THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM COUNTY OF AIKEN

M. Anderson Griffith, Master-In-Equity

Appellate Case No.: 2016-002102

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.,

Respondents/Appellants

vs.

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

Respondents

Ex Parte: Carolyn Barrett, Robert Barrett and Save Windsor SC, Proposed Intervenors,

Appellants, Respondents.

INITIAL RESPONSIVE BRIEF OF APPELLANTS/RESPONDENTS

James D. Mosteller III
The Mosteller Law Firm, LLC
P.O. Drawer 328
Aiken, SC 29801
803-226-0396

Bradford M. Owensby
319 Park Ave., SE
Aiken, SC 29801
803-648-5777
Attorneys for Proposed Intervenors/Appellants, Respondents

ARGUMENT

Respondents/Appellants, (hereinafter the Farms), make two issues on appeal in their initial brief: that A, proposed intervenors were given notice of the hearing, and had opportunity to be heard, and B, that the failure to attach a pleading to the motion to intervene was fatal to proposed intervenors request to intervene. The issue of pleading is addressed more thoroughly later in this brief.

For ease of reference, Appellants/Respondents – Proposed Intervenors will generally be referred to as "Save Windsor" in this brief. Since an initial brief was previously filed by Save Windsor on February 13, 2017, the Statement of the Case, Statement of Facts and Argument from that brief are incorporated into this responsive brief by reference in order to preserve judicial resources.

I. Notice of Hearing and Opportunity to Be Heard.

The Farms are incorrect in their assertion in the first of their issues on appeal, in that the proposed intervenors as a group or class of interested persons were not given notice of the hearing. The issue of notice of the commencement of the Farms action to close the road was previously addressed on pages 3 through 5 of Save Windsor's initial brief. Notice of the hearing was not addressed. As the record demonstrates, the Farms advertised in the newspaper prior to filing the action, posted the road with a sign, and the Farm's attorneys' telephone number; however, the newspaper notice did not contain a hearing date since the action was not yet filed. The road sign did not contain a hearing date.

There were no hearing notices mailed to any of the residents of Old Bell Road and Oakridge Club Road who had appeared in the case via March 17, 2016 petition objecting to closure of the roads. The petition was filed with the Court on March 21, and was inexplicably

ignored by the Farms' counsel and none of the signatories other than the Barretts were even listed as parties to the case. As stated before, none were given written notice of the hearing, and the procedure for finding out when the hearing was to take place was to call the Farms' attorney's office and ask about the hearing. Some did and some did not call the Farms attorneys, but notice of the hearing (and thus opportunity to be heard), is problematic in this case, since no written notice of the time and date of the hearing in this matter was not given to any of the people who responded to the complaint by petition.

Furthermore, the statute regarding road closures does not specify that in order to receive notice of the hearing (or to participate in the action) that a motion to intervene accompanied by an answer is required. The legislature is silent on how to treat interested parties, as well as the procedure for notifying them of a hearing date, but since more than twenty people appeared in the case by petition, Save Windor's position is that all of the persons signing the petition should have been given advance notice in writing of the date and time of the hearing in order to provide a modicum of due process to them.

On page eight of the Farms' brief, they assert that interested parties "were notified of the hearing through publication in the local paper and notices posted along the roadway itself." This is simply untrue and very misleading. Notice of the action was provided in that way, but date time and place of a hearing on the merits is absent in both the newspaper notice and road signs.

Therefore, the premise that reasonable opportunity to be heard was provided to Save Windsor rests upon a shaky foundation, as does the contention that they had a reasonable opportunity to be heard. To be certain, the Court did allow anyone who appeared at the hearing to testify and only three of those who appeared testified. However, the record is devoid of any actual written notice to the signatories of the March 17 petition and the right to testify at a

hearing of which no notice is given is an ephemeral right. The Farms' counsel didn't provide proper notice of commencement of the action (see, Save Windsor's brief of February 13, pp 3-5); chose not to notify the almost two dozen people who petitioned the court against road closure, and now wish to use their failure to provide written notice as a sword against the proposed intervenors to prevent a "do over". The Farms should not be so rewarded.

II. Save Windor's Motion To Intervene Did Not Run Afoul of SCRCP Rule 24(c)

The Farms assert that the detailed motion to intervene is fatally defective since it was not accompanied by a proposed answer or other pleading. The lower Court specifically addressed the issue of Rule 24 in its Order filed with the Aiken County Clerk of Court on September 15, 2016, stating in pertinent part: "Since there are no cases commenting on the term "shall" in this type of motion, the Court examines the detail of this Motion. The purpose of attaching the pleading, based on the language of the rule, is to set forth the claim or defense that is the basis for the for the intervention Motion. In this case, the detailed motion does supply sufficient information." [1] Save Windsor agree with the lower court's analysis on this issue.

The term "this type of motion" refers to Rule 24(c) SCRCP and the subsection of the rule in question is entitled "Procedure; Notice to State When Validity of Statute Questioned.[2]" It should be noted that South Carolina Rule 24 is modeled after Rule 24 of the Federal Rules of Civil Procedure. The Notes of the Advisory Committee for revisions in 1991 and 2006, respectively, as follows:

> Language is added to bring Rule 24(c) into conformity with the statute cited, resolving some confusion reflected in district court rules. As the text provides, counsel challenging the constitutionality of legislation in

[1] Order filed 9/15/2017

[2] Rule 24 (c) South Carolina Rules of Civil Procedure

an action in which the appropriate government is not a party should call the attention of the court to its duty to notify the appropriate governmental officers. The statute imposes the burden of notification on the court, not the party making the constitutional challenge, partly in order to protect against any possible waiver of constitutional rights by parties inattentive to the need for notice. For this reason, the failure of a party to call the court's attention to the matter cannot be treated as a waiver.

Advisory Committee Notes, 1991 revision Rule 24 Fed. Rules of Civil Procedure

New Rule 5.1 replaces the final three sentences of Rule 24(c), implementing the provisions of 28 U.S.C. §2403. Section 2403 requires notification to the Attorney General of the United States when the constitutionality of an Act of Congress is called in question, and to the state attorney general when the constitutionality of a state statute is drawn into question.

Advisory Committee Notes, 1991 revision Rule 24 Fed. Rules of Civil Procedure

A clear reading of Rule 24 (c) SCRCP must include the title of the Rule, which indicates the procedure to be used when notice to the state is required when an intervenor is challenging the validity of a statute. Additionally, it is clear in construing the intent of the advisory committees note to the Federal Rule, and in turn the State Rule which is modeled after it, that the subsection to the rule is concerned with notice to the state when the constitutionality of a statute is being challenged. In the instant case, there is no constitutional challenge to a South Carolina statute, nor is a statute of this state directly challenged. Moreover, it appears from the language

of S.C. Code Section 57-9-10 that there is an unconditional right to intervene for "any interested" party, but the statute is unclear on whether that intervention requires anything more than the petition filed by many of the members of Save Windsor on March 21, 2016, shortly after this action commenced.

A quick survey of cases in South Carolina Circuit Courts indicate that it is the common and customary practice of Courts to accept a filed motion for intervention, hold a hearing on the motion, and if granted set a time frame for the intervenor to file it's pleading.

For example, in the case of Hagood v South Greenville, LLC et al, 2014-CP-23-06681, a Motion to Intervene was filed by the South Carolina Human Affairs Commission January 8, 2015, sans an attached pleading. [3]The hearing on the Motion to Intervene was heard and the motion was granted and order filed April 10, 2015 directing the intervenor to file their pleading within 30 days of the filed Order. The intervenor's pleading was filed June 16, 2015.[4] In Van's Camp, LLC v. SCDHEC, et al, 2013-CP-23-06719, American Whitewater and Foothills Paddling Club filed a Motion to intervene on January 17, 2014, *sans* an attached pleading.[5] An Order was filed February 24, 2014 granting the intervenor's motion and directing the intervenor to file a pleading by March 1, 2014.[6] In Shaw Funding, LLC v. Multi Family Products, et al, 2012-CP-23-06319[7], Doster Construction Company filed a Motion to Intervene on January 29, 2015, sans an attached pleading. A hearing was held and the Motion to intervene granted on April 9, 2015.[8] In Joseph v S.C. Department of Labor Licensing and Regulation, 2012-CP-40-

[3] Hagood v. South Greenville, LLC, et al, 2014-CP-23-6681, Greenville County 2014
[4] id
[5] Van's Camp, LLC v. SCDHEC, et al, 2013-CP-23-06719, Greenville 2013
[6] id
[7] Shaw Funding, LLC v. Multi Family Products, et al, 2012-CP-23-06319, Greenville, 2012
[8] id

02632 a Motion to Intervene was filed on May 3, 2013, The Proposed Answer of Defendant Intervenors was filed May 15, 2013.[9]

Based on the foregoing, there was no error of law by the lower Court. Rule 24(c) SCRCP does not apply to the motion in the instant action wherein the motion was detailed and stated with specificity the grounds for intervention which were sufficient regrading claims and/or defenses sought. Furthermore, the lower Court was acting in accordance with the common and customary practices of Circuit Courts throughout South Carolina which allow for a Motion for Intervention to be filed, conduct a hearing upon the motion and if granted, commonly direct the proposed intervenor to file a pleading within 30 days of the entry of the Order granting the motion for intervention.

Respectfully submitted on this the 15th day of March, 2017.

James D. Mosteller III
The Mosteller Law Firm, LLC
P.O. Drawer 328
Aiken, SC 29801
803-226-0396

s/Bradford M. Owensby
Bradford M. Owensby, Esq.
319 Park Ave., SE
Aiken, SC 29801
803-648-5777
Attorneys for Proposed
Intervenors/Appellants, Respondents

[9] Joseph v S.C. Department of Labor Licensing and Regulation, 2012-CP-40-02632, Richland County 2012