THE STATE OF SOUTH CAROLINA
In The Supreme Court

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, Petitioners,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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February 10, 2022

CERTIFICATION BY COUNSEL

Pursuant to Rule 242, SCACR, the undersigned attorney certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals. Specifically, the Court of Appeals entered Opinion No. 5870 ("the Opinion") on November 10, 2021 in case number 2018-000948. The opinion affirmed the order of the Circuit Court. The Court of Appeals entered an Order denying the petition for rehearing on January 12, 2022. This petition follows.[1]

s/John Adams Hodge
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February 10, 2022
Columbia, South Carolina

[1] In conformity with the Court's Order on August 25, 2021 regarding Reduced Number of Copies Required in Appellate Matters, an appendix is not submitted herewith. References to documents herein will be either to the Record on Appeal (and its supplement filed on April 12, 2019) or a description of a document on file with the Court of Appeals sufficient to locate the same.

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V. THE COURT OF APPEALS IGNORED PRECEDENT DEMONSTRATING THE LEVEL OF KNOWLEDGE REQUIRED TO VIOLATE SECTION 16-11-780.

STATEMENT OF THE CASE

This case is an appeal of an Order of the Court of Appeals affirming summary judgment to the Respondent regarding the applicability of S.C. Code Ann. § 16-11-780. This is a case of first impression, as it is the first time that the aforementioned statute has been considered by the Supreme Court. The Petitioners in this matter are the Plaintiffs. The matter deals with the entry by the Respondent on lands of the Petitioners and the excavation and destruction of archaeological resources that were outside of an easement that had been granted to the Respondent City. The Petitioners 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).

The Petitioners filed their Complaint on September 11, 2015 The Petitioners are the owners of real property on Castle Road in Columbia The Petitioners settled with each of the Defendants except for the City of Columbia ("the City"), which holds a permanent easement across the Petitioners' land for the purpose of maintaining a sewer line.

On October 20, 2017, the City of Columbia filed a Motion for Summary Judgment. On May 23, 2017, the Court granted partial summary judgment, relying 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 Petitioners against NAPM and the City of Columbia, respectively.

The Court of Appeals heard the Petitioners' appeal on March 2, 2021, and it issued its opinion (the "Opinion") on November 10, 2021.[2] A Petition for Rehearing was filed on or about November 24, 2021, and the Court of Appeals denied the Petition on January 11, 2022.

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 Petitioners 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. (R. p. 73, R. p. 411:75, lines 14-24, R. 535:94-96, lines 24-25, 1-25, 1-14)

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 Petitioners. In approximately 2004, David Brinkman determined that a stone structure on his property was manmade. At first, he believed that the structure was part of an old ferry crossing. In 2007, the South Carolina State Archaeologist, Dr. Jonathan Leader,

[2] The Petitioners' Final Brief before the Court of Appeals contains a typographical error on the cover incorrectly stating that it is the "Initial Brief." Where the words "Initial Brief are used herein, it refers to the Final Brief before the Court of Appeals.

identified the structure as a bridge abutment.[3] (R. p. 64, R. p. 74, lines 5-21, R. p. 442:200-201, lines 13-25, 1-20, R. p. 406:56-57, lines 5-25, 1-5, R. p. 430:153, lines 4-24, R. pp. 559-560, R. p. 562-582) Petitioner 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. (R. p. 559-560, R. p. 430:151-152, lines 15-25, 1-2) 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 identified and determined that the Sherman Bridge was located elsewhere, and this finding was subsequently confirmed by the State Archaeologist. (R. p. 535:94-96, lines 24-25, 1-25, 1-14) This story was featured on the PBS show *History Detectives*. (R. p. 429:148, lines 1-25) Mr. Brinkman subsequently identified the abutments on his and Petitioner 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. (R. p. 442:200-201, lines 13-25, 1-15)

As part of a sewer maintenance plan to evaluate and upgrade the City's sewer pipes, the City of Columbia developed a "2020 Plan" in response to an enforcement action brought by the U.S. Environmental Protection Agency. (R. pp. 165-180) In 2014, the City entered into a contract with the Defendants for site preparation and placement of a synthetic liner into certain sewer pipes that were owned by the City.

[3] The Petitioners' properties are located within the "Broad River Historic District," which is listed on the National Register of Historic Places. (R. p. 576-578)

In a September 2014 meeting, each of the Defendants discussed building an access road across the Petitioners' properties for the purpose of the aforementioned sewer maintenance project. (R. p. 70) The memorandum memorializing the meeting states that the easement was to be cleared, a road was intended to be constructed within the fifteen (15) foot permanent easement that existed across the Petitioners' properties, and large rock formations were to be removed. (R p. 70) A budget for the work was developed that included extra funds for the removal of rock. (R. pp. 71-72) The large rock formations that were mentioned by the Defendants were the Compty bridge abutments on the Brinkman and Coleman properties, which were outside of the easement. (R p 442: 200-201, lines 13-25, 1-15) There is a dispute of fact as to whether the road and maintenance work was necessary, as discovery produced by the Defendants stated that the work was not needed in the vicinity of Petitioners' property, but it was unspent money in the budget that could be applied toward this work. (R. pp. 231-233)

On or about February 5, 2015, the Defendants, without any notice whatsoever to the Petitioners, began land clearing and excavation activities in their backyards. An earth moving equipment operator cut a road into the steep bank on the Petitioners' 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. (R. pp. 75-79, *see* p. 79, lines 3-6, R. p. 242, R. pp. 347-348, lines 25, 1-25) It is undisputed that the two Compty Bridge abutments were located outside of the fifteen-foot easement. (R. p. 407:61-62, lines 22-25, 1, R. p. 244) At the time that this work was in process, personnel from the Respondent City were plainly aware that the work exceeded the dimensions of the easement. (R. pp. 79-82, lines 3-6, 21-23, 1-25, 1-7) While the land disturbance was

ongoing, a supervisory worker indicated to one of the Petitioners that he was not sure of the width of the easement, even though his employer participated in the September 2014 meeting in which the fifteen (15) foot width was discussed and memorialized in a construction memo. (R.S. p.1, R. p. 70)

The Petitioner James Coleman pointed out the bridge abutment and advised the crew that the bridge abutment on his property was a historic structure that should be avoided. (R. p. 574, R. pp. 85-86) Nevertheless, when he returned to his property, the bridge abutment had been destroyed despite his warning. Dr. Coleman's notice to workers of the historical significance was provided prior to the workers' destruction and removal of the bridge abutment on Dr. Coleman's property. (R. p. 574, R. p. 349, lines 18-22) Earth moving equipment that was operated under the City's direction knocked over and destroyed both of the Compty Bridge Abutments. These structures were substantially outside of the permanent easement. (R. p. 244, R. p. 407:61-62, lines 22-25, 1) Based upon citizen complaints, the work was stopped by the City on February 12, 2015.

It is undisputed that neither the City nor the other Defendants obtained any required permits for the work that was undertaken. The remains of the Compty Abutments and other material 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. (R. pp. 237, 580-583) A prerequisite to a Section 404 Permit is the completion of a cultural resources study. (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)) The City paid the Corps a civil penalty as part of

resolving the Section 404 violation. 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 Petitioners' 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 Petitioners. Dr. Leader documented that the Petitioners' properties were a "multi-cultural" site with artifacts from Native American, Colonial, and later periods, and that archaeological resources including the Compty Bridge Abutments were disturbed at the site. (R. pp. 562-574)

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 (Ct.App. 2015)

ARGUMENT

I. THE COURT OF APPEALS ERRED AND SUBSTANTIALY DEVIATED FROM THE RECORD IN STATING THAT PETITIONERS PRESENTED NO EVIDENCE THAT THE CITY HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF KNOWN ARCHAEOLOGICAL RESOURCES ON THEIR PROPERTY.

The Court of Appeals based its decision "find[ing] no error" on a fallacious claim that "no evidence showed that the City of Columbia had actual or constructive knowledge of the existence of archaeological resources on the Owner's property." (Opinion p. 8) The Court's conclusion substantially deviated from the uncontroverted evidence to the contrary in the record of the case showing otherwise.

In the Opinion, the Court of Appeals stated that:

> 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)

The Court of Appeals ignored the City's actual and constructive knowledge by providing an incomplete statement of the record so selectively that it is in a light not favorable to the nonmoving party. The Court of Appeals' selective recitation of the

record erroneously implies that the warning and actual knowledge that the abutments were historical monuments was not received when clearly it was.

A. Evidence of the City's Actual Knowledge was Misapprehended by the Court of Appeals

The City's actual knowledge that the structures were historic occurred when an oral warning was provided to the personnel performing land disturbance, who ultimately destroyed the historic bridge abutments. The Court of Appeals briefly addressed evidence in the record that Dr. James Coleman warned workers that there was "a valued monument on the property," and the workers were warned not to destroy it. (Opinion p. 7) The Court of Appeals erroneously stated 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 written statement and testimony which clearly indicated 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) The State Archaeologist received a letter from Dr. Coleman attesting to the aforementioned 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 … 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)

B. The City's Constructive Knowledge was Demonstrated by the Petitioners.

At oral argument, on brief, and in the record of the case, the Petitioners clearly demonstrated that the City had constructive knowledge and actual knowledge that the bridge abutments were historical structures and archaeological resources. 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 designed to identify and protect historic and archaeological resources like the bridge abutments. (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. Despite such evidence, the Court of Appeals disregarded this uncontroverted evidence when it found that no such evidence was presented to the Court. (Opinion p. 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 and its Archsite database would have been part of such survey. (R. 506 p. 121 lines 12-13, 20-24, R. 527 pp. 62-63 lines 16-25, 1-21) In spite of these requirements being plainly before the Court of Appeals, it erroneously concluded, that "Notwithstanding the entry on ArchSite, Owners failed to show the City was obligated to consult this resource." (Opinion pp. 7-8)

It is undisputed that the City performed *no* due diligence whatsoever regarding the presence or potential presence of historical or archaeological resources prior to the commencement of its project. (Initial Brief p. 7) Furthermore, the City did not even notify the Petitioners that they intended to build a road and work outside of the easement in the Petitioners' 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 ArchSite 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.

The Court of Appeals incorrectly claimed that the Appellants "failed to demonstrate that the City was or should have been aware of such [historic] designation." (Opinion p. 8) The legal mechanism for protecting historic and cultural resources through Federal law and regulation by obtaining a permit prior to conducting such work was summarily ignored by the Court of Appeals. Federal Agencies are required to review a cultural resources study prior to issuing a permit. 33 CFR 800.1(a). At a minimum, the City should have contacted the State Historic Preservation Office as part of the process for the Army Corps to issue the City a Section 404 permit for this project. 33 CFR 800.2(c)(1), (R p.528), (R p.530, p.76 lines 2-12) Federal agencies typically delegate to the applicant the duty to consult with the State Historic Preservation Officer. 33 CFR 800.2(c)(4) Contrary to the Court's Opinion, the State Archaeologist testified that the ArchSite database was accessible to the public including the City, and had the performed *any* due diligence, it would have been expected to access ArchSite in the normal course

of business. (R. p. 527, p. 63, lines 16-20) In addition, a utility the size of the City of Columbia should have been 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) Had the City complied with the Clean Water Act, it would have performed the cultural resources survey, learned about the historic bridge abutments, and not gone outside of the easement to destroy them. (R. p. 527, p. 63, lines 16-20)

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)

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 or seek a Section 404 Permit. 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) Because of the City's failure to conduct any due diligence, apply for required permits, and perform the required cultural resources survey,

constructive knowledge may be presumed as a matter of law. It is settled law in South Carolina that when a person has notice of facts 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*, 314 S.C. 551, 572, 431 S.E. 2d 569 (S.C. 1993)

In its Opinion, the Court of Appeals correctly noted that the Archsite database stated, "Historic Areas: Broad River Ferry and Bridge Site" at 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) The Court of Appeals ignored uncontroverted testimony in the record that ArchSite is designed to trigger further inquiry by utilities such as the City. Contrary to the Court of Appeals' erroneous statement, no other reasonable inference or conclusion can be drawn from the aforementioned ArchSite notation but that the site is a historic area dating from 1791-1900. (R. 413, pp. 83-84, lines 18-25, 1-2)

The Court of Appeals' absolute statement that "no evidence showed that the City had either actual or constructive knowledge of the existence of archaeological resources on the property" is inconsistent with the overwhelming evidence in the record. The Court's deviation from the record is material and substantial; thus, it was an error for the Court of Appeals to affirm summary judgment.

II. THE COURT OF APPEALS MISAPPLIED THE STANDARD FOR SUMMARY JUDGMENT BY MISCONSTRUING MATERIAL FACTS ADVERSE TO THE PETITIONERS.

It is fundamental that in reviewing a motion for summary judgment, the Court is required to construe the facts and inferences in a light most favorable to the nonmoving party; however, in this case, the Court of Appeals and the Circuit Court did the opposite. (Rule 56 SCRCP). The Court of Appeals incorrectly stated that Dr. Coleman "did not specify whether this [his warning] occurred before or after the workers destroyed the stones." (Opinion p. 7) Both Dr. Coleman's testimony and his subsequent letter clearly contradict the finding by the Court of Appeals and show that the workers destroyed the historic site after Dr. Coleman put them on notice. (R pp. 524 and 574) In making its erroneous finding, the Court of Appeals impermissibly construed its inferences in a light most favorable to the City.

If there were *any* doubt regarding the existence of these material facts, then summary judgment in the City's favor would not have been proper on the issue of actual knowledge. "Summary judgment should be withheld when inquiry into the facts is desirable to clarify the application of the law. *Hook v. Rothstein*, 275 S.C. 187, 268 S.E. 2d 288 (1980), *Ford v. SC Department of Transp*., 492 S.E. 2d, 811,813, 328 S.C. 481 (S.C. App. 1997) The Court of Appeals applied the wrong standard when it misconstrued the aforementioned critical facts as a justification to affirm summary judgment.

III. SINCE THE COURT OF APPEALS ERRONEOUSLY IGNORED THE CITY'S ACTUAL AND CONSTRUCTIVE KNOWLEDGE OF THE ARCHAEOLOGICAL RESOURCES ON THE PETITIONERS' PROPERTY, THE CIRCUIT COURT'S ERROR IN MISQUOTING THE STATUTE IS SIGNIFICANT AND JUSTIFIES REVERSAL.

The Opinion acknowledges that the Circuit Court misquoted the controlling statute by inserting the word "sole" into Section 16-11-780; however, the Opinion sidesteps this error in claiming that "…because we find the City's actions did not violate the statute, we reject Petitioners' contention that the circuit court's interpretation requires reversal." (Opinion p. 7) The Opinion ignored the overwhelming evidence of the City's constructive knowledge, which was clearly before the Court of Appeals. In spite of the Opinion, the City's actions did violate Section 16-11-780.

The Opinion misapprehends and overlooks the significance of the Circuit Court's error which incorrectly requires that 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 using "the plain and unambiguous language of 16-11-780 (C), based upon the evidence presented, there is no evidence that NAPM entered upon Petitioners' 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. Rather than reject the Circuit Court's obvious mistake, the Court of Appeals also adopted the word "sole" in its erroneous claim that the "sole legitimate purpose of clearing the easement was to repair the sewer line" when the City's stated purpose was to build a road for future access, remove the rock structures (the bridge abutments), and clear the easement. (R p.70-72)

Even if the Supreme Court were to adopt the Court of Appeals' interpretation of the knowledge requirement, the Petitioners demonstrated that the City had both actual and constructive knowledge of the historic nature of the bridge abutments, and thus reversal of the Court of Appeals is proper.

IV. THE CITY'S STATED PURPOSE WAS TO REMOVE ROCK, I.E. THE BRIDGE ABUTMENTS; HOWEVER, THE COURT OF APPEALS ERRED IN CLAIMING THAT CLEARING THE EASEMENT WAS THE "SOLE LEGITIMATE PURPOSE" OF THE CITY'S WORK. WORKING OUTSIDE OF THE EASEMENT WAS NOT LEGITIMATE.

In seeking to interpret Section 16-11-780, the Court of Appeals improperly derived what it considered to be the purpose of the City's actions; however, the Court of Appeals failed to consider the actual purpose that the City had enumerated in its own memoranda. The Court of Appeals ignored the City's stated purpose of the project and incorrectly inserted its own opinion.

There were at least three purposes enumerated by the City, which included clearing the easement, building a road, and "removing large rock formations." (R p. 70, item 4, p. 72) In addition, the large rock formations that were the bridge abutments were located substantially outside of the easement; thus, the Opinion is flawed when it declares that there was a "sole" and "legitimate purpose" for the City's project. The Court of Appeals deviated from the record when it arbitrarily concluded that the "sole, legitimate purpose" was to repair the sewer line. (Opinion p. 7) The City's road construction outside of the easement was not necessary or part of the City's sewer line maintenance project, but it was added as a way of spending unused project budget. (R pp 231-232)

Repair of sewer lines was not the sole purpose or even the purpose that led to historical site destruction, nor was intentionally operating outside of the easement legitimate.

It is undisputed that the City was operating outside of the easement when it destroyed the standing stones; nevertheless, the Court of Appeals erroneously referred to the City's actions as legitimate. (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. The Court of Appeals is mistaken that working outside of an easement is a "legitimate purpose." In mischaracterizing these key facts, the Court of Appeals incorrectly validated the City's illegitimate 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.

V. THE COURT OF APPEALS IGNORED PRECEDENT DEMONSTRATING THE LEVEL OF KNOWLEDGE REQUIRED TO VIOLATE SECTION 16-11-780.

Although this is a case of first impression regarding Section 16-11-780, The Court of Appeals ignored established precedent in determining the level of purpose and knowledge necessary to sustain a violation of the Act. The Court of Appeals misapprehended the law requiring *a priori* knowledge that the thing disturbed or excavated is a prehistoric or historic site. As set forth previously, consistent with *Norris,* 111 S.C. 330 *and Multimedia,* 314 S.C. 572, the City's constructive knowledge may be presumed as a matter of law.

Actual knowledge was provided to workers on site in advance of the destruction of the historical site, as was the constructive knowledge described herein. In addition to

discounting this actual and constructive knowledge, the Court of Appeals misapprehended that advance knowledge is necessary that the thing destroyed is a historic or archaeological resource. The Opinion omitted consideration of the testimony 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)

The terms "willfully, knowingly, and maliciously" in Section 16-11-780 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 he is 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 lower Court's reasoning. The statute 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 he already has knowledge of it. The Court's of Appeals opinion makes no sense when its interpretation is read literally.

The second part of the statute has 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 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*. Below are examples of how the Legislature should have written Section 16-11-780 had they intended that advance knowledge of an archaeological resource was required to sustain a violation.

> 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 4th Circuit rejected the same logic used by the Court of Appeals 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. *United States v. Jones* , 471 F.3d 535, 538 (4th Cir. 2006) (brackets added)

There is "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." *State v. Miles* 421 SC 154, 805 S.E. 2nd 204 at 208 (Ct.App., 2017), quoting *United States v. Jones*, 471 F.3d 535, 538 (4th Cir. 2006) Liability in *Miles*, *supra*, requires only that a person knows 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.

The Court of Appeals ignored this precedent when it chose to adopt an interpretation of Section 16-11-780 that is grammatically incorrect, forced, and beyond the plain language meaning of the statute.

The Court of Appeals also ignored precedent when it refused to give deference to the State Archaeologist's opinion 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 for the Legislature, and he testified to the intent of the Legislature in drafting 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)

CONCLUSION

The Petitioners request that the Court issue a writ of certiorari, review decision of the Court of Appeals, and issue its decision reversing the Court of Appeals for the reasons set forth herein.

Respectfully submitted,

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February 10, 2022 *Counsel for Petitioners*

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Feb 10 2022
SC Court of Appeals

PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Respondent City of Columbia by email on February 10, 2022 and filed the document with the Clerk of Court and the following attorneys of record:

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Via Email and US Mail

February 10, 2022

The Honorable Patricia A. Howard
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: Brinkman v. City of Columbia; Appellate Case 2018-000948; Opinion 5870

Dear Ms. Howard:

Please find in the attached email a Petition for Writ of Certiorari in the aforementioned matter. Enclosed with this letter is a check for the filing fee in the amount of $250. Based upon the procedures in effect, it is currently my understanding that no additional copies or appendix are required at this time. I would appreciate receipt of an electronic confirmation of the filing.

Our firm represents the Petitioners in the matter.

I am serving a copy of this Petition on counsel for the Respondent as noted in the Proof of Service.

Please let me know if you have any questions or if any additional action is necessary to further perfect this appeal Thank you for your assistance.

Very truly yours,

John Adams Hodge

Enclosures
cc: Dana Thye, Esquire
Mike Hemlepp, Esquire
The Honorable Jenny Abbott Kitchings