

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,

RECEIVED
JAN 31 2019
SC Court of Appeals

v.

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

Respondents.

**REPLY BRIEF OF APPELLANTS
TO NORTH AMERICAN PIPELINE MANAGEMENT**

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PRELIMINARY STATEMENT

NAPM has incorrectly alleged that particular issues were not raised before the Circuit Court. In response, the Appellants demonstrate that either the issues were raised below, or they could not have been raised until the Court issued its Order. In addition, this Court is entitled to take judicial notice of adjudicative facts. NAPM further failed to rebut the Appellants' arguments, and it has misstated the record.

ARGUMENTS

I. THE APPELLANTS' ARGUMENTS ARE PRESERVED.

NAPM erroneously claims that several issues were not before the Circuit Court and are not preserved for appeal.¹ In response, the Appellants assert the following:

a. The issue of the lack of permits was properly before the Circuit Court.

The Appellants raised the issue of the lack of permits on pages two and three of their Memorandum in Opposition to NAPM's Motion for Summary Judgment before the Circuit Court. (Tr___) The issue was also raised before the Circuit Court in oral argument. (Tr___) The issue of the lack of permits is relevant because it goes to a material issue of fact: Had the Respondents obtained necessary permits, they would have been required to engage in a cultural resources survey; thus, the Respondents knew or should have known, through the exercise of ordinary due diligence, that the standing

¹ NAPM provided Appellants' counsel with a memorandum of law dated May 8, 2018 upon arrival in the courtroom at the commencement of the hearing. Under such circumstances, it is unreasonable to expect counsel to be prepared to address, and rebut each and every argument in detail that was not specifically enumerated in the written motion that was filed with the Court. In spite of NAPM's arguments, each issue of the "Statement of Issues on Appeal" raised by the Appellants is preserved for review.

stones on the Appellants' properties were historic structures and archaeological resources. Clearly, these arguments were raised before the Circuit Court and are preserved.

b. The Court is entitled to take judicial notice of adjudicative facts.

Pursuant to Rule 201 (d) of the South Carolina Rules of Evidence, "A court shall take judicial notice if requested by a party and supplied with the necessary information."

An appellate court is:

"authorized to take judicial notice in an appropriate case.

Fed.R.Evid. 201(d) ("The court may take judicial notice at any

stage of the proceeding."); *Massey v. Ojaniit*, 759 F.3d 343, 353

(4th Cir. 2014) (observing that an appellate court may take judicial

notice of the same materials as could a district court). *Goldfarb v.*

Mayor and City Council of Baltimore, 791 F.3d 500, 509 (4th Cir.,

2015)

The Appellants argued to the Circuit Court (and to this Court) that listing on the National Register of Historic Places is not determinative as to whether the Appellants' properties are historic sites pursuant to South Carolina Code of Laws Annotated 1976 §16-11-780. The Respondents have asserted in this appeal that the Appellants' properties are not historic sites based upon the 2008 letter that declined to nominate Appellant Brinkman's property to the National Register of Historic Places; however, this Court can take judicial notice that the Appellants' properties are covered under the National Register of Historic Places as part of the Broad River Historic District as an adjudicative fact. This Court can also take notice that the South Carolina Department of Archives and History has listed

the site on a statewide database of historically significant sites. These publicly available listings are in addition to the State Archeologist's testimony regarding the historical significance of these sites.

c. The Circuit Court's Order that improperly misstated Section 16-11-780 was properly preserved for review.

NAPM mistakenly states that the Appellant cited no case authority for the proposition that the Circuit Court's misstatement of the law is grounds for reversal. Although the Circuit Court's reliance on a misreading of the statute is such a fundamental error that it should not require citation, the Appellants cited *State of Ohio v. Goodwin*, 2013 Ohio 4591 (Ohio App. 2013), in their brief. There are no cases on point in South Carolina that specifically address this issue.

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.

The misstatement by the Circuit Court of §16-11-780 in its Order is properly before this Court. In spite of NAPM's objections, the Appellants could not have raised

this issue as an error by the Circuit Court until after the Court issued the Orders that are currently subject to this appeal.

d. The “utility worker exception” in Section 16-11-780 was preserved and properly before the Circuit Court.

Contrary to NAPM’s assertions, the Appellants have not taken “a contrary position for appellate purposes,” nor have the Appellants conceded that the so-called “utility worker provision” applies to anyone other than employees, literally “utility workers,” acting lawfully and within the scope of their employment. In oral argument before the Circuit Court, counsel referred to the statute as covering workers, and contrary to the dithering assertions by NAPM, the Appellants have not conceded that NAPM or any other corporate or governmental respondent in this matter is a “utility worker.” In argument before the Circuit Court, Appellants’ counsel stated:

...as far as the issue about sewer or utility *employees*, their actions outside the easement were not lawful, and that's the other point. They had no right, no permission to be out there, so there's no refuge in the last part of the statute that says lawful acts of a *utility worker* acting in the scope of in the course of *his employment*. And simply by going outside the easement, not only were they outside where they had unlawful permission, but they were well outside the scope in the course of their employment as well. So there's no way one can describe knocking down these abutments going outside, trespassing outside an easement as being a lawful act. (emphasis added, Tr)

The Appellants further crave reference to the specific arguments regarding the utility worker exception in Section V, below.

II. NAPM FAILED TO REBUT THE ERROR OF THE CIRCUIT COURT THAT WAS PRESENTED BY THE APPELLANTS.

In its brief, the Respondent NAPM failed to present any facts from the record or applicable law to rebut the Appellants' argument that *State v. Miles*, 805 S.E. 2d 204 (Ct. App., 2017), and *United States v. Jones*, 471 F.3d 535 (4th Cir. 2006), are controlling in this case. Based upon those authorities, statutory interpretation involves the application of grammatical rules which demonstrate that the words "willfully and knowingly" modify only the following verb, which is "enter." To stretch the interpretation of "willfully" and "knowingly" beyond the verb "enter" in Section 16-11-780 is improper according to the rules of grammar and statutory interpretation. Both the Circuit Court and NAPM made this mistake; however, NAPM fails to rebut in its Initial Brief why *Miles* and *Jones*, *supra*, are not controlling.

NAPM's argument is based upon the speculative divination of legislative intent without any supporting evidence in the record. (NAPM Initial Brief, p 10) In addition, NAPM states as the legislative intent, language that is not even in the statute. Specifically, NAPM and the Circuit Court stated that the statute would only 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." On its face, §16-11-780 (c) does not use the words "for the sole purpose." The Circuit Court made this mistake, and NAPM would have this Court perpetuate the same error. When the statute is read correctly, one is liable if the willful, knowing, or malicious act is entering upon the lands of another *and* the purpose is to discover, uncover, remove, move, remove, or attempt to remove an archaeological resource. The

statute does not say that the party who is liable must know that the thing disturbed is an archaeological resource. *Miles* and *Jones* support this interpretation, supra, as well as the unambiguous testimony of the South Carolina State Archaeologist. (Tr____. Appellants' Initial Brief. pp 20-21)

NAPM further argues that "legislative intent behind the statute requires some level of intent before the statute can apply to the facts in this case." (NAPM Initial Brief p 10) Intent was established by the September 18, 2014 memorandum between the Respondents which stated their intended scope of work and when the Respondents, including NAPM, willfully and knowingly entered the Appellants' land without notice or permission, willfully and knowingly operated outside of the easement, built a road which was beyond the scope of the easement, and intentionally engaged in earthmoving and land disturbing activities that destroyed the Compty bridge abutments which were also outside of the easement. (Tr____)

Respondent NAPM seeks refuge by claiming "NAPM was never aware of any historical structures, has never seen any documentation of any historical structures and began work without any knowledge of the area in question having a historical designation." (NAPM Initial Brief p10 and affidavit of Hertford (Tr____)) This admission by NAPM is a sufficient issue of material fact that should have rendered Summary Judgment improper. The statement is an admission of conduct that was willful, as NAPM knew or should have known through simple due diligence that they were working outside of the easement at a historical site where archaeological structures were present. Evidence of such conduct constitutes material facts that demonstrate willful blindness and negligence on the Respondent's part.

III. NAPM MISSTATES THE RECORD: THE EXISTENCE OF ARCHAEOLOGICAL RESOURCES ON THE APPELLANTS' LAND WAS DOCUMENTED.

- a. NAPM ignores the overwhelming evidence that the Appellants' properties were designated by the South Carolina Department of Archives and History and the South Carolina State Archaeologist as historic sites and archaeological resources.**

The Circuit Court's finding that the Compty Bridge abutments dating from 1791 on the Appellants' properties were "archaeological resource/structure(s) [that] had not been designated as historic by any applicable and/or governing, preservation and/or conservation authorities" was clearly erroneous. (brackets added) The *Archsite* public database maintained by the South Carolina Department of Archives and History listed the Appellants' lands as "Historic Areas," and the South Carolina State Archaeologist further testified that his office had made a similar declaration. (Appellants' Initial Brief, p 25-34)

- b. Since neither NAPM nor any other Respondents undertook any due diligence to determine whether historic or cultural resources were present on the Appellants' properties, NAPM's claim that these properties were not historic is of little consequence.**

It is undisputed that none of the Respondents undertook any effort to determine if there were any historic or cultural resources on the properties of the Appellants. Since no Respondent performed any due diligence, their argument is of little consequence. If they believed that the Appellants' properties were not historical sites or that abutments were not archeological resources, it makes no difference in light of their admitted failure to inquire.

c. The 2008 letter declining nomination to the National Register of Historic Places provided no basis for the Circuit Court to conclude in 2018 that the Appellants' properties were not historic.

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, it did not mean that the location was not a historic site. The Appellants' properties are clearly noted as "Historic Areas: Broad River Ferry and Bridge Site" 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 ___)

IV. NAPM MISCHARACTERIZES THE RECORD OF WORK DONE BY THE SOUTH CAROLINA STATE ARCHAEOLOGIST

In its Initial Brief, NAPM incorrectly states that the South Carolina State Archaeologist "has not done any independent research, excavation, archaeological research or other testing that would result in any governing authority issuing a historic designation for the site at issue." From a review of the record, this statement is a fiction. Had it chosen to be accurate, NAPM would have found that Dr. Leader had been to the site six times (Tr ___), had done field work there (Tr ___), had examined artifacts found at the site (Tr ___), reviewed Mr. Brinkman's research, and concluded that the site was determined to be a historic site as early as 2007 (Tr ___). (Appellants' Initial Brief p 27)

**V. NAPM DID NOT ESTABLISH THAT IT IS A UTILITY WORKER
LAWFULLY ACTING “IN THE SCOPE AND COURSE OF HIS
EMPLOYMENT” UNDER SECTION 11-16-780 (K).**

In its Initial Brief, NAPM failed to establish that it, as a company was a “utility worker” under the meaning of §16-11-780 (K) (3). NAPM may have been engaged in a utility project, but the Appellants reject the erroneous notion that NAPM was engaged in “lawful acts” when it conducted land disturbing activities and destroyed the Comptly Bridge Abutments outside of the easement. A plain reading of the statute further demonstrates that NAPM was not a “utility worker acting in the scope of and in the course of his employment.” As a corporation, NAPM was neither a worker nor an employee. Furthermore, the scope of work that was stated in the September 18, 2014 memorandum between the Respondents did not call for working outside of the fifteen-foot easement. (Tr___)

The Circuit Court erred in finding that the “utility worker exception” applied, and NAPM failed in its brief to provide a reasonable explanation as to why Summary Judgment was justified given the record in this case..

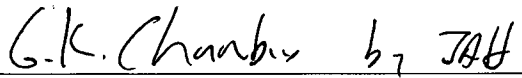
CONCLUSION

NAPM failed to rebut the errors that were set forth in the Appellants’ Initial Brief. The issues in this appeal were properly preserved, and the record demonstrates that there are multiple genuine issues of material fact in dispute. The Circuit Court’s order is clearly erroneous in light of the record before it. For such reasons, the grant of Summary Judgment to NAPM and the City was improper and should be reversed.

Respectfully submitted,



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