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

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,

v.

Becky 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, ... Respondents,

Ex Parte: Carolyn Barrett, Robert Barrett, and Save Windsor SC, Proposed Intervenors .....Appellants/Respondents.

INITIAL RESPONDENTS' BRIEF OF RESPONDENTS/APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

ISSUES ON APPEAL

I. Did the master properly find that the Farms satisfied the statutory notice requirements by (1) sending written notice to all property owners whose land abuts the portions of the roads to be closed, (2) running a newspaper advertisement for three consecutive weeks, and (3) posting signs along the roads regarding the proposed closure?

II. Did the master properly find that Proposed Intervenors failed to establish a timely application of their motion to intervene when the motion was filed five months after the lawsuit was filed, two months after a hearing, and one month after the master issued the final order closing the roads?

STATEMENT OF THE CASE

This appeal relates to the closure of two dirt roads in Aiken County that run through a working farm owned by Respondents/Appellants ("the Farms").[1] The Farms own the roads and sought to have them closed for a variety of reasons, including that the roads create hazardous conditions for motorists and people working on the farm, and prevent the Farms from fully using the land to plant and grow crops. (5/31/16 Tr. 19:3-4, 22:12-16; Aff. of Brandon Woody dated 8/8/16.)

One month after the Aiken County master-in-equity issued an order granting the Farms' request to close the roads, a newly formed, unincorporated entity named Save Windsor SC, comprised of approximately 55 individuals, including Carolyn and Robert Barrett, (collectively, "Proposed Intervenors") filed a motion to intervene in the case arguing that they had not been provided proper notice of the road closure lawsuit and hearing. (Mot. to Intervene.) The master denied the motion, finding that (1) Proposed Intervenors had received proper notice of the lawsuit and (2) the motion to intervene had not been timely filed. (Order.)

A more comprehensive statement of the facts and procedural history in this case is set forth in the Initial Brief of Respondents/Appellants as Appellants, which is incorporated here by reference.

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[1] Contrary to what Proposed Intervenors state in their brief, the Farms did not purchase "thousands of acres of property in Aiken County." (Br. of App./Resp. p. 2.) The Farms purchased 1,900 acres, which they cleared and converted into a working farm. (5/31/16 Tr. 40:1-5.)

ARGUMENT

The master's orders denying the motion to intervene and denying the motion to reconsider should be affirmed. The Farms provided notice of the road closure as outlined by statute, and Proposed Intervenors received the notice as evidenced by the fact that several people attended the road closure hearing, and three people, Carolyn Barrett, Michael Cave, and Vicki Long, who are all members of the Save Windsor SC, testified.

Additionally, the master properly found that a motion to intervene filed one month after the issuance of the final order closing the roads was untimely.

For these reasons and those set forth more fully below, the orders should be affirmed.

I. Proposed Intervenors received notice of the road closure lawsuit and hearing.

A. The issues related to notice are not preserved for appellate review.

As a preliminary matter, Proposed Intervenors' argument related to notice is not preserved for appellate review. As the master noted in his order denying the Rule 59(e) motion, Proposed Intervenors failed to raise the notice issue at the May 31, 2016 hearing, and they could not raise the issue for the first time in their 59(e) motion. (Order, p. 4.) (quoting *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.")). Accordingly, this issue is not preserved for appellate review. *See Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 206, 791 S.E.2d 321, 332 (Ct. App. 2016) (finding that issues raised for the first time in a Rule 59(e) motion are not preserved for appellate review).

Likewise, the argument related to the allegedly misleading plat referenced in the Farms' newspaper advertisement is not preserved for review. Although Carolyn Barrett testified at the hearing that the plat indicated that the roads were "to be relocated," neither she nor anyone else contended, as Proposed Intervenors do now, that the language in the plat conflicted with the notice provided. Moreover, the master did not address the issue regarding the language in the plat in his final order, and it was not raised by Proposed Intervenors in the Rule 59(e) motion. Accordingly, the issue of whether the plat was misleading is not preserved for review. *See Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) ("[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."); *Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999) ("[W]here an issue presented to the [lower] court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review.").

B. Even if preserved, notice was provided to the Barretts directly and to members of the public as required by statute.

Even if the Court determines the issue regarding notice is preserved, the issue fails on the merits. The master properly found that the Farms fully complied with the notice requirements found in South Carolina's road closure statute and that Proposed Intervenors received notice of the lawsuit.

To begin, Carolyn and Robert Barrett knew about the lawsuit and received written notice of the hearing. The complaint was filed on March 10, 2016. (Compl.) On March 15, 2016, less than one week later, the Barretts filed a letter of protest with the court. (Letter.) The letter referred to the road closure lawsuit and included the case

number. *Id.* The letter stated, "There are approximately 50 residents on this road and we do not want our road closed or taken away." *Id.* The letter further stated, "I am requesting that the other 50 residents on this road that use this road and want it to remain open, be given a voice before this is forced on us. We also want to be advised of the trial date." *Id.*

The following week, on March 21, 2016, a petition containing 25 signatures opposing the road closing was filed. (Pet.) Some of the signatures on this petition belonged to members of Save Windsor SC.

Additionally, on April 6, 2016, Carolyn Barrett wrote a letter to Mary Guynn, attorney for the Farms, requesting notice of the hearing. (Letter.) As requested, on May 13, 2016, Guynn provided the Barretts with notice of the hearing, which was scheduled for May 31, 2016 at 10:00 a.m.[2] (Notice.)

Finally, numerous interested people attended the hearing. (Final Ord. p. 4.) At the hearing, the master invited any and all of these attendees to testify. (5/31/16 Tr. 12:24 – 13:1.) Three individuals came forward: Carolyn Barrett, Vicki Long, and Michael Cave. (5/31/16 Tr. pp. 12:20 – 13:10.)

As for the entity Save Windsor SC, it did not exist at the time the lawsuit was filed, nor did it exist at the time the hearing took place. Accordingly, Save Windsor does not have standing to allege that the notice was improper, nor does it have standing to challenge the master's order denying the motion to reconsider. *See Ex Parte S.C. Dep't of Motor Vehicles*, 390 S.C. 457, 458, 458 702 S.E.2d 568, 568 (2010) (dismissing appeal on the

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[2] Given this evidence, the statement in Proposed Intervenors' brief that no one, including the Barretts, received written notice of the hearing is incorrect. (Br. of App./Resp. pp. 1-2.)

grounds that SCDMV was not a named party to the underlying matter and noting a denial of the SCDMV's motions for reconsideration for lack of standing).

In addition to written notice being sent to the Barretts, the Farms provided notice to all interested persons as required under the road closure statute. The statute states:

> 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.

S.C. Code Ann. § 57-9-10 (Supp. 2016).

"In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *First Baptist Church of Mauldin v. City of Mauldin*, 308 S.C. 226, 229, 417 S.E.2d 592, 593 (1992). According to Black's Law Dictionary, the word "abut" meant "to join at a border or boundary; to share a common boundary with." Black's Law Dictionary 12 (9th ed. 2009). The South Carolina Supreme Court has defined "abut" to mean "to be contiguous, or border on; to bound upon; to end, end at, or terminate, to join at a border or boundary; to meet; to touch at the end or side." *Mosteller v. Cnty. of Lexington*, 336 S.C. 360, 365, 520 S.E.2d 620, 623 (1999). "However, 'abut' does not always mean there must be actual contact. For example, property may still be deemed to abut a road when there is some intervening, natural barrier like a stream or river." *Id.* (internal citation omitted).

In this case, the master correctly concluded that the methods of notice used by the Farms fully complied with the statute. Specifically, the master properly found that under the plain language of the statute, the Farms needed only to provide direct written notice to those property owners whose property borders the portions of the road to be closed. (Ord. denying Mot. to Intervene p. 5.)

Contrary to what Proposed Intervenors argue, the statute does not require that written notice be sent to every property owner along the road. The statute requires notice to be sent to "all abutting property owners whose property would be affected by any such change." S.C. Code Ann. § 57-9-10. By using the term "abutting property owners" the legislature indicated its intent that notice be sent to only those people who own properties that "border on" or are "bound upon" or "end at[] or terminate" or "join at a border or boundary" or "meet" or "touch at the end or side" to the portions that are to be closed. *See Mosteller*, 336 S.C. at 365, 520 S.E.2d at 623. Indeed, South Carolina courts, albeit not in the context of Section 57-9-10, have found that "abutting property owners" are those property owners whose property borders the section of the street to be closed. *See City of Rock Hill v. Cothran*, 209 S.C. 357, 369, 40 S.E.2d 239, 243 (1946) *overruled by Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007) (interpreting, in the context of an unconstitutional taking related to a street closure, that abutting property owners were property owners whose land "abut immediately on the part of the street vacated").

This interpretation of the statute makes sense. To interpret the statute otherwise would require a petitioner to provide written notice to a numerous property owners whose properties would not be affected by the closure. Roads and highways can continue for long distances, through multiple counties. Under Proposed Intervenors' interpretation,

hundreds or even thousands of landowners would be entitled to notice despite the fact that some of these landowners would be great distances from the effected portion of the road. It is neither practical nor feasible to identify and provide written notice to every property owner along a lengthy highway in order to close a small portion of the road.

In any event, the fact that numerous people showed up at the hearing and three testified demonstrates that Proposed Intervenors and other members of the public had notice that the roads were to be closed. Notice was provided through *The Aiken Standard*, the newspaper in the county where the roads are to be closed. The newspaper notice stated:

LEGAL NOTICE

> **Legal notice is hereby given** of the intention of [the Farms] to file a Summons and Complaint in the Court of Common Pleas for Aiken County, South Carolina for the abandonment and closure of those certain roadways described as follows: **ALL** that certain portion of unpaved county roadway known as Oak Ridge Hunt 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 portion of unpaved county roadway known as Old Bell Road (C-744) located between Oak Ridge Hunt Club Road (C-800) and Weverhaeuser 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 Canadian River Farms, LLC by All Surveying Co., Inc. dated February 11, 2015 and recorded in Plat Book 58, Pages 359-360, Aiken County Records. TAX MAP PARCEL NUMBERS 207-00-01-003 and 207-00-05-001.
>
> The abutting property owners will be named as defendants in this action.
>
> [Contact info for the Farms' attorney]
>
> **February 16, 23 & March 1, 2016**

(Compl., Ex. B.)

In addition, the Farms placed signs along the dirt roads, which stated:

NOTICE
PENDING ROAD CLOSURE
57-9-10 AS AMENDED
FOR INFORMATION
CALL [Phone number of Farms' attorney]

(Compl., Ex. D.)

Even if Save Windsor SC existed at the time notice was required, the entity is not entitled to notice because it does not own any property.

Moreover, Proposed Intervenors' argument that the road closure order should be overturned because the closure effects an unconstitutional taking should be rejected. Takings principles do not apply because the present case does not involve government action, but instead an action brought by a private party (the Farms) to close a road owned by the Farms. *See, e.g.*, *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 605, 641 S.E.2d 437, 441 (2007) ("Determining whether ***government action*** effects a taking requires a court to examine the character of the ***government's action*** and the extent to which this action interferes with the owner's rights in the property as a whole." (emphasis added)).

Even if the takings analysis were appropriate, the line of cases relied upon in *S.C. State Hwy. Dep't v. Allison*, 246 S.C. 389, 143 S.E.2d 800 (1965), the case cited in Appellants/Respondents' brief, have been overturned by the South Carolina Supreme Court. *See Hardin*, 371 S.C. at 608, 641 S.E.2d at 443 (overruling *City of Rock Hill v. Cothran*, 209 S.C. 357, 40 S.E.2d 239 (1946) and its progeny and finding that "road closings and realignments which do not 'take' land or an easement from a property owner

do not give rise to compensable takings because these actions do not directly interfere with an owner's rights in the property as a whole").

Finally, because Proposed Intervenors failed to argue due process violations in their written motions or at the August 12, 2016 hearing, this argument is not preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Even if preserved, due process concerns are not at play here given that the Barretts received written notice of the hearing and all others were provided with notice through the newspaper advertisement and signs along the road. The fact that the Barretts and others attended the hearing and three people testified demonstrates that notice was received. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.").

For these reasons, the arguments related to notice should be rejected, and the master's orders closing the roads and denying the motion to reconsider should be affirmed.

II. The master properly found that the motion to intervene was not timely filed.

Because Proposed Intervenors did not move to intervene until one month after the road closure order was issued, the master's order denying the motion to intervene should be affirmed.

Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the

action. *See* Black's Law Dictionary 897 (9th ed. 2009). Intervention of right is governed by Rule 24(a), SCRCP, which provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

When a statute conferring an unconditional right to intervene does not exist, a party seeking to intervene under Rule 24(a)(2) must:

> (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.

In re Horry Cnty. State Bank, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004). "[F]ailure to satisfy any one of the four requirements precludes intervention." *Ex Parte Reichlyn*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993).

When determining whether a motion to intervene is timely, a court considers the following factors:

> (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.

Id. at 498, 427 S.E.2d at 663.

"The decision to grant or deny a Rule 24(a)(2) motion is reviewed under an abuse of discretion standard, and each case is viewed in the context of its unique facts and circumstances." *Ex Parte Gov't Employee's Ins. Co. v. Goethe*, 373 S.C. 132, 143, 644 S.E.2d 699, 705 (2007).

Here, the master properly denied the motion to intervene on the ground that it was untimely. First, Proposed Intervenors (except for Save Windsor itself, which did not exist at the time, and therefore did not have standing to intervene)[3] knew or should have known of their interest in the lawsuit since the time the lawsuit was filed. The lawsuit was a matter of public record, and Carolyn and Robert Barrett promptly noted their objection to the relief requested. (Letter.) Additionally, in the written objection, the Barretts stated that as many as 50 other people objected. *Id.* Rather than retain counsel or file a motion to intervene, Proposed Intervenors waited until one month after the road closure order was issued to seek intervention.

Second, Proposed Intervenors do not cite any valid reason for the delay in filing. (Mot. to Intervene.) The only reasons advanced by Proposed Intervenors relate to the alleged lack of notice. However, as noted above, Proposed Intervenors were given multiple forms of notice and have participated in this lawsuit since shortly after its filing. (Compl. Ex. B, D; Letter, Pet.) Accordingly, the master properly concluded that "the movants had not established valid reasons [for permitting intervention] based on the evidence before the [master]." (Order denying Mot. to Intervene, p. 6).

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[3] "[A] party must have standing to intervene in an action pursuant to Rule 24, SCRCP." *Goethe*, 373 S.C. at 138, 644 S.E.2d at 702.

Third, the motion to intervene was filed more than two months after the final hearing and one month after the master issued the final order closing the road. (Mot. to Intervene; 5/31/16 Tr. p. 1; Final Order.) Accordingly, the master properly found that the third factor weighed against a finding of timely application as "the litigation had progressed through the hearing and a final order being issued before the movants filed a motion to intervene." (Order denying Mot. to Intervene, p. 5.)

Finally, the original parties to the case would have been prejudiced if the motion to intervene had been granted. At the time the motion was filed, the case was over and had been over for a month. The Farms presented its evidence, and interested parties were permitted to testify. The court had reached a decision and issued a written order. To require the parties to start over would have caused the Farms financial harm both in terms of restarting the litigation and causing further delay to their ability to fully use and farm the property.

Proposed Intervenors, on the other hand, have not been prejudiced. The fact that Proposed Intervenors could raise additional arguments at a subsequent hearing is not prejudicial. Proposed Intervenors had the opportunity to be heard and were heard. The only harm articulated by Proposed Intervenors during their testimony at the road closure hearing related to their loss of use of the roads and the fact that the alternative route would increase their travel by two and a half miles. (5/31/16 Tr. 55:21 – 57:6, 70:8 – 71:23.) However, these witnesses also admitted that the current route consisted entirely of dirt roads with a posted speed limit of 35 miles per hour; an alternate, paved route existed with posted speed limits of 50 or 55 miles per hour; and they could not state with certainty which route was faster to travel. *Id.* at 65:15 – 66:1, 66:8-9, 74:4-13.

Because each of the four factors related to the timeliness of a motion to intervene weighs in favor of denying the motion, the master properly exercised his discretion and denied the motion.

Rather than address the timeliness factors, Proposed Intervenors argue that the delay in filing the motion to intervene should be excused because of the allegedly inadequate notice provided by the Farms, as well as the alleged incorrect information provided by counsel for the Farms.

First, as explained above, notice was provided and was adequate. Proposed Intervenors' argument that the newspaper notice was inadequate because it referenced a plat showing that the roads were being relocated is not preserved for review because it was not raised or ruled upon. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (noting that issues "must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). Even if preserved, a reference in a plat showing that the roads are to be relocated does not override the plain language in both the newspaper notice and signage placed along the roads, which state that the road is to be closed. (Compl. Ex. B, D.) Moreover, the complaint, which was a matter of public record, plainly states the relief sought and says nothing about the relocation of the roads. (Compl.)

Second, Proposed Intervenors' argument concerning their alleged phone calls to the office of the Farms' attorneys in which the staff for that office allegedly told them that "it was not necessary for [them] to come to the hearing" is unpersuasive. Counsel for the Farms filed an affidavit attesting that no one at her office instructed people "not to attend" the hearing, and each person who called was informed of the hearing date. (Aff. of Mary Guynn.) Further, as noted by the master in his order, the affidavits addressing these

allegations fail to state whether the affiants were given information regarding the time and place of the hearing during these calls or whether the affiants attended the hearing. (Order denying Mot. to Intervene, p. 4.) In fact, one of the affidavits specifically admits that the caller was given information on when the hearing would be held. (Aff. of William A. Smith.) Finally, any reliance Proposed Intervenors allegedly placed on the advice from this office was not reasonable given that the law offices represented the Farms. Proposed Intervenors could have and should have determined for themselves whether they needed to attend the hearing

Because the master properly found that the motion to intervene was late, the master's order denying the motion to intervene should be affirmed.[4]

CONCLUSION

The master's orders denying the motion to reconsider and motion to intervene should be affirmed. The procedure for obtaining a road closure was followed in this case. Proposed Intervenors received notice in numerous ways, either directly or through the methods provided by statute, and had the opportunity to be heard. Despite this, Proposed Intervenors did not seek to intervene in the case until one month after the order closing the roads was issued. This was too late. For these reasons and those set forth more fully above, the master's orders should be affirmed.

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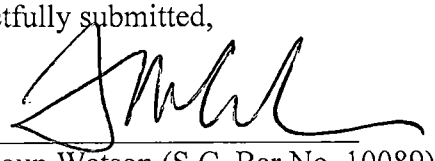
[4] In addition, Proposed Intervenors failed to establish the third and fourth prongs of the intervention test. Because Proposed Intervenors were given the opportunity to testify at the final hearing, their interests were adequately protected and intervention was unnecessary. The Farms' position on these issues is fully addressed under the first heading of the Argument section of their Appellants' brief and are incorporated here by reference.

Respectfully submitted,



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Becky 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, ... Respondents,

Ex Parte: Carolyn Barrett, Robert Barrett, and Save Windsor SC,
Proposed Intervenors.....Appellants/Respondents.

PROOF OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Robinson Stepp & Laffitte, LLC, attorneys for Respondents/Appellants, certify that I have served all counsel of record in this action with a copy of the Initial Respondents' Brief and Designation of Matter to be Included in the Record on Appeal of Respondents/Appellants by placing a copy of same by U.S. Mail and electronic mail, on March 15, 2017, to:

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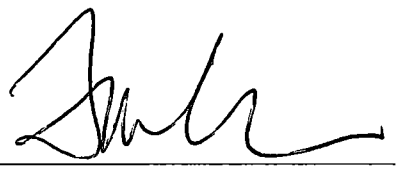

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March 15, 2017

By Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
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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 one copy of Initial Respondents' Brief of Respondents/Appellants and Designation of Matter to be Included in the Record on Appeal, along with a Proof of Service. Please file the originals and return filed copies to me through our courier.

By copy of this letter and as evidenced by the Proof 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

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MAR 15 2017
SC Court of Appeals

cc: Ms. Becky J. Gonshorowski (by U.S. mail)
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