THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

SUPREME COURT CASE NO. 2022-000137
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.

REPLY BRIEF FOR PETITIONERS

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The City of Columbia attempts to minimize the archeological character of structures on the Petitioners' property that were destroyed by the City, and the City persists in its false claims that it had no actual or constructive knowledge of these archeological sites. The evidence that was presented to and apparently ignored by the Court of Appeals demonstrated that both the State Archaeologist and the Department of Archives and History considered the Petitioners' bridge abutments dating from the 1790s to be historic and archaeological resources within the meaning of §16-11-780. Granting the Petition for Certiorari is necessary and appropriate to provide clarity on this issue of first impression of the controlling statute, and review of this case provides the Court with the opportunity to correct the errors of the Court of Appeals and reverse the grant of summary judgment in favor of the Respondent.

I. THE COURT OF APPEALS IMPROPERLY RELIED UPON SPECULATION TO GRANT SUMMARY JUDGMENT. THE CITY'S ARGUMENTS ARE CLEARLY ERRONEOUS.

In its brief, the City seeks to preserve the myth that the 1790s vintage bridge abutments[1] on the Petitioners' properties were not historical or archaeological structures, despite the clear and convincing testimony to the contrary by the State Archaeologist and the records contained in the Department of Archives and History's public website. (R. p. 530 (p 74, lines 7-9), R. p. 535

[1] Approximately ten years prior to their destruction, bridge abutments that date to the time of George Washington's presidency were discovered on the worksite that is the subject of this litigation. One of the property owners initially believed they were the place where General William Sherman crossed the river to burn Columbia during the Civil War. After the State Archeologist was called, it was confirmed that the bridge abutments were much older than the Civil War, and much more work was needed to uncover information. (R. p. 565). This site and the story of the bridge abutments were featured on an episode of the PBS show *History Detectives*. (R. p. 535, R. p. 405 (p52 lines 10-21).

(p 96 lines 8-10), R. p. 561). The City's mischaracterization of the record seeks to perpetuate the clearly erroneous finding of the Circuit Court and the Court of Appeals that no agency had designated the bridge abutments as historical or archaeological resources. Whether the abutments are archaeological resources has been defined by the Legislature in Section 16-11-780(A)(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.*

Contrary to the City's assertion, Section 16-11-780 does not make it a requirement that the object, site, or structure must be listed on the National Register of Historic Places to be an Archaeological Resource. In their Petition before this Court and on brief to the Court of Appeals, the Petitioners presented overwhelming evidence that the abutments were historical and archaeological resources, and any finding otherwise is unreasonable and clearly erroneous.

The City's stated purpose of this work was to clear a path for a road. The City of Columbia's inspector, James Cockrell, was responsible for the idea of building this road (R. p. 245). and indicated it would be permanent in the sense that it would be available for future access.(R. p. 227). In building the road, the City of Columbia exceeded its 15-foot easement by as much as 75 feet. Because the bridge abutments lay outside of the 15-foot easement (R. p. 244) and the City knowingly exceeded that easement, (R. p. 77) the historic structures were in the path of the City's destruction.

In its opposition to the Petition, the City claims 1) that the site was not an archeological site and 2) it is not at fault because it had no notice that the site contained archeological

resources. The City of Columbia's arguments are contradictory, because notice would not matter for a site if it were not archeologically significant. Their arguments are also meritless because they contradict facts known to the City of Columbia.

The City makes the argument that no one deemed the Petitioner's abutments to be an archeological resource. This erroneous claim is inconsistent with statutory law, the testimony of the State Archaeologist and public records on the Department of Archives and History's website. (R. pp. 550-551, R. p. 561, Petition pp. 13-15). Archeological resources are defined by statute. In South Carolina, if a site is over 100 years old and has archeological value, it is an archeological resource. Archeological value is defined as containing information that can be learned from further study of the site. South Carolina Code Ann. §16-11-780((A)(1-2). This site was over 100 years old (R. p. 565) and as evidenced by the further study necessary in the State Archeologist's report (R. p. 567-590), there was additional work needed to learn what we can from this site. As such, it is defined by law to be an archeological resource.

The City makes the claim that this is not an archeological resource despite having irrefutable information to the contrary. The City's representative called the State Archeologist after the City destroyed the site and was told blatantly and unmistakably that the site was historically significant. "[A]pparently Mr. Sheu, I believe it was Mr. Sheu, did, where I told him there was indeed a historic site there, which was then told they would get back to me, which they never did." (R. p. 530 (p76, lines 7-12)). For context, Mr. Sheu is the City's engineer in the Public Works Department. Making the claim to this Court that this is not a historical site and not an archeological resource after the City was advised otherwise directly by the State Archeologist is disingenuous.

In spite of the City's lack of performing any due diligence or obtaining any permits which, upon reasonable inspection, would have revealed the historic nature of the abutments, the City makes claims that no notice existed that the abutments were archeological or historic. (Respondents Return to Petition, p 5-8) This claim is also inconsistent with the record that the site was identified as historic in the public Archsite records of the Department of Archives and History. (R. pp. 416-417, R. p. 561). In addition, Petitioner Coleman, one of the property owners, stated that he stood on his deck and advised the workers that the abutments were historical and should be avoided. (R p 574). One worker was on a piece of equipment and the other was standing nearby. Petitioner Coleman told them the site was historic before they destroyed it, and one of the workers nodded. The Petitioner left for a few hours and returned to find the site destroyed. (R p. 85, R. p. 565, R. p. 574).

The lower courts misapplied the standard for summary judgment. "[I]t is the time-honored rule that no factual or legal determination may be based on speculation." *Jolly v. Gen. Elec. Co.* Appellate Case No. 2017-00261, Opinion No. 5858 (S.C. App. 2021). The Court of Appeals speculated that summary judgment was proper because workers on site may not have heard Petitioner Coleman's warning about the archeological site.

The City has not offered any evidence that workers did not hear the warning, because evidence shows they did hear Petitioner Coleman's warning. According to the City Engineer Michael Sheu, the City's inspector, Mr. James Cockrell was on site at the location. (R. p. 217). We rebut the speculation used by the Court of Appeals and the City's contention that the Court of Appeals was correct by proffering the sworn deposition testimony of City Inspector James Allen Cockrell. In his deposition, Mr. Cockrell describes the content of the conversation between Petitioner Coleman and a worker on site. The worker did in fact hear Petitioner Coleman as

evidenced by the worker being able to relay the basic content of the conversation to the City inspector Cockrell regarding the archeological site.

> 5 Q: Did anyone from NAPM tell you about a
> 6 conversation with a resident about
> 7 archeological structures?
>
> 8 A: After the fact.
>
> 9 Q: What were you told?
>
> 10 A: That there was a homeowner that was displeased
> 11 about us being back there, that they messed up
> 12 some kind of an abutment.
>
> 13 Q: When did -- when did that conversation take
> 14 place with NAPM?
>
> 15 A: Once we was stopped working.
>
> 16 Q: Did they tell you where the conversation took
> 17 place?
>
> 18 A: No, sir.
>
> 19 Q: Are you aware of anyone doing any work to check
> 20 for archeological structures in the area?
>
> 21 A: We don't check for stuff. If we see a
> 22 monument, or a sign, or something, we stop what
> 23 we're doing and question it then. But if
> 24 there's nothing there, we don't question it.
>
> Deposition of James Allen Cockrell, p 75

There were two known conversations between property owners and the workers. One was about the width of the easement and not about archeological sites. (R. pp. 83-84 The only conversation between a resident and a worker regarding the archeological site was the one described by Petitioner Coleman. (R. p. 85) We know the timing of that conversation from

Petitioner Coleman, who was a first-person participant in the event. The conversation happened before the bridge abutment was completely removed and pushed down the hill. (R. p. 574).

Both the Court of Appeals and the City relied on the erroneous speculation that workers on site did not hear Dr. Coleman and therefore did not have actual notice. The fact that the workers employed by the City relayed the information to the City inspector is proof that notice was given. The City's workers heard Petitioner Coleman, and they had actual notice before moving or removing the archeological site with an excavator. Whether these workers communicated the notice to inspector Cockrell in a timely manner is not relevant to the fact that Dr. Coleman's warning was heard and understood, even if it was not heeded.

The statute says, "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." South Carolina Code Ann. §16-11-780(c). It is irrefutable that the bridge abutments were property outside of the City's 15-foot easement, (R. p. 244) and the City and its contractors on site knew they were exceeding the easement. (R. p. 77). Workers entered the land of another, were told of an archeological site, and subsequently removed the archeological site from their path.

In using speculation to arrive at the erroneous conclusion that the City did not have actual notice of the historical and archaeological nature of the abutments, the Court of Appeals did not properly apply the correct standard for summary judgment. The Court of Appeals and the Circuit Court did not construe this evidence in a favorable light to the non-moving party; thus, the grant of summary judgment in favor of the City was improper.

II. THIS CASE IS RIPE FOR THE SUPREME COURT TO CORRECT ERRORS OF LAW AND MISTATEMENTS OF FACT AND PROVIDE NEEDED GUIDANCE REGARDING §16-11-780

South Carolina Code Ann. §16-11-780 serves the purpose of protecting South Carolina's archeological resources. The statute provides for both criminal prosecution and a private right of action against those who enter the land of another to remove, disturb, destroy, deface, or vandalize archeological resources. This statute has not been before appellate courts prior to this case.

Civil and criminal remedies in the same statute create have complex and potentially confusing proof and *mens rea* requirements. As outlined in Argument V of the Petition for Writ of Certiorari, both the trial Court and Court of Appeals provided an interpretation of this statute that is inconsistent with rules of statutory construction and prior Supreme Court decisions on knowledge and intent. *Norris v. Greenville S. & A. Ry. Co*., 111 S.C. 322, 330, 97 S.E. 848, 850 (1919), *Multimedia Pub. Of South Carolina, Inc. v. Mullis*, 314 S.C. 551, 572, 431 S.E. 2d 569 (S.C. 1993), *State v. Miles* 421 SC 154, 805 S.E. 2nd 204 at 208 (Ct.App., 2017) and *Oakwood Landfill, Inc. v. DHEC,* 671 S.E. 2d 646, 653 381 SC 120 (Ct.App. 2009).

Other errors of law include: 1) upholding summary judgment based on speculation of timing of actual notice (Petition p. 18, R. p. 524, R. p. 574), 2) ignoring constructive knowledge (Petition pp. 14-17), 3) ignoring precedent (Petition pp. 21-25), 4) misquoting the governing statute (Petition pp. 18-20) and Specifically the Court of Appeals speculated the timing of Petitioner Coleman's warning could have been after the fact when Dr. Coleman clearly indicated that his warning occurred before the destruction of the abutments. (Petition p. 18, R. p. 524, R. p. 574).

Statutes with a criminal penalty rarely contain a private right of action. Prior South Carolina Case Law offers no directly on point guidance for interpretation of knowledge and

intent in a civil action brought under a dual remedy statute. This case is the first time that the matter has been before the South Carolina Supreme Court. This case is ripe for the South Carolina Supreme Court to correct the Court of Appeals' flawed interpretation of Section 11-16-780, correct errors of law identified in the Petition, and provide ample authority regarding the civil remedy set forth in the statute. .

CONCLUSION

For the beforementioned reasons this Court should grant the Writ of Certiorari and the relief requested by the Petitioners, which includes the reversal of the Court of Appeals.

Respectfully submitted,

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