

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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SC Court of Appeals

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 Intervenor Appellants/Respondents.

FINAL BRIEF OF RESPONDENTS/APPELLANTS

Mary O. Guynn (S.C. Bar No. 69678)
SMITH MASSEY BRODIE GUYNN &
MAYES, PA
Post Office Box 519
Aiken, South Carolina 29802
(803) 643-4110
mguynn@smbgm.com

J. Calhoun Watson (S.C. Bar No. 10089)
Tina Cundari (S.C. Bar No. 71951)
Benjamin R. Gooding (S.C. Bar No. 100620)
SOWELL GRAY ROBINSON STEPP &
LAFFITTE, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
(803) 929-1400
cwatson@sowellgray.com
tcundari@sowellgray.com
bgooding@sowellgray.com

Attorneys for Respondents/Appellants

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ISSUES ON APPEAL

- I. In addition to being untimely, should the motion to intervene have been denied because Proposed Intervenors were given notice of the hearing and had the opportunity to be heard?
- II. Should the motion to intervene have been denied due to Proposed Intervenors' failure to attach a pleading to the motion as required by Rule 24(c), SCRCP?

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”). The Farms filed this cross-appeal solely for the purposes of raising two issues that provide additional sustaining grounds in support of the master’s order denying the motion to intervene. Other than these two issues, the Farms agree with the master’s orders in every respect, and ask this Court to affirm.

On March 10, 2016, the Farms filed a complaint pursuant to Section 57-9-10 of the South Carolina Code seeking to close portions of two dirt roads that run through the Farms’ property. (R. pp. 31-40; p. 136, lines 13-15). Aiken County maintains these dirt roads, but the Farms own them. (R. p. 120, lines 9-18, p. 142, lines 11-19). The Farms purchased the 1,900-acre property through which the dirt roads run in February 2015. (R. pp. 299-300). Since purchasing this property, the Farms have spent approximately \$4.5 million preparing the land for farming and installing various improvements, including a pivot irrigation system and supporting wells. (R. p. 146, lines 8-16).

The Farms named the following as defendants in the case: Aiken County, which maintains the dirt roads; the South Carolina Department of Transportation; and Becky Gonshorowski, the only individual owning land that abuts one of the dirt roads. (R. pp. 35-36). None of the defendants objected to the closure of the roads. (R. p. 15; p. 102, line 21 – p. 103, line 10).

As required by statute, the Farms published a notice of intent to file suit for three consecutive weeks in a newspaper published in Aiken County. (R. p. 104, line 23 – p. 105, line 5). The Farms also sent written notice to the one landowner owning property that abuts

the dirt roads. (R. p. 105, lines 6-11). Finally, the Farms posted notice along the roadway noticing to the proposed closure. (R. p. 105, lines 12-14).

Within a week of the complaint being filed, Robert E. Barrett and Carolyn Barrett filed a letter of protest objecting to the road closures. (R. p. 288). Soon thereafter, a petition with 25 signatures opposing the road closure was filed. (R. pp. 289-92).

On May 31, 2016, the Aiken County master-in-equity conducted a hearing to determine whether the dirt roads should be closed. (R. p. 96). At this hearing, the master heard testimony from the Farms in support of the closure as well as testimony from community members who opposed the closure.

The Farms sought to close the dirt roads for a variety of reasons, including concerns about the safety of the Farms' employees and motorists using the roads. (R. p. 114, lines 3-4; p. 117, lines 12-16). Specifically, representatives from the Farms testified about vehicles traveling down the dirt road at high rates of speed, at times in excess of 55 miles per hour and often within close proximity to the Farms' employees. (R. p. 114, line 2 – p. 115, line 17; p. 136, line 22 – p. 138, line 7). The Farms also presented photographs of damage to crops caused by trespassers "four-wheeling" and "cutting donuts" through planted fields. (R. p. 119, line 3 – p. 121, line 3; p. 138, line 21 – p. 140, line 7; pp. 301-313). In addition, the Farms introduced photographs of trash that was dumped on the property, as well as police reports related to this dumping and to arson that occurred on the property. (R. p. 122, lines 3-10; p. 123, lines 5-13; p. 124, line 8 – p. 125, line 14; p. 140, lines 8-12; p. 140, line 24 – p. 141, line 7; pp. 314-15, 320, 322-23).

Numerous members of the public attended the hearing. (R. p. 12). At the outset of the hearing, the master invited any interested parties of them to testify. (R. p 107, line

24 – p. 108, line 1). The master stated: “All right. Could I have a show of hands of other parties who would like to testify here today?” *Id.* Three individuals came forward: Carolyn Barrett, Vicky Long, and Michael Cave. (R. p. 107, line 20 – p. 108, line 10).

Carolyn Barrett testified about her concern that closing the dirt roads would cause emergency vehicles to have to take an alternate route, thereby increasing the response time for these vehicles. (R. p. 150, line 21 – p. 152, line 6). She later admitted that the route consisted entirely of dirt roads with a posted speed limit of 35 miles per hour and that an alternate, paved route existed with posted speed limits of 50 or 55 miles per hour. (R. p. 160, line 15 – p. 161, line 1). She also admitted that her concern that the alternate route would take longer was not based on any mathematical calculation, but rather based solely on her opinion. (R. p. 161, lines 8-9). Ms. Barrett also testified that her property would not be landlocked by closing the dirt roads. (R. p. 169, line 24 – p. 175, line 3).

Vicky Long echoed Ms. Barrett’s concerns about the potential for increase travel time for emergency vehicles. (R. p. 165, line 8 – p. 166, line 23). Ms. Long likewise admitted that an alternative, paved route existed and that she was not aware which route was faster in practice. (R. p. 169, lines 4-13).

Finally, Michael Cave expressed concerns about the effects of increased traffic on the dirt roads, specifically referencing work vehicles and delivery trucks taking construction material to the Farms’ property. (R. p. 174, line 13 – p. 175, line 13). Mr. Cave testified that the traffic was causing increased dust and clay to accumulate on his home and vehicles. (R. p. 175, line 21 – p. 177, line 14).

At the conclusion of the hearing, the master took the matter under advisement. (R. p. 191, lines 5-19). On June 27, 2016, the master issued an order detailing his findings of

fact and conclusions of law related to the closure of the dirt roads. (R. pp. 9-16). In this order, the master made extensive findings of fact, recapping testimony from each of the five witnesses who testified at trial. (R. pp. 10-13). In both his findings of fact and conclusion of law, the master specifically noted the concerns of the interested parties who testified at the hearing. (R. pp. 12-14). Ultimately, the master concluded that it was “in the best interest of all concerned that the roads . . . be closed.” (R. pp. 279-86).

On July 8, 2016, a group of 52 individuals, including Robert and Carolyn Barrett, filed a motion to reconsider the order closing the dirt roads. (R. pp. 60-62). On August 9, 2016, the Farms filed a Memorandum in opposition to the motion to reconsider. (R. pp. 279-86).

On August 1, 2016, a newly formed unincorporated association called Save Windsor, SC, comprised of approximately 55 individuals, including Carolyn and Robert Barrett, (collectively, “Proposed Intervenors”) filed a motion to intervene in the case. (R. pp. 65-77). On August 8, 2016, the Farms filed a Memorandum in Opposition to the motion to intervene. (R. pp. 258-65).

On August 12, 2016, the master conducted a hearing to address both the motion to reconsider and the motion to intervene. (R. p. 194). Following this hearing, the master denied both motions. (R. pp. 19-30).

As for the order denying the motion to reconsider, the master found that “[i]t was undisputed that the public can use paved roads in the area and there was no testimony of any owner being landlocked due to the proposed road closure.” (R. p. 21). The master further found that movants had the opportunity to be heard because the court “allowed any interested party to testify but only three individuals testified.” *Id.* The master further found

that the three individuals who testified had standing to move for reconsideration, but none of the other individuals did. *Id.*

As for the order denying the motion to intervene, the master found that the movants failed to show that they timely filed the motion, and failure to timely file is critical in a motion to intervene. (R. pp. 24-28). The master found that despite the fact that several movants knew about the action, they did not file the motion until after the hearing and after the final order had been issued. (R. pp. 27-28).

Although failure to timely file the motion was fatal to the relief requested, the master went on to make additional findings related to the motion to intervene. The master found that the movants had an interest in the action, and that their interest will not be protected by the named parties to the action. (R. p. 28). The master also found that the movants' failure to attach a pleading to the motion as required by Rule 24(c) was not fatal to the motion. (R. p. 29).

On October 7, 2016, Save Windsor and the Barretts filed a Notice of Appeal which on its face stated that they were appealing the order denying the motion to intervene. (R. pp. 78-79). The Notice attached the September 15, 2016 order denying the motion to intervene and the July 27, 2016 order closing the dirt roads, but did not attach the order denying the motion to reconsider. *Id.* Proposed Intervenors subsequently filed an Amended Notice of Appeal attaching the September 15, 2016 order denying the motion to reconsider. (R. pp. 94-95).

The Farms filed a Notice of Appeal for purposes of cross-appealing two issues decided in the September 15, 2016 order denying the motion to intervene. (R. pp. 82-93). This brief relates solely to those two issues.

ARGUMENT

The Farms agree with the master's orders denying the motion to intervene and denying the motion to reconsider and ask this Court to affirm those rulings. The Farms submit this brief solely for the purpose of addressing two findings made in the order denying the motion to intervene. The Farms agree with the master that the motion to intervene should have been denied because it was late, but contend that the motion should also have been denied because (1) Proposed Intervenors' interests were heard and protected at the road closure hearing, and (2) Proposed Intervenors failed to attach a pleading to the motion as required by Rule 24(c), SCRCF. These two grounds provide additional support for the master's order denying the motion to intervene.

The Farms raise these issues out of an abundance of caution only, so as to avoid the scenario where these findings could be deemed un-appealed from and the law of the case. The Court need not reach these issues if the Court agrees with the master that the motion to intervene was untimely.

I. Proposed Intervenors had the opportunity to be heard and their interests were adequately protected.

In addition to being untimely, the motion to intervene should have been denied because Proposed Intervenors had the opportunity to be heard at the road closure hearing, and their interests were adequately protected through the testimony provided.

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* 826 (7th ed. 1999). Intervention of right is governed by Rule 24(a), SCRCF, 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 there is not a statute that confers the unconditional right to intervene, "a party moving to intervene . . . 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." *Ex Parte Reichlyn*, 310 S.C. 495, 498, 427 S.E.2d 661, 663 (1993).

In the case at hand, Proposed Intervenors should not be permitted to intervene in this case after-the-fact because they have already been given the opportunity to be heard. The interested parties were notified of the hearing through publication in the local paper and notices posted along the roadway itself. (R. p. 104, line 23 – p. 105, line 14). Numerous people attended the hearing. (R. p. 12). The master invited any person who was interested in the matter to testify. (R. p. 107, line 24 – p. 108, line 2). Only three individuals, all of whom are Proposed Intervenors, testified. The only concerns raised by these individuals related to an increased length of time for emergency vehicle travel and increased traffic on the roads in question. (R. p. 150, line 21 – p. 152, line 6; p. 165, line 8 – p. 166, line 23; p. 174, line 13 – p. 175, line 13).

Proposed Intervenor should not be given yet another opportunity to be heard, particularly when there is no reason to think that testimony from any other Proposed Intervenor would differ from the testimony that was presented at the hearing. None of Proposed Intervenor's own property abutting the dirt roads. Carolyn Barrett acknowledged that closing the dirt roads would not land-lock her property and would have no impact on the road in front of her home. (R. p. 159, line 19 – p. 160, line 3). The remaining Proposed Intervenor are all similarly situated to Ms. Barrett.

Additionally, Proposed Intervenor had the opportunity to be heard through the numerous affidavits submitted in support of the motion to intervene. Rather than identify additional reasons in support of the dirt roads remaining open, Proposed Intervenor focused on whether they received proper notice of the hearing. (R. pp. 65-77). Proposed Intervenor could have used these affidavits as yet another opportunity to be heard but failed to do so.

Finally, the master considered the testimony of Ms. Barrett and others in concluding that it was in the best interest "of all concerned" that the dirt roads be closed. (R. p. 15). The testimony was explicitly incorporated into and addressed in the master's order closing the roads. In the conclusions of law, the master wrote:

11. Carolyn Barrett and Vicky Long presented testimony about their concerns 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 alternative routes are paved and no owner is landlocked if the roads are closed.

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

(R. p. 14).

Because Proposed Intervenor were given the opportunity to be heard, were permitted to testify and protect their interests, and the testimony provided was considered and addressed in the master's order closing the roads, the master should have denied the motion to intervene on the ground that Proposed Intervenor failed to satisfy the final two prongs of Rule 24(a). Proposed Intervenor had the opportunity to protect their interests and their interests were adequately protected by those who testified. Intervention should not be permitted simply to allow Proposed Intervenor to have a "do over." The motion to intervene was late and additional reasons exist for denying it.

II. Proposed Intervenor's failure to attach a pleading to the motion to intervene is fatal to the relief requested.

Another reason Proposed Intervenor's motion should have been denied is because Proposed Intervenor failed to attach a pleading to their motion as required by Rule 24(c), SCRPC.

Rule 24(c), SCRPC, which governs the procedure related to intervention, states in part:

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the ground therefor and **shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.**

Rule 24(c), SCRPC (emphasis added). "Ordinarily, the use of the word 'shall' in a statutory provision indicates the provision is mandatory." *Charleston Cnty. Parents for Pub. Schools, Inc. v. Moseley*, 343 S.C. 509, 519, 541 S.E.2d 533, 538 (2001).

As noted in the master's order denying the motion to intervene, no South Carolina appellate court has addressed the question of whether failure to attach a pleading to a

motion filed under Rule 24 is fatal to the motion. (R. p. 15). At least one South Carolina trial court has. *See Anderson Cnty. v. Preston*, No. 2009-CP-04-4482, 2013 WL 10154806, at *4 (S.C. Com. Pl. Nov. 8, 2013). In that case, the court found that “[w]ithout a proposed pleading, [the intervening party] procedurally failed to interpose a proper motion under which intervention could be granted.” *Id.*

Numerous federal courts have found that failure to attach a pleading is fatal to a motion to intervene. *See, e.g., Miami Cnty. Nat’l Bank of Paola, Kan. v. Bancroft*, 121 F.2d 921, 926 (10th Cir. 1941) (affirming denial of intervention where no pleading was filed with the application); *Sch. Dist. of Philadelphia v. Pennsylvania Milk Mktg. Bd.*, 160 F.R.D. 66, 67 (E.D. Pa. 1995) (finding that the motion “must be denied” because the intervening party failed to attach a pleading as required by Rule 24(c)); *Sears Roebuck & Co. v. IPofA Salina Cent. Mall, LLC*, 2009 WL 1664614 (D. Kan. 2009) (denying the motion to intervene due to the failure to attach a pleading).

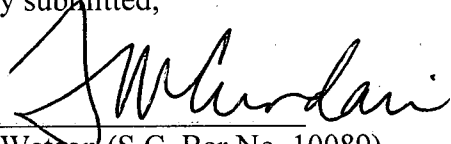
Here, Proposed Intervenors failed to attach a pleading to the motion to intervene. This failure to attach pleading to the motion was yet another reason the motion to intervene should have been denied. The rule plainly states that a pleading is required, and Proposed Intervenors failed to follow the rule. Accordingly, the motion should have been denied on this basis as well.

CONCLUSION

The master’s order denying the motion to intervene should be affirmed. Proposed Intervenors had the opportunity to be heard and indeed were heard at the road closure hearing in this case. Additionally, Proposed Intervenors did not abide by the requirement

in Rule 24(c) that they attach a pleading to the motion. These are additional reasons why the master correctly found that the motion to intervene should be denied.

Respectfully submitted,



J. Calhoun Watson (S.C. Bar No. 10089)
Tina Cundari (S.C. Bar No. 71951)
Benjamin R. Gooding (S.C. Bar No. 100620)
SOWELL GRAY ROBINSON STEPP &
LAFFITTE, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
(803) 929-1400
cwatson@sowellgray.com
tcundari@sowellgray.com
bgooding@sowellgray.com

Mary O. Guynn (S.C. Bar No. 69678)
SMITH MASSEY BRODIE GUYNN &
MAYES, PA
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Aiken, South Carolina 29802
(803) 643-4110
mguynn@smbgm.com

Attorneys for Respondents/Appellants

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