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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

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

Appellate Case No. 2022-000137
Case No. 2015-CP-40-5598

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

v.

Weston & Sampson Engineers, Inc., City of Columbia, South Carolina,
North American Pipeline Management, and Layne Inliner,……..Respondents.

RESPONDENT CITY OF COLUMBIA'S RETURN TO PETITION FOR WRIT OF CERTIORARI

Dana M. Thye, S.C. Bar No. 16602
City of Columbia
Post Office Box 667
Columbia, South Carolina 29201
Telephone: 803-737-4242
Email: Dana.Thye@columbiasc.gov
Attorney for Respondent

INDEX

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Petitioners presented no evidence of knowledge on the part of the Respondent?

2. Did the Court of Appeals misapply the standard for summary judgment?

3. Did the Court of Appeals err in holding a misstatement of the applicable statute was not reversible error?

4. Did the Court of Appeals err in holding the Respondent's sole purpose was to fix the sewer pipe and not to remove known archeological resources?

5. Did the Court of Appeals err by ignoring precedent?

COUNTER-STATEMENT OF THE CASE

Petitioners are landowners of parcels of real property located on Castle Road in the City of Columbia, South Carolina. The City owns and operates the sewer lines that run beneath a portion of the Petitioners' properties. Each parcel of land has a sewer easement held by the City, running across a back portion of each of the properties between Castle Road and approximately fifty feet from the bank of the Broad River. The easement grants to the City the right "to construct, operate and maintain together with the right of ingress and egress at all times for the purpose of constructing, operating, and maintaining a sewer main and with the right to remove shrubbery, trees and other growth from the right-of-way and construction area provided that the property will be restored as nearly as practicable to its original condition upon completion of the construction and damaged shrubbery and trees will be replaced with the same variety from nursery stock of a practicable size..." (R. pp. 123-164)

In 2007, Petitioner David Brinkman discovered some large rock arrangements, which he believes to have been old bridge abutments, on his property located at 154 Castle Road, Columbia, South Carolina. In order to gather more information, Mr. Brinkman contacted Dr. Jonathan Leader, South Carolina's State Archaeologist, to come and inspect the rocks. Thereafter, Mr. Brinkman and Dr. Leader continued to keep in contact on a professional and social basis, including through their respective memberships of the Columbia chapter of the Explorer's Club. In May 2008, the South Carolina Archives and History Center declined Mr. Brinkman's request for the bridge abutments to be considered for listing on the National Registry, stating, in short, "that a great deal more research and archaeological investigation and assessment will be necessary. . . ." (R. pp. 58-59). More specifically, the State Historic Preservation Office questioned "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 area of the river before, during and immediately following the Civil War" despite an "abundance of documentary material" compiled and submitted by Mr. Brinkman. (R. pp. 58-59).

Subsequently, pursuant to a Consent Decree with the U.S. Environmental Protection Agency, the City engaged in a comprehensive inspection, remediation and maintenance program for its sewer lines, including the sewer line running across the Petitioners' properties. After an inspection of those sewer lines revealed that "slip lining" maintenance was needed, Defendant North American Pipeline Management ("NAPM") began clearing the easements of obstructions, including vegetation, shrubbery and trees that had grown over the easements since the sewer lines were installed in the early 1980's. It is also undisputed that the entire portion of the properties upon which NAPM was working was a wooded, overgrown portion of the property without improvements.

The City hired various contractors (including the other Respondents in this action) to perform services specific to this effort, such as clearing of sewer easements, smoke testing, and visual inspections of the lines, construction repairs and remediation of the property after the completion of the project. However, before the project's completion, Petitioners objected to the work and demanded all work cease; and all Respondents complied. Respondents were, therefore, unable to complete the slip lining or post-project remediation of the area. To date, this work remains incomplete.

This action was commenced on September 11, 2015. The seven Petitioners sued asserting causes of action for (a) trespass, (b) gross negligence, (c) nuisance, (d) violation of S.C. Code Ann. §16-11-780 for "destruction of archaeological structures," (e) "taking," (f) negligence, and (g) negligence per se. Following the Circuit Court's grant of summary judgment in favor of the City

with regard to the cause of action under (d) violation of S.C. Code Ann. §16-11-780 for "destruction of archaeological structures," the Petitioners sought appellate review.

On March 2, 2021, oral argument was held before a panel of the Court of Appeals. On November 10, 2021, by Opinion #5870, the Court of Appeals affirmed the circuit court order granting summary judgment in favor of the City on that cause of action in Plaintiff's Complaint. Modesta Brinkman et al. v. Weston & Sampson Engineers, Inc., et al. No. 2018-000948, (S.C. Ct. App. November 10, 2021). The Court of Appeals denied Petitioner's request for rehearing on January 12, 2022. Brinkman's Petition for Writ of Certiorari was filed on February 10, 2022.

ARGUMENT

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. The following factors, while not exclusive, are illustrative of the type of "special and important reasons" this Court considers when deciding to grant a writ of certiorari:

(1) Where there are novel questions of law.
(2) Where there is a dissent in the decision of the Court of Appeals.
(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
(4) Where substantial constitutional issues are directly involved.
(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR

Petitioner fails to identify any special and important reason why this Court should grant review. Instead, Petitioner seeks to impermissibly relitigate the facts of the case, contrary to the proper standard of review and rules of issue preservation. Pursuant to Rule 56, SCRCP, an appellate court reviews the granting of summary judgment under the same standard applied by the trial court.

I. The Court of Appeals correctly ruled that the City had no actual or constructive knowledge of <u>known</u> archeological resources on Petitioners' property.

The Petitioners' belief that this small site is historic despite never having been declared such is the crux of the conflict in this litigation. The Petitioners, specifically Petitioner Brinkman, insist that the entirety of the known world should accept as true *his* opinion that this bridge abutment exists on this property. The City of Columbia, in its duty to inspect, repair and maintain its sewer lines, hired contractors and engineers to preserve the integrity of the Castle Road line which runs adjacent to the Broad River. While it is true that the Petitioners would seek to have the rocks on their property identified as historic, their efforts have been fruitless.

As the trial court found, "Thereafter, in May, 2008, in response to Mr. Brinkman's request for a listing on the National Registry, the South Carolina Archives and History Center – State Preservation Office (SHPO) determined, among other things, additional research and other steps needed to be complete before the site could be eligible for consideration".

The trial court relied on the Letter to David Brinkman from the State Historic Preservation Office, May 30, 2008 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." (R. pp. 58-59).

In 2015, when the work on this project was performed by the Respondents, this site had not been declared historic by SHPO. Today, as this appeal is considered nearly ten years following the original SHPO determination, the site is still not designated as historic by a person or department with the authority to do so.

Petitioners' grounds for certiorari all focus on an asserted error that the Court of Appeals incorrectly found the City had no actual or constructive knowledge of the existence of an archeological resource. Petitioners point to areas in the record where they contend such knowledge is found. However, the knowledge Petitioners seek is not knowledge at all. 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.*

The Court of Appeals 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.)

Petitioners 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 Petitioners' 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.

II. The Court of Appeals correctly applied the standard for summary judgment.

Pursuant to Rule 56, SCRCP, an appellate court reviews the granting of summary judgment under the same standard applied by the trial court. Under that standard, Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C.R.Civ.P. 56(c). 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. Brock Bank v. Best Capital Corp., 341 S.C. 372, 534 S.C.2d
688 (2000).

In order to resist a motion for summary judgment, the non-moving party must come forward with specific facts showing genuine issues necessitating trial. NationsBank v. Scott Farm, 320 S.C. 299, 302 (1995). When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the plaintiff cannot defeat the motion by relying on the allegations of his Complaint, but must disclose the facts he intends to rely on by affidavit or the proof. Shupe v. Settle, 315, S.C. 510, 516 (1994). A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. Id. at 516-517. "The trial court should grant summary judgment against a party who

fails to make a showing sufficient to establish the existence of an essential element of the party's case." Fender and Latham, Inc. v. First Union Nat. Bank of S.C., 316 S.C. 48, 50 (1994).

The Court of Appeals Order sets forth the appropriate standard and applied that standard by taking into account all the allegations contained in the record and yet still found City forces were without sufficient knowledge to make removing an archeological resource a "purpose" or "objective, goal, or end." Opinion p. 6. There is no evidence in the Court's Order of a misapplication of any review standard.

III. The Court of Appeals correctly held the misstatement of the statute did not require reversal.

At the heart of this appeal is S.C. Code Section 16-11-780 which was passed by the South Carolina General Assembly and which reads, in its entirety:

> ***SECTION 16-11-780.*** *Prohibition on entering certain lands to discover, uncover, move, remove, or attempt to remove archaeological resource; definitions; penalty; exception.*
>
> *(A) As used in this section:*
>
> *(1) "Archaeological resource" means all artifacts, relics, burial objects, or material remains of past human life or activities that are at least one hundred years old and possess either archaeological or commercial value, including pieces of pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, rock paintings, rock carving, intaglios, graves, or human skeletal materials.*
>
> *(2) "Archaeological value" means the value of the data associated with the archaeological resource. This value may be appraised in terms of the costs of the retrieval of the scientific information that would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.*
>
> *(3) "Commercial value" means the fair market value of the archaeological resource. When a violation has resulted in damage to the archaeological resource, the fair market value may be determined using the condition of the archaeological resource prior to the violation, to the extent its prior condition can be ascertained.*
>
> *(4) "Cost of restoration and repair" means the sum of the costs incurred for emergency restoration or repairs to an archaeological resource, plus those costs projected to be*

necessary to complete restoration and repair, which may include, but need not be limited to, the costs of the following:

(a) Reconstruction of the archaeological resource;

(b) Stabilization of the archaeological resource;

(c) Ground contour reconstruction and surface stabilization;

(d) Physical barriers or other protective devices, necessitated by the disturbance of the archaeological resource, to protect it from further disturbance;

(e) Examination and analysis of the archaeological resource, including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining resources that cannot be otherwise conserved; or

(f) Preparation of reports relating to any of the activities described in this section.

(5) "Posted lands" means lands where the State has complied with the notice or warning requirement which must either be posted or given to an offender pursuant to Section 16-11-600.

(B) The court may call upon the Office of the State Archaeologist to provide evidence to assist in determining, calculating, or computing archaeological value, commercial value, or the cost of restoration and repair of an archaeological resource.

(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.

(D) For a first offense, a person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined, imprisoned, or both, pursuant to the jurisdiction of magistrates as provided in Section 22-3-550.

(E) For a second offense for violating this section on the same property as the first offense or on another posted property, a person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not less than one thousand dollars or more than three thousand dollars or imprisoned not more than three years, or both.

(F) For a third or subsequent offense for violating this section on the same property as the first offense or on another posted property, a person who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both.

(G) For the purposes of subsections (E) and (F) of this section, a second, third, or subsequent offense on the same property as the first offense or on another posted property must include no offense that occurs more than ten years after conviction for the first offense.

(H) All equipment and conveyances including, but not limited to, trailers, motor vehicles, and water-going vessels that were used in connection with felony violations of this section are subject to forfeiture to the State in the same manner as equipment and conveyances are subject to forfeiture pursuant to Section 44-53-520, if the offender either owns the equipment or conveyance or is a resident of the equipment or conveyance owner's household.

(1) All equipment and conveyances subject to confiscation and forfeiture under this section may be confiscated by any law enforcement officer as provided in this section. The confiscating officer shall deliver the confiscated property immediately to the county or municipality where the offense occurred. The county or municipality shall notify the registered owner of the confiscated property by certified mail within seventy-two hours of the confiscation. Upon notice, the registered owner has ten days to request a hearing before the court. The confiscation hearing must be held within ten days from the date of receipt of the request. The confiscated property must be returned to the registered owner if the registered owner shows by a preponderance of the evidence that he did not know the confiscated property was used in the commission of the crime, that he did not give permission for the confiscated property to be used in the commission of the crime, and that the confiscated property had not been used for a previous violation of this section on the posted land where this offense occurred or other posted land.

(2) The county or municipality in possession of the confiscated property shall provide notice by certified mail of the confiscation to all lienholders of record within ten days of the confiscation.

(3) Forfeiture of property is subordinate in priority to all valid liens and encumbrances.

(4) A person whose property is subject to forfeiture under this section is entitled to a jury trial if requested.

(I) The landowner, in the case of private lands, or the State, in the case of state lands, may bring a civil action for a violation of this section to recover the greater of the archaeological resource's archaeological value or commercial value, and the cost of restoration and repair of the site where the archaeological resource was located, plus attorney's fees and court costs.

(J) Nothing contained in this section shall limit or interfere with a landowner's lawful use of his property or with the state's ability to conduct archaeological investigations or excavations on either state lands or private lands with the consent of the landowner.

(K) Nothing contained in this section shall limit or interfere with:

(1) A landowner's lawful use of his property;

(2) The lawful acts of a landowner's employee, agent, or independent contractor acting in the scope of and in the course of his employment, agreement, or contract;

(3) The lawful acts of a utility worker acting in the scope of and in the course of his employment; or

(4) The state's ability to conduct archaeological investigations or excavations on either state lands or private lands with the consent of the landowner.

The trial court was persuaded by the clear, plain and unambiguous language of Section 16-11-780(C):

> *(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.*

Where a statute is not ambiguous, the rules of construction do not apply. "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct.App.2005) (citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (S.C., 2000); Bayle v. South Carolina Dept. of Transp., 344 S.C. at 122, 542 S.E.2d at 739 (Ct.App.2001)). "When the terms of a statute are clear, the court must apply those terms according to their literal meaning." Georgia-Carolina Bail Bonds v. County of Aiken, 354 S.C. at 24, 579 S.E.2d at 334 (Ct.App.2003) (citing Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994); Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct.App.1999); see also Parsons v. Georgetown Steel, 318 S.C. 63, 65, 456 S.E.2d 366, 367 (1995) ("Where the terms of a relevant statute are clear, there is no room for construction."). Eagle Container v. County of Newberry, 622 S.E.2d 733, 366 S.C. 611 (S.C., 2005).

The clear reading of the statute evidences the legislature's intent to criminalize individuals unlawfully entering on the lands of another "for the purpose of" removing or injuring an archaeological resource which does not belong to them.

The inclusion of the word "sole" in the trial court's Order below was found to be without consequence in terms of the appeal. Whether a purpose was the only purpose or one of many, it

still must have been at least one and where the appellate court found it did not matter because the City did not violate the statute – a reversal based on the inadvertent inclusion of the word "sole" is not reversible error.

IV. The Court of Appeals correctly held the record indicated that only purpose of the City was to line its sewer pipe.

It is wholly uncontroverted that the only purpose for any person, agent or representative of any of the Respondents or Defendants in this action for being on the property of the Appellants was to perform work on the sewer line of the West Columbia Basin Sanitary Sewer System. Petitioner argues that because the City had as its purpose to move whatever boulders were necessary to clear its easements, the City therefore had a purpose "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." S.C. Code Section 16-11-780(C). However, that ignores the knowledge requirement of that section and presumes the boulders were an archeological resource thus creating a strict liability criminal offense. The Court of Appeals drew the only inference reasonable under these circumstances, that the City's purpose was to repair its sewer line. Opinion p. 7.

V. The Court of Appeals correctly used the appropriate application of knowledge.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). However, "[a]ll rules of statutory

construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010).

In ascertaining legislative intent, "a court should not focus on any single section or provision but should consider the language of the statute as a whole." Mid–State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Gay v. Ariail, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). If the statute is ambiguous, however, courts must construe the terms of the statute. Lester v. S.C. Workers' Comp. Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606–07 (2006). In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct.App.1993). Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). The Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C., 2011).

As a preliminary finding, the trial court found that this statute is part of South Carolina's criminal code. The statute is located in Title 16 of the Code (Crimes and Offenses of the South Carolina Code of Laws) and contains language which is clearly criminal in nature, specifically the penalty provisions which provide for a term of imprisonment for offenses. "'Purpose' is the highest level of *mens rea* known in criminal law…." Opinion p. 6. (citations omitted). It follows that knowledge must not be a mere guess, and the record when viewed even in the light most favorable to the Petitioners is devoid of any evidence that City forces knew of the stone's archeological significance when they cleared the area for repair.

CONCLUSION

For these reasons, Petitioner's Petition for Writ of Certiorari should be denied.

s/ Dana M. Thye
Dana M. Thye, S.C. Bar No. 16602
CITY OF COLUMBIA
Post Office Box 667
Columbia, South Carolina 29201
Telephone: 803-737-4242
Email: Dana.Thye@columbiasc.gov
Attorney for Respondent

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