

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

M. Anderson Griffith, III, Master-In-Equity

Appellate Case No. 2016-002102

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OCT 13 2016
SC Court of Appeals

Canadian River Farms, Ltd., Colt Farms, Inc., BC Farms, Inc. n/k/a BC Farms
of South Carolina Inc., and Outback Farms, Ltd., Plaintiffs-Respondents,

v.

Becky J. Gonshorowski, South Carolina Department of Transportation, and
Aiken County South Carolina, Defendants.

Save Windsor SC.....Appellant.

MOTION TO DISMISS

Pursuant to Rule 203(d)(3) of the South Carolina Appellate Court Rules, Plaintiffs-Respondents in the above-captioned case move this Court for an order dismissing the appeal brought by Save Windsor SC (“Appellant”), an entity that is not a party to this case and that sought to intervene in the case below after the trial court issued its ruling. **Ex. A.** The appeal should be dismissed because Appellant did not timely file the Notice of Appeal with this Court, and did not timely file the same Notice of Appeal filed with this Court with the lower court as required by Rule 203(d)(1)(B), SCACR.

According to the appellate court rules, “[t]he notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within ten (10) days after

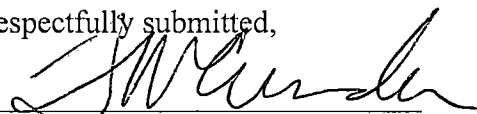
the notice of appeal is served.” Rule 203(d)(1)(B), SCACR. If the notice of appeal is not timely filed, “the appeal shall be dismissed” Rule 203(d)(3), SCACR.

In the present case, Appellant served a “Notice of Intent to Appeal” on the parties on September 15, 2016, and filed the notice with the lower court. **Ex. B.** On October 7, 2016, twenty-two days later, Appellant filed a Notice of Appeal with this Court, this time with orders attached, but did not file the Notice of Appeal with the lower court. **Ex. C.**

Because more than ten days have elapsed between the time the Notice of Intent to Appeal was served and the time the Notice of Appeal was filed, the appeal must be dismissed pursuant to Rule 203(d)(3), SCACR. Further, the appeal should be dismissed because Appellant failed to timely file the Notice of Appeal filed with this Court with the lower court pursuant to Rule 203(d)(1)(B), SCACR. *See* Rule 260(a), SCACR (“Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal”).

Because Appellant failed to timely file the Notice of Appeal and did not file the Notice of Appeal filed with this Court with the lower court, the appeal should be dismissed.

Respectfully submitted,



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Columbia, South Carolina
October 13, 2016

EXHIBIT A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF AIKEN) SECOND JUDICIAL CIRCUIT

Canadian River Farms, Ltd., Colt Farms, Inc.,) CASE NO.: 2016-CP-02-00511
 B C Farms, Inc. n/k/a B C Farms of South)
 Carolina, Inc., and Outback Farms, Ltd.)
 Plaintiffs,)

Vs.) ORDER DENYING MOTION FOR
) INTERVENTION

Beck J. Gonshorowski, The South Carolina)
 Department of Transportation and Aiken)
 County, South Carolina, a body politic and)
 political subdivision of the State of South)
 Carolina)
 Defendants,)

FILED 9.15.16
 Shig. Hadard
 I.C. CP & SS
 Charlotte 11/20
 2016

Procedural History

The Summons and Complaint were filed on March 10, 2016. The parties moving for intervention received notice by the newspaper advertisement and the public posting. Robert E. Barrett and Carolyn Barrett filed a letter of protest on March 15, 2016. A petition with twenty-five signatures objecting to the road closing was filed on March 21, 2016. The hearing was held on May 31, 2016. Prior to that time, no party had filed a motion to intervene. The Order was filed on June 27, 2016. A Motion to Reconsider pursuant to Rule 59(e) was filed by the movants on July 8, 2016. The plaintiffs filed a Memorandum in Opposition to the Motion to Reconsider on August 9, 2016. The movants Motion to Intervene and Amending the Prior Motion was filed on August 1, 2016. The plaintiffs filed a Memorandum in Opposition to the Motion to Intervene on August 8, 2016. The motion hearing was held on August 12, 2016.

Exhibits

Both parties submitted affidavits prior to the motion hearing on August 12, 2016. However, the movants also produced another affidavit, some maps of Aiken County and Barnwell County, Minutes from two Barnwell County Council meetings and a letter related to those public meetings. The plaintiffs objected to the submission of those documents based on Rule 6, SCRPC. The plaintiffs were allowed to file a Supplemental Memorandum to the motion to Intervene and Motion to Reconsider on August 25, 2016. The objection was granted as to the affidavit. The court issued an Order following the hearing specific to this

issue. The Court allowed the introduction of the maps that were public records. It also allowed the minutes from the meeting and the letter. However, the Court does not find the minutes of the meetings or the letter to be relevant to this matter. Those documents include a brief summary and a letter of actions at two Barnwell County Council meetings that do not involve the portions of the roads closed in Aiken County. The letter does not discuss the area in Aiken County. No evidence of any legal actions filed in Barnwell County were submitted.

The movants also raised the issue that the Aiken County Clerk of Court had the movants who sent letters and submitted a petition listed as "other party to the case". This label is believed to be required with the public filing system when a letter or document is filed with the Clerk of Court by someone who is not a named party. It does not change the status of parties named in the lawsuit or provide any special status for someone filing a letter.

"Relevant evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE, *State v Spears*, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). Based on that definition, the court does not find the Barnwell County Council minutes or the letter to be relevant. The moving parties did make a proffer to preserve the record.

Motion to Intervene

To prevail on Rule 24 SCRPC motion, the moving party must establish the following:

- (1) Establish timely application:
- (2) Assert an interest relating to the property or transaction which is the subject of the action;
- (3) Demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and
- (4) Demonstrate that its interest is inadequately represented by other parties. *Horry County State Bank v. Flemington Properties, LLC*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004).

"Intervention should be liberally granted, particularly where judicial economy will be promoted by the declaration of the rights of all parties who may be affected. However, this does not mean intervention should always be granted. Instead, we must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24 (a) (2)." *Horry County State Bank v. Flemington Properties, LLC*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004). "Failure to satisfy any one of the four requirements precludes intervention." *Ex Parte Reichlyn: In Re: SCDHEC v. Columbia Organic Chemical Co. Inc.*, 310 S.C. 495, 500, 427 S.E. 2d 661,664 (1993)

Timely Application

"In South Carolina, the factors to examine to determine if a timely application has been made are: 1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; 2)

the reason for the delay; 3) the stage to which the litigation has progressed; and 4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denying intervention.” *Ex Parte Reichlyn: In Re: SCDEC v. Columbia Organic Chemical Co., Inc.*, 310 S.C. 495, 500, 427 S.E. 2d 661,664 (1993).

The movants are parties whose property abuts the road but the property does not abut the portion of the road that was closed in the Order filed on June 27, 2016. The movants argue that South Carolina Section 57-9-10 requires notice be sent by mail, return receipt, to the last known address of all abutting property owners even if it is not on the portion of the proposed area to be closed. This is regardless of the length of the road or how many counties the road passes through. Based on this argument, the moving parties argue that anyone who lives on the road is entitled to notice by certified mail with no limitations. The Order closed approximately 10,576 linear feet (approximately two miles) of unpaved road on Oak Ridge Club Road and an unpaved portion of Old Bell Road (approximately 6,034 linear feet). This argument is apparently submitted to explain the delay in filing the motion of intervention and to argue that these individuals should have been named as parties in the lawsuit.

They also argue that the newspaper publication must be printed in every county that the road may pass through even if the portion that may be closed is just in one county. Finally, the movants argue that the public posting must be made throughout the entire length of the road even if it is not a portion of the road that is the subject of the action or if the road extends into other counties.

The Plaintiff's argue that the moving parties did receive notice of the hearing as required in the statute. The plaintiffs published the notice required by the statute and posted the area as required by the statute. The parties who attended the hearing were given an opportunity to testify. The plaintiff argues that the appellate courts have not interpreted the statute to require that every owner whose property abuts the road should receive notice by certified mail. Also, the courts in South Carolina have not interpreted the statute to require that type of notice for everyone who has property that abuts the road even if it extends to another county or the road changes names. The plaintiffs also argue that the language of the statute does not require the newspaper publication or the public posting to be performed in the manner suggested by the movants. Finally, in reference to the telephone calls, the attorney for the plaintiff just advised the people that called that they were not required to attend the hearing as opposed to they should not attend the hearing.

The exact language of that portion of 57-9-10 states, "Any interested person, the State or any of its political subdivisions or agencies may petition a court of competent jurisdiction to abandon or close any street, road or highway whether opened or not. Prior to filing the petition, notice of intention to file shall be published once a week for three consecutive weeks in a newspaper published in the county where such street, road or highway is situated. Notice also shall be sent by mail requiring a return receipt to the last known address of all abutting property owners whose property would be affected by any such change and

posted by the petitioning party along the street, road or highway, subject to approval of the location of the posting by the governmental entity responsible for maintenance of the street, road or highway." Both the moving parties and the plaintiff agreed that there are no South Carolina cases cited that have ruled on this particular issue.

The movants argue that if the legislature only wanted the certified mailing portion of the statute to apply to the area where the road is closed, the statute would contain that specific language. However, the language in the statute does say "all abutting property owners whose property would be affected by any such change...". The language of the statute does specify that only those persons whose property abuts the road and who would be affected receive the notice by certified mail. The term "affect" has been defined as "to act on: produce an effect or change in: <http://www.dictionary.com>."

"In construing a statute, it's words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Bryant v. City of Charleston*, 295 S.C.408, 368 S.E. 2d 899 (1988), *First Baptist Church of Mauldin V. City of Mauldin*, 308 S.C. 226, 417 S.E. 2d 592 (1992). "When interpreting a statute, this Court's primary function is to ascertain the intention of the Legislature." *Holley v. Mt Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E. 2d 373 (1994).

The moving parties filed several affidavits with the motion to intervene. Deborah L. Dixon's affidavit states that she left two messages with the office of the plaintiff's attorney requesting the hearing information. She did not receive a response. The affidavit does not state if the hearing information was provided or if she attended the hearing.

Wylie's Hutson's affidavit states that he contacted the office for the attorney for the plaintiff and was told "it was not necessary for me to come to the hearing." The affidavit does not state if the hearing information was provided or if he attended the hearing.

Patrick Martin's affidavit states that he contacted the office for the attorney for the plaintiff and was told "it was not necessary for me to come to the hearing." The affidavit does not state if the hearing information was provided or if he attended the hearing.

William A. Smith's affidavit states that he was told when the hearing would be held when he contacted the office of the attorney for the plaintiff. It does not state if Mr. Smith attended the hearing.

Robert E. Barrett's affidavit states that he contacted the office for the attorney for the plaintiff and was told "it was not necessary for me to come to the hearing." The affidavit does not state if the hearing information was provided or if he attended the hearing. Mr. Barrett also was provided with hearing information from the plaintiffs' attorney based on a letter provided to the clerk of court prior to the hearing.

Carolyn L. Barrett's affidavit states that she contacted the office for the attorney for the plaintiff and was told "it was not necessary for me to come to the hearing". The affidavit does not say she was not provided with the hearing information. Mrs. Barrett also was provided with hearing information from the

plaintiffs' attorney based on a letter provided to the clerk of court prior to the hearing. She appeared and testified at the hearing.

None of the affidavits offer any information as to where those parties live in relation to the area of the road that was ordered closed or how their property was affected. An owner, whose property abuts the portion of a road to be closed, clearly would be affected by the action. The language of the statute does not limit or specify that those are the only parties whose property interest may be affected. The language also cannot be construed to include all parties who live on the road, regardless of distance from the portion being closed. There may be special circumstances that may affect property owners whose property does not abut the portion of the road being closed. An example may be if it affects the ingress and egress to the property. However, there are no affidavits submitted to establish any special circumstances for any of the movants to be "abutting property owners whose property would be affected by any such change...". Therefore, the court finds that the movants were not entitled to notification by mail requiring a return receipt to the last known address. They did receive notification by the newspaper advertisement and the public posting. In regards to the newspaper publication, the plaintiffs filed the notice in the Aiken Standard, a newspaper published in Aiken County. The Court interprets the statutory language to require publication in the county where the portion of the road that is the subject of the action (to be closed or abandoned) is located. The statute uses the language, "where such street, road or highway is situated". The public posting is required to be along the street, road or highway subject to the approval of the location of the posting by the department that is responsible for the maintenance of that road, street or highway. There are no affidavits, answers of the defendants or legal arguments to establish that the public posting was not done in accordance with the language of the statute. Having decided that issue, the factors for determining a timely application can be reviewed.

The summons and complaint was filed on March 10, 2016. The parties moving for intervention received notice by the newspaper advertisement and the public posting. Robert E. Barrett and Carolyn Barrett filed a letter of protest on March 15, 2016. A petition with twenty-five signatures objecting to the road closing was filed on March 21, 2016. Clearly, many of the movants knew or could have known that the action was filed and could have filed a motion to intervene. The hearing was held on May 31, 2016. Prior to that time, no party had filed a motion to intervene. The order was filed on June 27, 2016. The motion to intervene was filed on August 1, 2016.

Based on the letters and the petition filed with the Aiken County Clerk of Court, many of the movants knew that the action was filed. Other than the manner in which they were notified, it is not clear why the motion to intervene was not filed prior to the hearing date. As a result, the litigation had progressed through the hearing and a final order being issued before the movants filed a motion to intervene.

The movants believe all of the reasons for their opposition to the road closing was not established at the hearing. This may include the history of the use of the road and the notice the parties received. However, a review of the affidavits does not specify those reasons to any particular movant. The plaintiffs submitted the affidavit of Brandon Woody about the financial issues the plaintiffs would suffer if the motion to intervene is granted. The movants reply to the affidavit of Mr. Woody was that the equipment and material were purchased before the order was issued to close the road. Also, a motion was filed pursuant to Rule 59(e), SCRPC shortly after the Order was filed. The court would also note that no changes were to be made to the roads for forty days after the Order was filed.

Reviewing all of the evidence submitted, the affidavits and reviewing the statutes, rules and cases the court finds that the movants have not established that a timely application was made to intervene in this action. While there may be circumstances to support filing for intervention after the hearing is held and a decision is filed, the movants have not established valid reasons based on the evidence before the Court.

Movants Interest in The Property or Transaction

The movants assert that they do have an interest since their property abuts the road. Based on the affidavits, the exact nature of any interest other than the information submitted is speculative at this point but clearly the individuals do have some interest in the action.

Movants to Demonstrate That Without Intervention, Disposition of The Action May Impair Their Ability to Protect Their Interest

The movants must also establish that without intervention, they may not be able to adequately protect their interest. The movants again argue that they were not able to attend the hearing or did not receive notice of the hearing. Also, even though three of the movants did appear and testify at the hearing, the remaining movants do not believe that testimony protected their interest in this matter. The affidavits submitted do discuss the information provided by the plaintiffs' attorneys office about the hearing.

The Movants Should Be Able to Demonstrate That Their Interest Is Inadequately Represented by The Other Parties

"Factors to consider in determining whether the existing representation is adequate: 1) whether the existing parties will undoubtedly make all of the interveners' arguments 2) whether the existing parties are capable and willing to make such arguments and 3) whether the intervener offers different knowledge, experience or prospective on the proceeding that would otherwise be absent." *Berkeley Electric v. Town of Mt. Pleasant*, 302 S.C. 186, 191, 394 S.E.2d 712, 715 (1990).

The movants interest will not be protected by the named parties in this action. Aiken County did not object to the relief requested by the plaintiffs in its answer and at the hearing. The South Carolina Department of Transportation filed an answer but did not attend the hearing. In the second defense of the answer, this defendant denied it had any interest in the roads and had no objection to the road closure.

Becky Gonshorowski filed a letter/answer but did not attend the hearing. The plaintiffs informed the court that those parties had reached an agreement. Since the motion to intervene was filed after the hearing, it is clear that the interest of the movants was not protected by any of the named parties. Three of the movants did testify at the hearing over the plaintiffs' objection. Those individuals are not named parties in this action and the Court cannot assume that the testimony of those interested persons protects the other movants. Also, the language used in prior cases specifically discusses whether the movants interests are protected by other "parties".

Rule 24(c), SCRPC

The plaintiffs raised the issue that the movants failed to attach a pleading "setting forth the claim or defense for which intervention is sought". The movants responded by arguing that the motion contains sufficient details of the movants claims. The movants' motion is four pages and does provide details of the basis for the motion.

Rule 24(c), SCRPC is entitled "Procedure; Notice to State When Validity of Statute Questioned". The movants properly served the motion to intervene and provided the grounds of the motion. A pleading was not attached to the motion. The rule does use the term "shall" when the pleading requirement is discussed. "Ordinarily, the use of the word "shall" in a statutory provision indicates the provision is *mandatory.*" *Charleston Cty. Parents for Pub. Sch., Inc. v. Moseley*, 343 S.C. 509, 541 S.E. 2d 533 (2001). There are no cases that discuss whether this term is mandatory when used in Rule 24, SCRPC.

Since there are no cases commenting on the term shall in this type of motion, the court examines the detail of the motion. The purpose of attaching the pleading, based on the language in the rule, is to set forth the claim or defense that is the basis for the intervention motion. In this case, the detailed motion does supply sufficient information. Therefore, the court will not dismiss the motion based on the language of Rule 24(c).

Conclusion

To prevail on Rule 24 SCRPC motion, the moving party must establish the following:

- (1) Establish timely application:
- (2) Assert an interest relating to the property or transaction which is the subject of the action;
- (3) Demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and
- (4) Demonstrate that its interest is inadequately represented by other parties. *Horry County State Bank v. Flemington Properties, LLC*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004).


"Intervention should be liberally granted, particularly where judicial economy will be promoted by the declaration of the rights of all parties who may be affected. However, this does not mean intervention should always be granted. Instead, we must consider the pragmatic consequences of a decision to permit or

deny intervention an avoid setting up rigid applications of Rule 24 (a) (2).” *Horry County State Bank v. Flemington Properties, LLC*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004).

“Failure to satisfy any one of the four requirements precludes intervention.” Ex Parte Reichlyn: In Re: *SCDHEC v. Columbia Organic Chemical Co. Inc.*, 310 S.C. 495, 500, 427 S.E. 2d 661,664 (1993). In this motion, the movants have failed to establish that a timely application was filed in this matter. Failure to satisfy this element is critical in a motion for intervention. The movants motion for intervention is denied.

ITS SO ORDERED

September 15, 2016



M. Anderson Griffith
Master-in-Equity for Aiken County

EXHIBIT B

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

Canadian River Farms, LTD,)
Colt Farms, Inc., BC Farms, Inc.)
nka BC Farms of South Carolina)
Inc. Outback Farms, Ltd.,)

Plaintiffs,)

Vs.)

Becky J. Gonshorowski, South)
Carolina Department of)
Transportation, Aiken County)
South Carolina,)

Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2016-CP-02-0051_

NOTICE OF INTENT TO APPEAL

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SEP 15 2016 4:40
4a

AIKEN COUNTY
CLERK OF COURT

The Intervener, "Save Windsor", et. al., hereby gives notice of appeal from the judgment of the Master-in-Equity, M. Anderson Griffith, dated September 15, 2016 in the above action, to the Court of Appeals, in the State of South Carolina.

This notice of appeal is made subsequent to personal notice of the judgment which was received on the 15TH day of September, 2016.



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STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)
Canadian River Farms, LTC, Colt Farms,)
Inc., BC Farms Inc. f/k/a BC)
Farms of South Carolina,)
Inc., Outback Farms, LTD)

Plaintiff,)

vs.)

Becky J. Gonshowski, SC Dept. Of)
Transportation, Aiken)
County, South Carolina,)

Defendant.)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

AFFIDAVIT OF MAILING

Docket No. 2016-CP-02-511

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SEP 15 2016 440
AIKEN COUNTY
CLERK OF COURT

Personally appeared Sarah Felton, Legal Assistant to Brad M. Owensby, who states that she served Cal Watson, with a copy of NOTICE OF INTENT TO APPEAL by placing in the United States Mail, General Service, Postage Pre Paid as addressed below:

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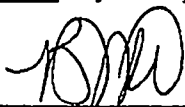
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18th day of September, 2016.



Notary Public of South Carolina

My Commission expires: 7/7 2019



Affiant

EXHIBIT C

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY

Anderson M. Griffith, Master-In-Equity

Case No.: 2010-CP-02-175=2

Canadian River Farms, LTD,
Colt Farms, Inc., BC Farms, Inc.
nka BC Farms of South Carolina
Inc. Outback Farms, Ltd.,

Appellant,

v.

Becky J. Gonshorowski, South
Carolina Department of
Transportation, Aiken County
South Carolina.

Respondent(s).

NOTICE OF APPEAL

The Intervener, "Save Windsor", et. al. including those individuals set forth in the Motion to Intervene and the Barretts, by and through its undersigned counsel, appeals the Order of the Honorable M. Anderson Griffith, dated September 15, 2016, which had been denied motion for intervention following a road closure by Appellant.

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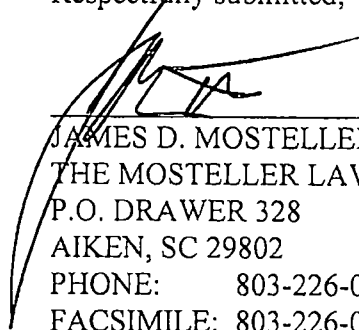
OCT 11 2016

SC Court of Appeals

Canadian River Farms, Ltd., et. al. V. Beck J. Gonshorowski, et. al.
Case No.: 2016-CP-02-00511
NOTICE OF APPEAL

October 7, 2016

Respectfully submitted,



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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY

Anderson M. Griffith, Master-In-Equity

Case No.: 2010-CP-02-175=2

Canadian River Farms, LTD,
Colt Farms, Inc., BC Farms, Inc.
nka BC Farms of South Carolina
Inc. Outback Farms, Ltd.,

Appellant,

v.

Becky J. Gonshorowski, South
Carolina Department of
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Respondent(s).

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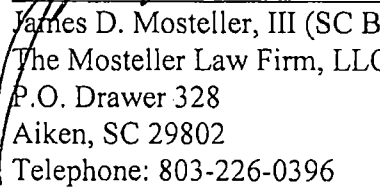
SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent(s) by depositing a copy of same in the United States mail, postage prepaid, on October 7, 2016, addressed to Respondents attorneys of record Mary Olivia Guynn, 210 Colony Pkwy, Aiken, SC 29803; J. Calhoun Watson, P.O. Box 11449, Columbia, SC 29211; Tina Marie Cundari, 1310 Gadsden Street, Columbia, SC 29201; James M. Holly, P.O. Box 5924, Aiken, SC 29804; Natalie Jean Moore, P.O. Box 191, Columbia, SC 29202.

Canadian River Farms, Ltd., et. al. V. Beck J. Gonshorowski, et. al.
Case No.: 2016-CP-02-00511
NOTICE OF APPEAL

October 7, 2016



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October 7, 2016 **RECEIVED**

Honorable Jenny Abbott Kitchings
Clerk of the South Carolina
Court of Appeals
P.O. Box 11629
Columbia, SC 29211

OCT 11 2016
SC Court of Appeals

C. LaVaun Fox, Esquire
Post Office Box 464
Aiken, SC 29801

Re: Canadian River Farms, Ltd., Colt Farms, Inc., B C Farms, Inc. n/k/a B C Farms of South Carolina, Inc., and Outback Farms, Ltd. v. Beck J. Gonshorowski, The South Carolina Department of Transportation and Aiken County, South Carolina, a body politic and political subdivision of the State of South Carolina

Case No. 2016-CP-02-00511

Dear Ms. Kitchings:

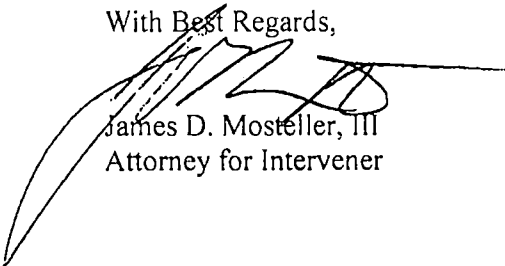
Please find attached a Notice of Appeal with attachments and Proof of Service with a check to cover the filing fee in this matter.

Also, please find a copy of the letter requesting the transcript regarding the above referenced matter.

Upon filing of the Notice of Appeal, please return a copy in the self-addressed stamped envelope.

If you have any questions or need any further information, please do not hesitate to contact me.

With Best Regards,



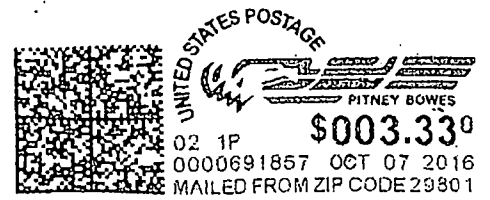
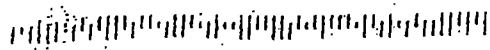
James D. Mosteller, III
Attorney for Intervener

Enclosure

cc: James L. Holly, Esquire
Mary O. Guynn, Esquire
Cal Watson, Esquire
Natalie Jean Moore
Tina Mari Cundari

Barnwell
9725 Marlboro Avenue
Barnwell, South Carolina 29812

Aiken
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Aiken, South Carolina 29801



THE MOSTELLER LAW FIRM, LLC
Post Office Box 1832
9725 Marlboro Avenue
Barnwell, South Carolina 29812

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7. Becky Gonshorowski was served on March 12, 2016. She filed a letter/answer on April 12, 2016.
8. An Order of Reference was filed on May 12, 2016.
9. The hearing was held on May 31, 2016. Brandon Woody and the Plaintiff's attorney, Mary O. Guynn were present on behalf of the plaintiffs. Aiken County was represented by its attorney, James M. Holly. No appearance was made by South Carolina Department of Transportation or Becky Gonshorowski.
10. The plaintiff informed the court that an agreement had been reached with Becky Gonshorowski, an abutting landowner.
11. The Court inquired as to any members of the public who wished to testify based on the advertisement and/or public notice. Carolyn Garrett, Vickie Long and Michael Cave advised the court they wished to testify.

Statement of Facts

1. The plaintiffs and Becky Gonshorowski are abutting property owners whose property would be affected by the abandonment and closure of the road(s).
2. The following is a description of the roads maintained by Aiken County that plaintiff seeks to close:

ALL that certain portion of an unpaved county roadway known as Oak Ridge Club Road (C-800) located between Charleston Highway (US Highway 78) and Cedar Branch road (S-576) being 10,576 linear feet, more or less, TOGETHER WITH ALL that certain portion of an unpaved county roadway known as Old Bell Road (C-774) located between Oak Ridge Club Road (C-800) and Weyerhaeuser Road (C-776) being 6,034 linear feet, more or less

The aforesaid portions of the unpaved county roadways that are proposed to be closed are also shown on that certain plat prepared for Candian River Farms LLC by All Surveying Co., Inc. Dated February 11, 2015 and recorded February 17, 2015 in Plat Book 58, Pages 359-360, Aiken County Records.

Tax Map Parcel Numbers: 207-00-01-003
207-00-05-001

3. The plaintiff presented the testimony of Tyler Stone. Mr. Stone is a contractor who worked for the plaintiffs. He is familiar with the roads. He used the roads three to four days a week when he was doing work on the property. When he started work in the area, the unpaved roads were surrounded by heavily wooded areas. Visibility was limited in some areas. As part

of the process of creating working farms, the wooded areas around the roads were cleared. After this, he noticed an increase in the speed of the vehicles traveling on those roads. He believes travel on the roads is unsafe at times due to the speed of the vehicles. Since the plaintiffs own property on both sides of the road, farm equipment cross and use the roads, which creates dangerous situations. He testified about a specific incident where one worker walking around some equipment was almost struck by a passing car.

The roads are unpaved and are slick when wet. The Aiken County Sheriff's Department was notified but that did not help with the speed of vehicles on the road. There are no signs to regulate the speed of vehicles on the roads. He testified that trash has been dumped on different areas of the property. There have also been episodes of vandalism where unknown parties drive through the fields. A fire was also started on the property near one of the roads. Tires have been dumped off of Oak Ridge Club Road. Finally, there was some damage to the sign posted about the road closing. A mailbox was dumped in one of the fields. The plaintiff introduced several police reports that have been filed.

The witness said the plaintiffs were concerned about installing wells, transformers and irrigation systems due to the vandalism. Some improvements were not completed due to this concern. He believes the vandalism would be hindered if the roads are closed. There are still paved roads that would serve the area. He had a meeting with representatives of Aiken County and was aware of the Aiken County Resolution that it had no objections to the abandonment of the roads. Aiken County does maintain the roads. Closing Oak Ridge Club Road does not prevent any owners from having access to Highway 78 or other paved roads. He has the same opinion in regards to Old Bell Road.

The plaintiffs then presented the testimony of Brandon Woody. His family owns the real estate. He drives and observes the roads five to six days each week. The area around the roads were heavily wooded when the real estate was purchased. He did not notice vehicles traveling at excessive speeds at that time. After the trees were removed, he noticed that traffic on the roads and the speed of those vehicles traveled has increased. He agreed that visibility was better but he feels many vehicles travel at unsafe speeds on the roads. The sheriff department presence has helped but that department cannot stay in the area.

Since the property is a working farm, equipment is moved across the road. His concern is that there are hills and areas on the roads where it is difficult to see traffic approaching. He is

worried that the increased speed and the limited visibility in the same areas lead to an unsafe condition.

Mr. Woody reviewed the photographs that were previously introduced into evidence. The photographs showed fields and crops damaged when someone drove a vehicle through the fields on those roads. The photographs also showed other vandalism where unknown parties dumped tires on the property, damaged a sign, dumped a mailbox in the field. The vandalism started about one year ago and he believes some incident occurs almost every week.

If the roads are abandoned and closed, the plaintiff will install gates or dirt berms. He believes this would end the vandalism and the vehicles traveling at unsafe speeds. Although Aiken County has maintained the roads, the deeded owners actually own the real estate. Becky Gonshorowski is the only other owner with real estate abutting the road(s). No owner would be land locked if the roads are closed. There is still access to paved roads in the area. Mr. Woody also offered testimony about not planting some fields and the economic impact to the plaintiffs and the suppliers for the farms.

Aiken County offered no testimony and is not opposed to the court granting the plaintiff's action to abandon and close the roads. Ms. Gonshorowski did not appear at the trial and appears to have reached an agreement with the plaintiffs. The South Carolina Department of Transportation stated that it has no interest in the roads and has not opposed the plaintiffs being granted the requested relief.

Although numerous citizens appeared for the hearing, only three wished to testify. The plaintiffs objected to these individuals offering testimony since they are not named parties and no named party called them as witnesses. The court allowed the testimony. The statute requires public posting and three weeks of advertisement. The court must also determine if closing the road is in the best interest of all concerned. This process indicates that the court should allow members of the public to offer testimony about their concern of the road(s) being closed.

Carolyn Barrett is concerned about the response time of emergency vehicles in the area. The Windsor Fire Station serves the area. In responding to any emergency, it is 5.1 miles if the unpaved roads are used that the plaintiffs wish to close. It is 7.5 miles if the other paved roads are used. She believes this difference puts the public safety at risk. She does admit that vehicles may be able to travel at a higher rate of speed on the paved roads.

She believes a survey establishes that the plaintiffs wanted the roads closed when they purchased the property. In his rebuttal testimony, Mr. Woody testified that the owners had asked the county about relocating the roads. However, he testified that would not correct the safety issues or the vandalism. He is not willing to re-locate the roads and there is no testimony the county has ever agreed to that action.

Mrs. Barrett has not observed any vehicles traveling at a high rate of speed other than suppliers vehicles that are performing work for the plaintiffs. She also pointed out that the notice listed Old Bell Road as C-744, instead of the correct Road C-774. The posted signs provide a telephone number and notify the public of a pending road closure. The advertisement also included the names of the road.

She lives on Old Bell Road and would not be landlocked if the portion of the road was closed as requested by the plaintiffs.

Dr. Vickie Long owns property in the area, but outside of the area map introduced at the hearing. She testified about her concerns of 911 emergency response times without the use of Oak Ridge Club Road and Old Bell Road. She did agree that emergency vehicles would still be able to use U. S. Highway 78 and other paved roads in the area.

Michael Cave lives on Old Bell Road. He has a difficult time making a left hand turn into his property due to the traffic. He believes the biggest contributor to this problem is contractors and suppliers working for the plaintiffs. He has experienced significant problems with dust on his home and vehicle. He was not aware of any police reports about vandalism. However, the plaintiffs did introduce some police reports.

Conclusion of Law

1. The Court has jurisdiction of this matter. All parties were properly served.
2. The parties were properly notified of the hearing date.
3. The plaintiffs complied with the S. C. Code Ann. § 57-9-10 (2012) by filing the Notice by publication, mailing the Notice to all abutting property owners, and posting the correct signage as required by the statute.
4. Aiken County does not contest the plaintiffs request for relief.
5. South Carolina Department of Transportation did not attend the hearing. The answer filed states that the agency has no interest in the roads that are the subject of this action.

6. Becky Gonshorowski filed an answer but did not attend the hearing. The plaintiff advised the court that the plaintiffs had reached an agreement with this defendant.

7. S. C. Code Ann. § 57-9-20 states that the court shall determine if it is in the best interest of all concerned whether a road should be abandoned or closed.

8. Title to the property is already in the name of the private owner. Aiken County did not contest this testimony.

9. No defendant opposed closing the following section of Oak Ridge Club Road and Old Bell Road.

10. The specific legal description of the proposed road closing is:

ALL that certain portion of an unpaved county roadway known as Oak Ridge Club Road (C-800) located between Charleston Highway (US Highway 78) and Cedar Branch road (S-576) being 10,576 linear feet, more or less, TOGETHER WITH ALL that certain portion of an unpaved county roadway known as Old Bell Road (C-774) located between Oak Ridge Club Road (C-800) and Weyerhaeuser Road (C-776) being 6,034 linear feet, more or less

The aforesaid portions of the unpaved county roadways that are proposed to be closed are also shown on that certain plat prepared for Candian River Farms LLC by All Surveying Co., Inc. Dated February 11, 2015 and recorded February 17, 2015 in Plat Book 58, Pages 359-360, Aiken County Records.

Tax Map Parcel Numbers: 207-00-01-003
207-00-05-001

11. Carolyn Barrett and Dr. Vickie Long presented testimony about their concern of emergency vehicles having to travel further to respond to a call. However, it is not disputed that the roads at issue are not paved. The alternate routes are paved and no owner is land locked if the roads are closed.

12. Michael Cave issues appear to be primarily caused by more traffic on the road. If the road is closed, the traffic on that road should decrease.

13. The plaintiffs introduced evidence through testimony and exhibits about a safety issue due to the increased speed of vehicles on the road combined with the equipment used by the plaintiffs on the roads and crossing the roads. In addition, a fire was set on the plaintiffs property, trash has been dumped in the fields and vehicles have driven off of the roads and into the fields owned by the plaintiffs. The plaintiffs entered some police reports about these issues and photographs to substantiate the problems.

14. None of the defendants contest the roads being closed. All of the parties who testified agreed that owners would still have access to public paved roads. While interested parties filed documents prior to the trial only three testified about their opposition to the proposed closing of the roads as described above. While the distance for emergency vehicles may be longer there is still access over public roads. The routes that remain are paved roads. There was also no testimony from anyone with emergency services that any service use the unpaved roads.

15. The court finds the testimony about the financial impact to the plaintiffs is not relevant to the roads being closed.

16. Under S. C. Code Ann. § 57-9-20, the court may close road(s) if it is in the best interest of all concerned. Based on the testimony of the contractor and one of the owners, there are concerns for public safety considering the flow of traffic and the work being performed in the area. The plaintiff also established the vandalism, litter and arson on portions of the roads to be closed through testimony, photographs and reports. The other abutting landowner did not contest the relief requested by the plaintiffs. Aiken County has passed a resolution to support closing the road and presented no testimony. The three interested parties raised legitimate concerns but there is no dispute that emergency vehicles will be able to use the paved roads.

17. The court finds it is in the best interest of all concerned that the roads described on page 2 paragraph 2 be closed. However, the plaintiffs will take no action to close the roads until forty days after this order is filed. Based on the testimony, the property is already titled in the private owners.

ITS IS THEREFORE ORDERED.

The areas of Oak Ridge Club Road and Old Bell Road described in page 2, paragraph 2 are to be closed forty days from the date of this order. The plaintiff will not make any changes until after forty days from the date of this order.

ITS SO ORDERED

June 27, 2016

M. A. Griffith
M. Anderson Griffith
Master-in-Equity for Aiken County

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP0200511

Canadian River Farms Ltd Outback Farms Ltd	Colt Farms Inc B C Farms Of South Carolina Inc	Becky J Gonshorowski Aiken County South Carolina	Department Of Transportation South Carolina
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PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Mary O. Guynn	Attorney for: <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Non suit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

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OCT 11 2016

SC Court of Appeals

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk: _____

FILED
8-27-16
Eli Hodard
RECEIVED
M. Anderson Griffith

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		See Order

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

<u>M. A. Griffith</u>	3076	6/27/2016
M. Anderson Griffith, Master-in-Equity	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on 06/27/2016, and a copy mailed first class or placed in the appropriate attorney's box on ^{6/27/16}, to attorneys of record or to parties (when appearing pro se) as follows:

Mary Olivia Guynn 210 Colony Pkwy Aiken, SC
29803-7468

James M. Holly PO Box 5925 Aiken, SC 29804
Natalie Jean Moore PO Box 191 Columbia, SC 29202

MJE

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

[Handwritten signature]

Court Reporter

- Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

5

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) SECOND JUDICIAL CIRCUIT

Canadian River Farms, Ltd., Colt Farms, Inc.,) CASE NO.: 2016-CP-02-00511
B C Farms, Inc. n/k/a B C Farms of South)
Carolina, Inc., and Outback Farms, Ltd.)
Plaintiffs,)

Vs.) ORDER DENYING MOTION FOR
INTERVENTION

Beck J. Gonshorowski, The South Carolina
Department of Transportation and Aiken
County, South Carolina, a body politic and
political subdivision of the State of South
Carolina
Defendants,

RECEIVED
FILED 9.15.16
OCT 11 2016
SC Court of Appeals
Heidi Hedard
10/11/16

Procedural History

The Summons and Complaint were filed on March 10, 2016. The parties moving for intervention received notice by the newspaper advertisement and the public posting. Robert E. Barrett and Carolyn Barrett filed a letter of protest on March 15, 2016. A petition with twenty-five signatures objecting to the road closing was filed on March 21, 2016. The hearing was held on May 31, 2016. Prior to that time, no party had filed a motion to intervene. The Order was filed on June 27, 2016. A Motion to Reconsider pursuant to Rule 59(e) was filed by the movants on July 8, 2016. The plaintiffs filed a Memorandum in Opposition to the Motion to Reconsider on August 9, 2016. The movants Motion to Intervene and Amending the Prior Motion was filed on August 1, 2016. The plaintiffs filed a Memorandum in Opposition to the Motion to Intervene on August 8, 2016. The motion hearing was held on August 12, 2016.

Exhibits

Both parties submitted affidavits prior to the motion hearing on August 12, 2016. However, the movants also produced another affidavit, some maps of Aiken County and Barnwell County, Minutes from two Barnwell County Council meetings and a letter related to those public meetings. The plaintiffs objected to the submission of those documents based on Rule 6, SCRCPC. The plaintiffs were allowed to file a Supplemental Memorandum to the motion to Intervene and Motion to Reconsider on August 25, 2016. The objection was granted as to the affidavit. The court issued an Order following the hearing specific to this

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issue. The Court allowed the introduction of the maps that were public records. It also allowed the minutes from the meeting and the letter. However, the Court does not find the minutes of the meetings or the letter to be relevant to this matter. Those documents include a brief summary and a letter of actions at two Barnwell County Council meetings that do not involve the portions of the roads closed in Aiken County. The letter does not discuss the area in Aiken County. No evidence of any legal actions filed in Barnwell County were submitted.

The movants also raised the issue that the Aiken County Clerk of Court had the movants who sent letters and submitted a petition listed as "other party to the case". This label is believed to be required with the public filing system when a letter or document is filed with the Clerk of Court by someone who is not a named party. It does not change the status of parties named in the lawsuit or provide any special status for someone filing a letter.

"Relevant evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE, *State v Spears*, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). Based on that definition, the court does not find the Barnwell County Council minutes or the letter to be relevant. The moving parties did make a proffer to preserve the record.

Motion to Intervene

To prevail on Rule 24 SCRPC motion, the moving party must establish the following:

- (1) Establish timely application;
- (2) Assert an interest relating to the property or transaction which is the subject of the action;
- (3) Demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and
- (4) Demonstrate that its interest is inadequately represented by other parties. *Horry County State Bank v. Flemington Properties, LLC*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004).

"Intervention should be liberally granted, particularly where judicial economy will be promoted by the declaration of the rights of all parties who may be affected. However, this does not mean intervention should always be granted. Instead, we must consider the pragmatic consequences of a decision to permit or deny intervention an avoid setting up rigid applications of Rule 24 (a) (2)." *Horry County State Bank v. Flemington Properties, LLC*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004). "Failure to satisfy any one of the four requirements precludes intervention." *Ex Parte Reichlyn: In Re: SCDHEC v. Columbia Organic Chemical Co. Inc.*, 310 S.C. 495, 500, 427 S.E. 2d 661,664 (1993)

Timely Application

"In South Carolina, the factors to examine to determine if a timely application has been made are:
1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; 2)

the reason for the delay; 3) the stage to which the litigation has progressed; and 4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denying intervention." *Ex Parte Reichlyn: In Re: SCDEC v. Columbia Organic Chemical Co., Inc.*, 310 S.C. 495, 500, 427 S.E. 2d 661,664.(1993).

The movants are parties whose property abuts the road but the property does not abut the portion of the road that was closed in the Order filed on June 27, 2016. The movants argue that South Carolina Section 57-9-10 requires notice be sent by mail, return receipt, to the last known address of all abutting property owners even if it is not on the portion of the proposed area to be closed. This is regardless of the length of the road or how many counties the road passes through. Based on this argument, the moving parties argue that anyone who lives on the road is entitled to notice by certified mail with no limitations. The Order closed approximately 10,576 linear feet (approximately two miles) of unpaved road on Oak Ridge Club Road and an unpaved portion of Old Bell Road (approximately 6,034 linear feet). This argument is apparently submitted to explain the delay in filing the motion of intervention and to argue that these individuals should have been named as parties in the lawsuit.

They also argue that the newspaper publication must be printed in every county that the road may pass through even if the portion that may be closed is just in one county. Finally, the movants argue that the public posting must be made throughout the entire length of the road even if it is not a portion of the road that is the subject of the action or if the road extends into other counties.

The Plaintiff's argue that the moving parties did receive notice of the hearing as required in the statute. The plaintiffs published the notice required by the statute and posted the area as required by the statute. The parties who attended the hearing were given an opportunity to testify. The plaintiff argues that the appellate courts have not interpreted the statute to require that every owner whose property abuts the road should receive notice by certified mail. Also, the courts in South Carolina have not interpreted the statute to require that type of notice for everyone who has property that abuts the road even if it extends to another county or the road changes names. The plaintiffs also argue that the language of the statute does not require the newspaper publication or the public posting to be performed in the manner suggested by the movants. Finally, in reference to the telephone calls, the attorney for the plaintiff just advised the people that called that they were not required to attend the hearing as opposed to they should not attend the hearing.

The exact language of that portion of 57-9-10 states, "Any interested person, the State or any of its political subdivisions or agencies may petition a court of competent jurisdiction to abandon or close any street, road or highway whether opened or not. Prior to filing the petition, notice of intention to file shall be published once a week for three consecutive weeks in a newspaper published in the county where such street, road or highway is situated. Notice also shall be sent by mail requiring a return receipt to the last known address of all abutting property owners whose property would be affected by any such change and

posted by the petitioning party along the street, road or highway, subject to approval of the location of the posting by the governmental entity responsible for maintenance of the street, road or highway." Both the moving parties and the plaintiff agreed that there are no South Carolina cases cited that have ruled on this particular issue.

The movants argue that if the legislature only wanted the certified mailing portion of the statute to apply to the area where the road is closed, the statute would contain that specific language. However, the language in the statute does say "all abutting property owners whose property would be affected by any such change...". The language of the statute does specify that only those persons whose property abuts the road and who would be affected receive the notice by certified mail. The term "affect" has been defined as "to act on: produce an effect or change in: <http://www.dictionary.com>."

"In construing a statute, it's words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Bryant v. City of Charleston*, 295 S.C.408, 368 S.E. 2d 899 (1988), *First Baptist Church of Mauldin V. City of Mauldin*, 308 S.C. 226, 417 S.E. 2d 592 (1992). "When interpreting a statute, this Court's primary function is to ascertain the intention of the Legislature." *Holley v. Mt Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E. 2d 373 (1994).

The moving parties filed several affidavits with the motion to intervene. Deborah L. Dixon's affidavit states that she left two messages with the office of the plaintiff's attorney requesting the hearing information. She did not receive a response. The affidavit does not state if the hearing information was provided or if she attended the hearing.

Wylie's Hutson's affidavit states that he contacted the office for the attorney for the plaintiff and was told "it was not necessary for me to come to the hearing." The affidavit does not state if the hearing information was provided or if he attended the hearing.

Patrick Martin's affidavit states that he contacted the office for the attorney for the plaintiff and was told "it was not necessary for me to come to the hearing." The affidavit does not state if the hearing information was provided or if he attended the hearing.

William A. Smith's affidavit states that he was told when the hearing would be held when he contacted the office of the attorney for the plaintiff. It does not state if Mr. Smith attended the hearing.

Robert E. Barrett's affidavit states that he contacted the office for the attorney for the plaintiff and was told "it was not necessary for me to come to the hearing." The affidavit does not state if the hearing information was provided or if he attended the hearing. Mr. Barrett also was provided with hearing information from the plaintiffs' attorney based on a letter provided to the clerk of court prior to the hearing.

Carolyn L. Barrett's affidavit states that she contacted the office for the attorney for the plaintiff and was told "it was not necessary for me to come to the hearing". The affidavit does not say she was not provided with the hearing information. Mrs. Barrett also was provided with hearing information from the

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plaintiffs' attorney based on a letter provided to the clerk of court prior to the hearing. She appeared and testified at the hearing.

None of the affidavits offer any information as to where those parties live in relation to the area of the road that was ordered closed or how their property was affected. An owner, whose property abuts the portion of a road to be closed, clearly would be affected by the action. The language of the statute does not limit or specify that those are the only parties whose property interest may be affected. The language also cannot be construed to include all parties who live on the road, regardless of distance from the portion being closed. There may be special circumstances that may affect property owners whose property does not abut the portion of the road being closed. An example may be if it affects the ingress and egress to the property. However, there are no affidavits submitted to establish any special circumstances for any of the movants to be "abutting property owners whose property would be affected by any such change...". Therefore, the court finds that the movants were not entitled to notification by mail requiring a return receipt to the last known address. They did receive notification by the newspaper advertisement and the public posting. In regards to the newspaper publication, the plaintiffs filed the notice in the Aiken Standard, a newspaper published in Aiken County. The Court interprets the statutory language to require publication in the county where the portion of the road that is the subject of the action (to be closed or abandoned) is located. The statute uses the language, "where such street, road or highway is situated". The public posting is required to be along the street, road or highway subject to the approval of the location of the posting by the department that is responsible for the maintenance of that road, street or highway. There are no affidavits, answers of the defendants or legal arguments to establish that the public posting was not done in accordance with the language of the statute. Having decided that issue, the factors for determining a timely application can be reviewed.

The summons and complaint was filed on March 10, 2016. The parties moving for intervention received notice by the newspaper advertisement and the public posting. Robert E. Barrett and Carolyn Barrett filed a letter of protest on March 15, 2016. A petition with twenty-five signatures objecting to the road closing was filed on March 21, 2016. Clearly, many of the movants knew or could have known that the action was filed and could have filed a motion to intervene. The hearing was held on May 31, 2016. Prior to that time, no party had filed a motion to intervene. The order was filed on June 27, 2016. The motion to intervene was filed on August 1, 2016.

Based on the letters and the petition filed with the Aiken County Clerk of Court, many of the movants knew that the action was filed. Other than the manner in which they were notified, it is not clear why the motion to intervene was not filed prior to the hearing date. As a result, the litigation had progressed through the hearing and a final order being issued before the movants filed a motion to intervene.

The movants believe all of the reasons for their opposition to the road closing was not established at the hearing. This may include the history of the use of the road and the notice the parties received. However, a review of the affidavits does not specify those reasons to any particular movant. The plaintiffs submitted the affidavit of Brandon Woody about the financial issues the plaintiffs would suffer if the motion to intervene is granted. The movants reply to the affidavit of Mr. Woody was that the equipment and material were purchased before the order was issued to close the road. Also, a motion was filed pursuant to Rule 59(e), SCRPC shortly after the Order was filed. The court would also note that no changes were to be made to the roads for forty days after the Order was filed.

Reviewing all of the evidence submitted, the affidavits and reviewing the statutes, rules and cases the court finds that the movants have not established that a timely application was made to intervene in this action. While there may be circumstances to support filing for intervention after the hearing is held and a decision is filed, the movants have not established valid reasons based on the evidence before the Court.

Movants Interest in The Property or Transaction

The movants assert that they do have an interest since their property abuts the road. Based on the affidavits, the exact nature of any interest other than the information submitted is speculative at this point but clearly the individuals do have some interest in the action.

Movants to Demonstrate That Without Intervention, Disposition of The Action May Impair Their Ability to Protect Their Interest

The movants must also establish that without intervention, they may not be able to adequately protect their interest. The movants again argue that they were not able to attend the hearing or did not receive notice of the hearing. Also, even though three of the movants did appear and testify at the hearing, the remaining movants do not believe that testimony protected their interest in this matter. The affidavits submitted do discuss the information provided by the plaintiffs' attorneys office about the hearing.

The Movants Should Be Able to Demonstrate That Their Interest Is Inadequately Represented by The Other Parties

"Factors to consider in determining whether the existing representation is adequate: 1) whether the existing parties will undoubtedly make all of the interveners' arguments 2) whether the existing parties are capable and willing to make such arguments and 3) whether the intervener offers different knowledge, experience or prospective on the proceeding that would otherwise be absent." *Berkeley Electric v. Town of Mt. Pleasant*, 302 S.C. 186, 191, 394 S.E.2d 712, 715 (1990).

The movants interest will not be protected by the named parties in this action. Aiken County did not object to the relief requested by the plaintiff's in its answer and at the hearing. The South Carolina Department of Transportation filed an answer but did not attend the hearing. In the second defense of the answer, this defendant denied it had any interest in the roads and had no objection to the road closure.

Becky Gonshorowski filed a letter/answer but did not attend the hearing. The plaintiffs informed the court that those parties had reached an agreement. Since the motion to intervene was filed after the hearing, it is clear that the interest of the movants was not protected by any of the named parties. Three of the movants did testify at the hearing over the plaintiffs' objection. Those individuals are not named parties in this action and the Court cannot assume that the testimony of those interested persons protects the other movants. Also, the language used in prior cases specifically discusses whether the movants interests are protected by other "parties".

Rule 24(c), SCRPC

The plaintiffs raised the issue that the movants failed to attach a pleading "setting forth the claim or defense for which intervention is sought". The movants responded by arguing that the motion contains sufficient details of the movants claims. The movants' motion is four pages and does provide details of the basis for the motion.

Rule 24(c), SCRPC is entitled "Procedure; Notice to State When Validity of Statute Questioned". The movants properly served the motion to intervene and provided the grounds of the motion. A pleading was not attached to the motion. The rule does use the term "shall" when the pleading requirement is discussed. "Ordinarily, the use of the word "shall" in a statutory provision indicates the provision is mandatory." *Charleston Cty. Parents for Pub. Sch., Inc. v. Moseley*, 343 S.C. 509, 541 S.E. 2d 533 (2001). There are no cases that discuss whether this term is mandatory when used in Rule 24, SCRPC.

Since there are no cases commenting on the term shall in this type of motion, the court examines the detail of the motion. The purpose of attaching the pleading, based on the language in the rule, is to set forth the claim or defense that is the basis for the intervention motion. In this case, the detailed motion does supply sufficient information. Therefore, the court will not dismiss the motion based on the language of Rule 24(c).

Conclusion

To prevail on Rule 24 SCRPC motion, the moving party must establish the following:

- (1) Establish timely application:
- (2) Assert an interest relating to the property or transaction which is the subject of the action;
- (3) Demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and
- (4) Demonstrate that its interest is inadequately represented by other parties. *Horry County State Bank v. Flemington Properties, LLC*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004).

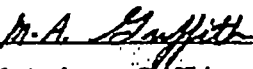
"Intervention should be liberally granted, particularly where judicial economy will be promoted by the declaration of the rights of all parties who may be affected. However, this does not mean intervention should always be granted. Instead, we must consider the pragmatic consequences of a decision to permit or

deny intervention an avoid setting up rigid applications of Rule 24 (a) (2)." *Horry County State Bank v. Flemington Properties, LLC*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004).

"Failure to satisfy any one of the four requirements precludes intervention." Ex Parte Reichlyn: In Re: *SCDHEC v. Columbia Organic Chemical Co. Inc.*, 310 S.C. 495, 500, 427 S.E. 2d 661,664 (1993). In this motion, the movants have failed to establish that a timely application was filed in this matter. Failure to satisfy this element is critical in a motion for intervention. The movants motion for intervention is denied.

ITS SO ORDERED

September 15, 2016



M. Anderson Griffith
Master-in-Equity for Aiken County

5

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP0200511

Canadian River Farms Ltd Tina Marie Cundari Outback Farms Ltd	Colt Farms Inc B C Farms Of South Carolina Inc	Becky J Gonshorowski Aiken County South Carolina	Department Of Transportation South Carolina
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy; Other: _____
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

RECEIVED
OCT 11 2016
SC Court of Appeals

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF APPEALS CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date 9/15/2016

For Clerk of Court Office Use Only

This judgment was entered on 9-15-16, and a copy mailed first class or placed in the appropriate attorney's box on 9-15-16, to attorneys of record or to parties (when appearing pro se) as follows:

Mary Olivia Gynn 210 Colony Pkwy Aiken, SC
29803-7468
J. Calhoun Watson PO Box 11449 Columbia, SC 29211
Tina Marie Cundari 1310 Gadsden St. Columbia, SC 29201

James M. Holly PO Box 5925 Aiken, SC 29804
Natalie Jean Moore PO Box 191 Columbia, SC 29202
Bradford M. Owensby 319 Park Ave. SE Aiken, SC 29801
James D. Mosteller III PO Box 1832 Barnwell, SC 29812

MIE

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard

Court Reporter

Liz Godard - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

RECEIVED

OCT 13 2016

M. Anderson Griffith, III, Master-In-Equity

SC Court of Appeals

Appellate Case No. 2016-002102

Canadian River Farms, Ltd., Colt Farms, Inc., BC Farms, Inc. n/k/a BC Farms
of South Carolina Inc., and Outback Farms, Ltd., Plaintiffs-Respondents,

v.

Becky J. Gonshorowski, South Carolina Department of Transportation, and
Aiken County South Carolina, Defendants.

Save Windsor SC.....Appellant.

PROOF OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Stepp & Laffitte, LLC,
attorneys for Plaintiffs-Respondents, certify that I have served all counsel of record in
this action with a copy of the Motion to Dismiss by placing a copy of same by U.S. Mail
and electronic mail, on October 13, 2016, to:

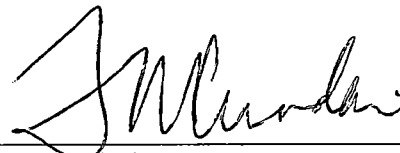
James D. Mosteller, III, Esquire
The Mosteller Law Firm, LLC
Post Office Drawer 328
Aiken, SC 29801

Bradford M. Owensby, Esquire
Banks & Owensby, LLC
319 Park Ave. SE
Aiken, SC 29801

Becky J. Gonshorowski
183 Old Bell Road
Aiken, South Carolina 29801

Linda C. McDonald, Esquire
Natalie Jean Moore, Esquire
SCDOT
Post Office Box 191
Columbia, South Carolina 29201

James M. Holly
Aiken County Attorney
1930 University Parkway, Suite 3600
Aiken, SC 29801

A handwritten signature in black ink, appearing to read 'Tina M. Cundari', written in a cursive style.

Tina M. Cundari

October 13, 2016

By Hand Delivery

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

RECEIVED

OCT 13 2016

SC Court of Appeals

Re: Canadian River Farms Ltd. et al. v. Becky J. Gonshorowski et al.
Appellate Case No. 2016-002102
Our File No. 6928/1500

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and seven copies of a Motion to Dismiss, along with the Proof of Service. Also enclosed is our firm's check in the amount of \$25.00 for the filing fee. Please file the motion and return a filed copy to me through our courier.

By copy of this letter and as evidenced by the Certificate of Service, I am serving all counsel of record with a copy of same.

Thank you for your assistance. Please contact me if you have any questions.

Sincerely,



Tina Cundari

TMC:cls
Enclosures

cc: Ms. Becky J. Gonshorowski (by U.S. mail)
Linda C. McDonald, Esq. (by U.S. mail and email)
Natalie Jean Moore, Esq. (by U.S. mail and email)
James M. Holly, Esq. (by U.S. mail and email)
Bradford M. Owensby, Esq. (by U.S. mail and email)
James D. Mosteller, III, Esq. (by U.S. mail and email)