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Dec 16 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

APPELLATE CASE NO: 2018-000948
CIVIL ACTION NO: 2015-CP-40-05598

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

v.

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

**RETURN TO APPELLANTS' PETITION FOR REHEARING
BY THE CITY OF COLUMBIA**

Dana M. Thye
Office of the City Attorney
Post Office Box 667
Columbia, South Carolina 29202
(803) 737-4242

Attorney for Respondent City of Columbia

The City of Columbia, as the remaining Respondent, hereby presents its Return to Appellant's Petition for Rehearing pursuant to Rule 221, SCACR, and asserts that the Court of Appeals did not err, overlook or misapprehend material points at issue in this case. Inasmuch as no error was committed, there exists no reason to rehear this matter as requested by Appellant.

Appellants list eight (8) grounds for rehearing, all of which focus on an asserted error that this Court incorrectly found the City had no actual or constructive knowledge of the existence of an archeological resource. Appellants point to areas in the record where they contend such knowledge is found. However, the knowledge Appellants seek is not knowledge at all, but merely wishful thinking and belief. At issue in this appeal is the clear, plain and unambiguous language of Section 16-11-780(C) of the SC Code of Laws:

(C) 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.

This Court in its Order gave clear adherence to the plethora of case law covering the precepts of statutory construction. "Viewing the evidence and drawing all reasonable inferences therefrom in the light most favorable to Owners, no evidence showed the City cleared the land 'for the purpose of discovering, uncovering, moving, removing, or attempting to remove an archaeological resource.'" (Opinion p. 5.) "'Purpose' is the highest level of *mens rea* known in criminal law." (Id.) "Thus, to violate the statute, a person must desire the result of moving or removing an archeological resource." (Id.) (Citations omitted.)

Appellants' grounds for rehearing assert that the City had actual or constructive knowledge of the presence of archeological resources on the Brinkman parcel and therefore, violated the statute. However, the archeological resources claimed by Appellants have never been designated

as historic by any applicable governing preservation or conservation authority; not prior to the work attempted by the City, nor since – despite all the efforts of Appellants.

Appellants argue that the City’s failure to obtain the appropriate U.S. Army Corps of Engineers permitting before beginning its work would have required a cultural resource study which, in turn, would have led them to a website that would have then yielded information that would have led them to look further, only to ultimately come to the threshold of the State Historic Preservation Office who declined to afford this site historic protection more than ten years ago. Such machinations surely are not the standard by which actual and constructive knowledge is measured by. “Knowledge” as defined by Black’s Law Dictionary is the “acquaintance with fact or truth.” Black’s Law Dictionary, Sixth Ed.. Neither of those simple standards can be implied to what information the City of Columbia had or was imputed to have with regard to the archeological resources hoped for on Brinkman’s parcel. The Appellants’ belief that this small site is historic despite never having been declared such, while certainly the crux of the conflict in this litigation, does not make it fact nor truth. The South Carolina Archives and History Center – State Preservation Office (SHPO) determined, among other things, that additional research would be needed before the site could be eligible for consideration as a historic site.

This Court in its Order, also quoted in part, a letter to Appellant Brinkman from the State Historic Preservation Office which questioned, in pertinent part:

“... Whether there is a sufficient amount of physical remains from the ferry and bridge site to convey in any tangible way the history of this areas of the river before, during and immediately following the Civil War.” (Opinion p. 2).

More than ten years later, there is still no fact nor truth that imputes actual or constructive knowledge to the City and no obligation that the City consider rocks historic when governing experts have not.

Further, all of Appellants' assertions of overlooked or misapprehended legal bases in this Court's Order ignore the basic requirement found in the statute that it must be the City's *purpose* to impact this supposed archeological resource. This Court found, correctly, that the City's purpose was to fix an aging sewer line. Without that need, there would have been no reason for City contractors to be on that parcel at all. That need to rehabilitate the sewer line was the reason for the easement clearing. No facts or circumstances were overlooked or misapprehended by the Court when coming to that conclusion and Appellants do not even contend otherwise.

CONCLUSION

In this matter, both of the trial courts have correctly interpreted the plain meaning of the language contained in S.C. Code Ann. Section 16-11-780. This Court agreed with such analysis and affirmed the rulings. There were no overlooked or misapprehended points by this Court. The statute is clearly a criminal statute designed to protect historical and archaeological resources from wrong doers who seek to do harm to those sites, but exempts from liability inadvertent damage caused by the lawful work of utility workers without actual or constructive knowledge of such archeological resources. This Court's Order correctly sets forth the legal analysis and evidentiary review appropriate in this case, without error. For these reasons, there exists no grounds for rehearing as requested by Appellants.

s/Dana M. Thye

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Civil Action No. 2015-CP-40-05598

Modesta Brinkman, David Brinkman, James Coleman, Carl Foster, Karen Foster and
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v.

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

PROOF OF SERVICE

The undersigned hereby certifies that she served a copy of the *RETURN TO APPELLANTS' PETITION FOR REHEARING BY THE CITY OF COLUMBIA* upon counsel for the parties by email to them at their addresses shown below on this 16th day of December 2021:

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s/Dana M. Thye

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VIA EMAIL ONLY - ctappfilings@sccourts.org; jkitchings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Modesta Brinkman, David Brinkman, James Coleman, Carl Foster, Karen Foster and Robert Collins v. City of Columbia, South Carolina, North American Pipeline Management and Layne Inliner
Appellate Case No.: 2018-000948
Circuit Court File No.: 2015-CP-40-5598

Dear Ms. Kitchings:

Enclosed for filing is the *Return to Appellants' Petition for Rehearing by the City of Columbia* along with the *Proof of Service* in the above-referenced matter.

Please let me know if you have any questions or if I can be of any further assistance to you.

Sincerely,

Dana M. Thye
Deputy City Attorney

/dt

cc: John Adams Hodge, Esquire – via email only
Geoffrey Chambers, Esquire – via email only
Sharon Hodges, Esquire – via email only
W. Michael Hemlepp, Esquire – via email only