

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
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 SC Court of Appeals
 J.C.C.P. & S.
 Debra Smith

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, SCRCF. 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 SCRC 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

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. Such., 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