3) TO THE RESPONDENTS.

The City's Initial Brief, which states that §16-11-780 (K)(3) of the Code makes it immune to liability, tortures any reasonable and logical reading of the statute. The City cites the Appellants' recitation of the statute that "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 of their employment" is "without merit." (City's Initial Brief p 15) The City goes on to make an incorrect statement that the Appellants "want this Court to rewrite the statute to provide that this provision would subject corporate and municipal entities in a manner which is not written into the statute." (*Id*) The City cites no authority for this erroneous position, nor does it state with any specificity what is meant by this statement.

The Appellants point to the plain language of the statute that it applies only to "lawful acts of a utility worker acting within the scope and in the course of his employment." The City cannot point to any evidence that it as a municipality is a "utility worker." In addition, the City makes the unsupported claim that the statute "does not apply to utilities." (City's Initial Brief p 16) The "utility worker exception" does not apply to utilities, but it actually says that the statute does not "limit or interfere with the lawful acts of a utility *worker* acting in the scope of and in the course of his employment." (Italics added) The City's attempt to call itself a "utility worker" is

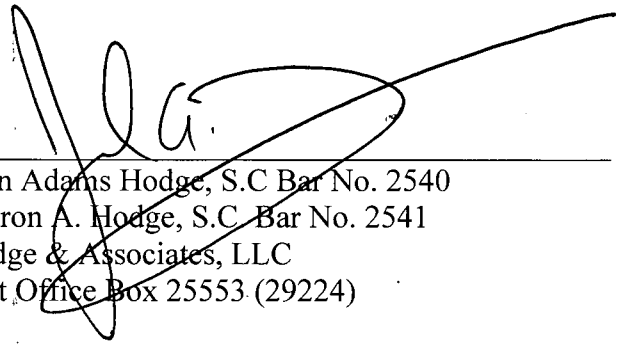
unreasonable, untenable, incorrect, and not consistent with the plain language of the statute.

In going outside of the easement, the Respondents' work was not lawful and beyond the project's scope of work. (Appellants' Initial Brief pp 17-19, Tr____) There can be no refuge for the City or the other Respondents under §16-11-780, as neither the municipality nor the corporations are "utility workers."

CONCLUSION

In the interest of avoiding oral argument by ambush, Appellants request that this Court not consider any authority, arguments, or facts not supplied in the City of Columbia's Initial Brief and limit the City of Columbia to the contents of its brief in which authority and citation to the record support positions. Appellants further request that this Court take judicial notice of public record evidence of the historical site and evidence of historical significance supplied in the record. As a matter of law, the Court should declare the City's Arguments II through VI. as abandoned. Appellants respectfully request this Court to reverse the Orders for Summary Judgment subject to this appeal, hold that there is a genuine factual dispute, and remand the case for jury trial on the merits.

Respectfully submitted,



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