THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

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

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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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APPELLANTS' PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Rule 221 (a), SCACR, Appellants hereby petition for rehearing of the Court's opinion affirming the lower court's Order granting summary judgment to the City of Columbia. See Modesta Brinkman, David Brinkman, James Coleman, Carl Foster, Karen Foster, Robert Collins, Appellants, v. Weston & Sampson Engineers, Inc., City of Columbia, South Carolina, North American Pipeline Management, and Layne Inliner, Defendants, of which the City of Columbia, South Carolina, is the Respondent. Appellant Case No. 2018-000948, Opinion No. 5870. (Ct. App. Filed November 10, 2021) (the "Opinion"), copy attached hereto.

The decision of the Circuit Court granted summary judgment to the City of Columbia, finding that the South Carolina Archeological statute, Section 16-11-780 of the South Carolina Code (2015), was inapplicable because (1) "no governing preservation or conservation authority [had] recognize[d] the alleged archaeological structures as either archaeological resources or historic structures," and (2) subsection 16-11-780 (k)(3) exempted the City from liability.

The Appellate Court affirmed the summary judgment in favor of the City on several grounds including, *inter alia*, that the Appellants did not provide evidence that the City had actual or constructive knowledge of the existence of archaeological resources on the property, and such knowledge was required to sustain a violation of Section 16-11-780.

GROUNDS FOR REHEARING

Rehearing is warranted because the Opinion overlooks, misapprehends, and fails to apply the applicable statute, the law, the record, and issues properly raised before the Court of Appeals.

1. The Court overlooked evidence presented in the record and at oral argument when it incorrectly stated that there was no evidence that the City had either actual or constructive knowledge of the existence of archaeological resources on the property.

In the Opinion, the Court stated that:

> Owners failed to demonstrate the City was or should have been aware of such [historic] designation. Thus, no evidence showed the City had either actual or constructive knowledge of the existence of archaeological resources on the property, and we find no error. (Opinion p. 8)

At oral argument and in the record of the case, the Owners demonstrated that the City had constructive knowledge, as well as actual knowledge (as cited in Argument 7 below), that the bridge abutments were historical structures. Constructive knowledge is derived primarily from the undisputed claim that the City failed to obtain a permit from the US Army Corps of Engineers, which requires a cultural resource study as a prerequisite. (Initial Brief p. 17, R. pp. 237, 580-583, 33 U.S.C. 1344, 33 CFR 320.4 (a), 33 CFR 320.4 (e), 33 CFR 320.4 (j)(4)) At oral argument, the City admitted that it had been cited by the Corps for violation of the Federal Clean Water Act, and that the City had paid a civil penalty to the Corps as a result of its omission. Accordingly, the Opinion overlooked this important evidence when it found that no such evidence was presented to the Court. (Opinion p. 8.)

The Opinion further overlooked the evidence presented to it when it concluded, "Notwithstanding the entry on ArchSite, Owners failed to show the City was obligated to consult this resource." (Opinion pp. 7-8) In addition to the permitting requirement above which has as a prerequisite the requirement to perform a cultural resources survey, the testimony of the State Archaeologist confirmed that consulting with the State Historic Preservation Office would have been part of such survey. (R. 506 p. 121 lines 12-13, 20-24, R. 527 pp. 62-63 lines 25, 1-21)

It is undisputed that the City performed *no* due diligence regarding the presence or potential presence of historical or archaeological resources prior to the commencement of its project. (Initial Brief p. 7) The City further did not notify the Owners that they intended to build a road and work outside of the easement in the Owners' backyards. (Initial Brief p. 6) Had the City done so, they would have also been advised of the presence of these historic structures and told to avoid them. (R. pp. 443-444, pp. 204-206) Constructive knowledge is also derived from the City's apparent failure to consult public databases such as the ArchSite database as part of normal due diligence that would have been expected by a utility company that regularly engages in excavation projects as part of its regular course of business. Testimony in the record from the State Archaeologist indicated that the ArchSite database was accessible to the public and to the City, and had the City performed *any* due diligence, the City would have been expected to have accessed ArchSite in the normal course of business. (R. p. 527, p. 63, lines 16-20) It is not credible that a utility of the size and apparent sophistication of the City of Columbia would have been unaware of the requirement to consult with the State Historic Preservation Office regarding cultural resources before the commencement of its sewer

project. The Opinion should have presumed that a utility with the size of the City of Columbia would be aware of its duty to obtain proper permits, including a Clean Water Act (Section 404) Permit from the Corps of Engineers which requires a cultural resources study. (Initial Brief p. 17) Arguably, had the City complied with the Clean Water Act, they would have performed the cultural resources survey, learned about the historic bridge abutments, and not gone outside the easement to destroy them. (R. p. 527, p. 63, lines 16-20)

2. The Court overlooked or misapprehended the deference that was afforded to the State Archaeologist, who testified that (1) the City should have performed a cultural resources survey prior to the commencement of its work, and (2) had the City consulted the ArchSite database, it should have triggered a duty of further inquiry by the City.

The Opinion further overlooked the authority cited in the Appellants' brief and in oral argument that the State Archaeologist is afforded substantial deference in the interpretation of Section 16-11-780 of the Code. (Initial Brief pp. 21-22) The State Archaeologist testified that:

- It is customary for utilities such as the City to consult ArchSite. (R. p. 443, p. 204)
- A listing on ArchSite should trigger a duty of inquiry. (R. 443, p. 202-204)
- The State Archaeologist routinely receives requests for information prior to the commencement of land disturbing activities. (R. 443, p. 202-204)
- The City should have consulted ArchSite, and based upon the listing of the Bridge Abutments, the City should have contacted his office for additional information. (R. 443, p. 202-204)

- The City was required to obtain a 404 permit for this work but did not obtain the necessary permit. (R. 527, p.63, lines 8-21)
- In this case, historic and cultural resources were impacted due to the failure of the City to obtain a permit. (Initial Brief p.31, R. p. 530, p. 74, lines 7-15)

In addition:

- The legal mechanism for protecting historic and cultural resources is through Federal law and regulation regarding obtaining a permit for the work performed. Federal Agencies are required to review a cultural resources study prior to issuing a permit. 33 CFR 800.1(a). At a minimum, the State Historic Preservation Office should have been consulted for the Army Corps to issue the Respondent a 404 permit for this project. 33 CFR 800.2(c)(1) Federal agencies typically delegate to the applicant the duty to consult with the State Historic Preservation Officer. 33 CFR 800.2(c)(4)

In its Statement of Facts, the Opinion correctly noted that the database stated, "Historic Areas: Broad River Ferry and Bridge Site" at the Brinkmans' address, but it omitted the following: "Date of Resource: 1791-1900." (R. p. 73) The Opinion misapprehended the record in "questioning whether the ArchSite entry contained sufficient information to conclude that the property was historic. (Opinion p. 7, Footnote 6) While ArchSite is designed to trigger further inquiry, no other reasonable inference or conclusion can be drawn from the aforementioned ArchSite notation. (R. 413, pp. 83-84, lines 18-25, 1-2)

3. The Opinion misapprehended the knowledge requirement in the statute, and the practical effect of the Court's decision is to legitimize willful blindness as a defense to the destruction of archaeological or historic resources on the lands of the Owners.

The effect of the Opinion is to legitimize willful blindness as a defense to a violation of Section 16-11-780. While one purpose of the project was to clear a sewer line, the stated scope of work included other purposes such as to "remove rock" and build a road. (R p. 70, item 4, p. 72) The Opinion misapprehends the record when it erroneously concluded that the "sole, legitimate purpose" was to repair the sewer line. (Opinion p. 7) The City clearly knew what it was doing when it intended to "move, remove, or attempt to remove" the standing stones that were located outside of the easement. Working outside of the easement was also not a "legitimate purpose."

If, as the Opinion states, advance knowledge that the standing stones were bridge abutments dating from 1791 was required in order to be liable under the 16-11-780, the Appellants' clearly presented evidence that the City's failure to obtain permits which would have mandated a cultural resources survey constituted constructive knowledge. The City's failure to obtain permits and perform such due diligence is analogous to and as fundamental an error as a purchaser of land who does not perform a title search or search for encumbrances prior to purchase.

The Opinion erroneously stated that the Appellants did not present evidence that the City had knowledge that the bridge abutments were archaeological resources. (Opinion pp. 6, 8) In overlooking the constructive knowledge that was presented to the Court in the record and at oral argument, the Opinion has misapprehended facts and rewarded the City for its willful and intentional blindness resulting from its failing to

obtain proper permits. Since the Appellants provided the Court with undisputed evidence of constructive knowledge on the part of the City, the Court should reconsider its decision and reverse the summary judgment.

4. The Opinion overlooks precedent before the Court that demonstrates the level of knowledge required to violate Section 16-11-380.

The Appellants cited authority for the proposition that knowledge is satisfied by knowingly or willfully entering the lands of another for the purpose of discovering, uncovering, moving, removing, or attempting to remove an archaeological resource; however, at the time of the entry, the party need not know that the thing discovered, uncovered, moved, removed, or attempted to move was an archaeological resource. (Initial brief pp. 8-24) The Opinion omitted any analysis of the authority cited by Appellants nor did it distinguish why it found such authority inapplicable or why the Court reached a different conclusion.

The Opinion misapprehends the law in that it requires *a priori* knowledge that the thing disturbed or excavated is a prehistoric or historic site. It is settled law in South Carolina that when a person has notice of facts as are sufficient to put him on inquiry, and those facts, if pursued with due diligence, would lead to knowledge of other facts, he must be presumed to have knowledge of the undisclosed facts. *Norris v. Greenville S. & A. Ry. Co*., 111 S.C. 322, 330, 97 S.E. 848, 850 (1919). In accordance with this standard, we hold that a person is "aware" of a claim… if he has notice of facts which, if pursued with due diligence, would lead to knowledge of the claim. *Multimedia Pub. Of South Carolina, Inc. v. Mullis*, 431 S.E. 2d 569, 314 S.C. 551, 572 (S.C. 1993)

The State Archaeologist alluded to the City's duty of inquiry and due diligence when he testified,

> You're talking about the river alliance which the City is a signatory to. You're talking about 90 miles of history up that river. You are talking about archaeological materials known to the City up and down that river. And you've got people unsupervised, as far as I can tell…
>
> So they [the City] are not working in a black box. **This is not a question of, we didn't know. There is a question that they should've known or should've suspected, and they should've supervised.** (R 532, p. 83, lines 12-25)

The City further had constructive knowledge of the bridge abutments through the required Federal permitting process. 33 CFR 800.1(a) requires that a cultural resources study be conducted for an Army Corps 404 permit to be issued. Application for the required permit is the legal mechanism by which the bridge abutments become known to the City for the purposes of evaluation of the level of protection necessary. The United States Supreme Court has held that for an entity operating in a regulated environment, "the probability of regulation is so great that anyone who is aware that he is in possession of them [corrosive materials] or dealing with them must be presumed to be aware of the regulations. *U.S. V. International Minerals & Chem. Corp*, 402 U.S. 558, 565. 92 S.Ct. 1697, 1701 (1971)

Here, the City of Columbia operates miles of sewer lines as a sophisticated wastewater utility and has its own engineering department. The City's sewer lines cross-streams and wetlands, and the City should be presumed to have knowledge of the regulatory system that requires a Section 404 Permit from the Corps of Engineers and as a prerequisite, a cultural resources study. The State Archaeologist further confirmed this

in his testimony that the City "…should have gotten the permit, which would have triggered cultural resources management, which would have done all of these other things [due diligence], and we would not be having this conversation." (R. p 527, p 63, lines 16-20) He further stated, "I think that it was pretty clear that it [the 404 Permit] should have been done initially. They [the City] rolled their dice…and they ended up short. But again, had they rolled up and not down, they would have done the permit, done the research, and again, we would not be here today…" (R. p. 528, p. 66 lines 25, p. 67 lines 1-8.)

The Opinion misapprehends that advance knowledge is necessary that the thing destroyed is a historic or archaeological resource. The Opinion omitted consideration of the opinion of the State Archaeologist that a party did not need to know that the object affected was a historical or archaeological resource in order to be liable under the statute. (Initial Brief p. 21, R. 553, p. 169, lines 5-8)

5. Since the Court overlooked the evidence before it demonstrating the City's constructive knowledge of the archaeological resources on the Owners' property, the Circuit Court's error in misquoting the statute is significant and justifies reversal.

The Opinion correctly states that the Circuit Court misquoted the controlling statute by inserting the word "sole" into its opinion; however, the Opinion sidesteps this error in claiming that "…because we find the City's actions did not violate the statute, we reject Owners' contention that the circuit court's interpretation requires reversal." (Opinion p. 7) Since the Opinion misapprehends and overlooks undisputed evidence that was clearly before the Court demonstrating that, at least, the City had constructive knowledge as discussed above, the City's actions did violate Section 16-11-780.

The Opinion misapprehends and overlooks the significance of the Circuit Court's error. Under the Circuit Court's misunderstanding of the statute, in order to be liable, the City's *sole* purpose would have to be to destroy the abutments. The record is clear that there were multiple purposes expressed in the City's scope of work, including: 1. Clearing the easement, 2. Building a road, and 3. Removing rock (i.e. the bridge abutments). (R. 70-72, Initial Brief pp. 5-6) The Circuit Court misquoted and misapplied the controlling statute when it held that "the plain and unambiguous language of 16-11-780 (C), based upon the evidence presented, there is no evidence that NAPM entered upon Plaintiffs' properties for the *sole* purpose of finding and removing…an archaeological resource." (emphasis added) (R. p.8) Not only did the Circuit Court misquote the statute, but it went on to base its analysis on its own flawed interpretation of the law. Presumably, had the Circuit Court understood the law, its decision would have been different.

In as much as this Court is free to make its own statutory interpretation without deference to the lower court, the Appellants satisfied the knowledge requirement enumerated as controlling in the Opinion. Thus, the City's constructive knowledge makes it liable pursuant to the Opinion. The Court should, upon rehearing, reconsider its Opinion and reverse the Circuit Court.

6. <u>In concluding that the "sole legitimate purpose of clearing the easement was to allow for the repair of a sewer line," the Court overlooked or misapprehended the fact that (1) the destruction of the historic bridge abutments occurred outside of the easement as the result of an intentional trespass which was not legitimate, and (2) the stated purpose in the City's scope of work was the removal of large rock formations, i.e. the bridge abutments.</u>

In making the statement that the "sole, legitimate purpose of clearing the easement was to allow for the repair of a sewer line," the Opinion overlooked and mischaracterized the record. (Opinion p. 7) As enumerated in Arguments 3 and 5, above, there were at least three purposes enumerated by the City, which included clearing the easement, building a road, and "removing large rock formations." The so-called large rock formations were the bridge abutments that were located substantially outside of the easement. Since it is undisputed that much of the City's work occurred outside of the easement, the Opinion is flawed when it declares that there was a "sole" and "legitimate purpose" for the City's project. There was no legitimate need to destroy these bridge abutments or to work outside of the easement.[1]

In mischaracterizing these key facts, the Opinion incorrectly validates the City's actions. Since there will be a trial on the merits of this case, the Opinion can be easily misconstrued to approve such actions as legitimate when they were not.

7. <u>The Court overlooked or misapprehended the actual knowledge provided to the City by James Coleman which, at a minimum, is a genuine issue of material fact warranting reversal.</u>

The Opinion briefly addresses the Appellants' argument that Dr. James Coleman warned workers that there was "a valued monument on the property," and the workers were warned not to destroy it. The Opinion states that Dr. Coleman "did not specify whether this [warning] occurred before or after the workers destroyed the stones." (Opinion p.7) The Court overlooked Dr. Coleman's statement which clearly indicated

[1] When the sewer line was constructed in the 1980s, there was no need to destroy the bridge abutments outside of the City's easement, and although the City's scope of work included removal of these "large rock formations," the City enumerated no purpose requiring the destruction these abutments in 2015 as part of clearing its easement. (Initial Brief pp. 5-6, R. pp.231-233)

that his warning was provided prior to the destruction of the bridge abutment on his property. (R. 574, Initial Brief p. 19, R. pp. 65-66, 85-86)

In addition, the Opinion misapprehends the record in dismissing the warning provided by Dr. Coleman. In his testimony and statement, he indicated that there were two persons present. He yelled to warn them to stop the clearing and pushing the stones down the bank toward the river. One of the workers nodded his head as if to acknowledge the warning. (R. 85-86, 574) Dr. Leader received a letter from Dr. Coleman and summarized, "What you have is a destruction of archaeological sites. You have a landowner going to at least one of the individuals involved in this case in terms of a business and in his letter to me asserting that he met the people there and told them, don't do that, it is a historic site. Okay, And they did it." (R. 554 p. 717 lines 6-12, R. 574)

The Opinion misapprehends or overlooks these facts by not providing a complete statement of the record, and it does so selectively in a light not favorable to the Appellants. This selective recitation of the record implies that no warning was received prior to destruction of the archaeological and cultural resource, which is not correct.

If there was any doubt regarding these material facts, then summary judgment would not have been proper on whether the City was given actual knowledge by the Appellants. In a light most favorable to the Appellants, the City was provided with knowledge of the importance of the abutments, and Dr. Coleman asked that the work avoid the bridge abutments prior to destruction. The Opinion overlooked and ignored these critical facts.

8. Although the City had both constructive and actual knowledge that the standing stones were archaeological resources, the Opinion misapprehends

whether a party must know in advance that the thing disturbed is an archaeological resource.

The Opinion misapprehends that advance knowledge is necessary that the thing destroyed is a historic or archaeological resource. The Opinion omitted consideration of the opinion of the State Archaeologist that a party did not need to know that the object affected was a historical or archaeological resource in order to be liable under the statute. The State Archaeologist testified that he was part of a team that wrote Section 16-11-780 and related sections for the Legislature, and he spoke to the intent of the statute. (R. 508, p. 132, lines 15-18, Initial Brief p. 21, R. pp.87-88, lines 13-25, 1-5)

The Office of State Archaeologist is responsible to oversee the historical and archaeological resources of the State pursuant to Section 60-13-210 (2015), and as such, the interpretation of the statute by the State Archaeologist is afforded deference as a matter of law. (Initial Brief, pp. 21-22) "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 (Ct.App. 2009)

As an example, Section 16-11-780 (C) makes it "unlawful to willfully, knowingly, or maliciously enter the lands of another…for the purpose of discovering…an archaeological resource." Contrary to the Opinion, a party cannot have advance

knowledge that the object is an archaeological resource if he or she is trying to discover it. The Legislature could have drafted the statute to specify that it is unlawful to enter lands of another for the purpose of discovering, uncovering, moving, removing, or attempting to remove an object that the person knows is an archaeological resource. (Initial Brief pp. 10-13) The Opinion misapprehends that the Legislature did not specifically require advance knowledge that the thing disturbed was an archaeological resource. The practical effect of the Opinion is that all future defendants will use the Opinion as a "get out of jail free card" by claiming that they did not know that the object they disturbed or excavated was an archaeological resource. For this reason and others set forth herein, the Court should rehear the matter.

CONCLUSION

For the foregoing reasons, Mr. and Mrs. Brinkman, Dr. Coleman, Mr. and Mrs. Foster, and Mr. Collins request that this Court grant their Petition for Rehearing.

Respectfully submitted,

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