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.

FINAL 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

Table of Authorities

STATEMENT OF THE CASE

This case was commenced by plaintiffs filing suit for the closure of roads, on March 10, 2016, after having advertised their intention in newspapers prior to the filing, and after sending written notice to the land-owners along the stretch of road to be closed. (R. pp. 42)

The plat referenced in the newspaper advertisements is set forth as Exhibit A to the complaint (R. pp. 40-40a) . The plat states that the subject roads (Old Bell Road, and Oakridge Club Road) were to be relocated. The plaintiffs served only the South Carolina Department of Transportation, Becky Gonshorowski and Aiken County with the complaint once it was filed (R. pp. 43) . The three defendants were also apparently the only persons served with notice of intent prior to filing the complaint.

Aiken County filed an answer with no objection to the road closure, but did not appear to have a public hearing on the issue of road closure. The Department of Transportation did not agree nor disagree with the relief sought in the complaint. Defendant, Becky Gonshorowski, initially objected to the road closure, but apparently reached a settlement prior to trial.

As interested parties who own property abutting Old Bell Road, Robert E. Barrett and Carolyn Barrett objected to the closing of the roads by letter filed March 15, 2016. (R. pp. 288) On March 21, 2016 a petition of twenty-three people living on or owning property on the subject roads was filed objecting to the closing of the roads. (R. pp. 289) Two additional signatories were on roads near the proposed closure. In each instance above, the interested parties were acting pro se. (A list of the owners is set forth in paragraph two of Save Windsor's August 1, 2016 Motion to Intervene.)(R. pp. 65)

The case was referred to the Aiken Master-In-Equity by order dated May 12, 2016, and on

May 17, 2016, plaintiffs sent written notices of the hearing date to the three defendants, but sent no written notice to any of the petitioners, nor to the Barretts. (R. pp. 1) The trial court issued its judgment on June 27, 2016 and a Rule 59(e) motion for reconsideration was filed on July 8, 2016 (R. pp. 9) (R. pp. 60) . An amended Rule 59 motion and formal motion to intervene was filed on August 1, 2016. The order from that hearing was filed on September 15, 2016 and this appeal followed (R. pp. 65) .

STATEMENT OF THE FACTS

The Farms (collectively the Farms) located in Aiken County purchased a thousands of acres of property in Aiken County. When they purchased the property, they had discussions with Aiken County about relocating the roads, and even prepared a plat indicating that the subject roads would be relocated. (Tr. Pp. 57, 58, 90, 91 and Exhibit A to complaint)(R. pp. 152, 153, 185, 186) (R. pp. 40-40a).

Proposed Interveners, Appellants/Respondents will be collectively referred to as Save Windsor for ease of reference. Save Windsor is comprised of people owning or residing on property abutting the two roads, but which does not abut the portion of the road closed. None of the people comprising Save Windsor received written notice of the road closure. Some of them called plaintiffs' attorney's office and were told that they did not need to attend the final trial. (See, Tr. P. 63, and affidavits of Deborah L. Dixon, Wylie Hutson, Patrick Martin, William A. Smith, Robert E. Barrett, and Carolyn Barrett)(R. pp. 158) (R. pp. 70-75) .

According to the affidavit of Cole Page, Jr. a former Highway Department engineer assigned to Aiken County, Old Bell Road had been in use and maintained by the County since at least 1972, when he became the engineer for Aiken County (R. pp. 247) . The official road

maps for Aiken County show the roads as being County Roads. (Exhibits to motion hearing)(R. pp. 255-257) .

ARGUMENT

THE LACK OF WRITTEN NOTICE TO ALL PROPERTY OWNERS ABUTTING OLD BELL ROAD AND OAKRIDGE CLUB ROAD COMBINED WITH A MISLEADING NOTICE IN THE NEWSPAPER TAINTED THE PROCESS SUFFICIENTLY TO WARRANT A NEW TRIAL FOR THE INTERVENERS (R. pp. 42)

Save Windsor contends that the Farms had a statutory duty to provide all of the abutting land-owners with written notice of the intent to close the road' The Farms argue that they are simply required to notify those owners whose property abuts the portion to be closed. The statute requires written notice and road closing signs, as well as notice in the newspaper.

The newspaper notice refers to a plat prepared by Richard All (R. pp. 42) . That plat is attached as Exhibit A, to the plaintiffs' complaint, and anyone reading the notice, upon checking the plat, would be lead to believe that the roads would be relocated, and not simply closed (R. pp. 40-40a) . As to the Farms contention that not all abutting landowners are required to be given written notice, the plain language of the statute indicates otherwise. S.C. Code § 57-9-10 provides:

> 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. The Department of

> Transportation shall promulgate regulations which once effective will establish the minimum mandatory size, language, and specific positioning of signs pursuant to this section. (Emphasis added).

The trial court determined that only the persons along the closed portion of the road could be affected by the road closure, but the Supreme Court in Mosteller v. County of Lexington, 336 S.C. 360, 520 S.E.2d 620 (S.C., 1999), citing, South Carolina State Highway Dep't v. Allison, 246 S.C. 389 (1965) has held that requiring an abutting land owner to drive an additional seven tenths of a mile could result in a constitutional taking. The case further defined "abut", to mean "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, supra , at 365. Abut is clearly more broad a term than as viewed by the trial court, and would clearly include those owners adjacent to the actual closed portion of the road, such as the proposed interveners.

The testimony at trial of both Carolyn Barrett and of Dr. Vickie Long indicates that owners along the unclosed portions of the road would have further to drive to get to main highways as would emergency responders. The testimony indicated that their drives would be as much as 2.5 miles further in distance, as opposed to the seven tenths of a mile in the Allison case, supra. (Tr. Pp. 55- 57, 65, 66, 72-75)(R. pp. 150-152, 160, 161, 167,-175) . Therefore, the abutting property along the unclosed portions of the subject roads would be affected, requiring written notice to those owners. The failure to provide written notice in accordance with the statute should lead to the granting of the motion to intervene and a new trial with all interested or affected parties having proper notice of the hearing and opportunity to be heard.

In the case of Turner v. Rogers, 564 U.S. 431 (2011) the United State Supreme Court set forth some specific safeguards the Constitution's Due Process Clause requires in order to make a

civil proceeding fundamentally fair, in addition to notice and opportunity to be heard: those factors include (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s].

In the case at bar, there is an interest in not having to drive further and liberty to travel as recognized as long ago as 1965 in South Carolina State Highway Dep't v. Allison, supra. Merely notifying **all** of the abutting landowners in writing is not too great a burden given the comparative risk of deprivation.

The comparative risk of deprivation of those rights becomes greater in this particular case, since the newspaper advertisement referenced a plat that indicated the roads would be relocated did not inform the public at large, nor the abutting landowners of the plan to close the road without relocating it. The only countervailing interest against written notice to all abutting landowners is that anyone wishing to close part of a long road would have to do more title searches, and notify more people in writing. This burden is far outweighed by the liberty interest in freedom to travel an old road dedicated to the public for decades, with shorter driving distances for both the owners and for emergency responders.

At trial, the lower court heard testimony that the plan to relocate the road had changed and that the original notice to the public was that the road would be relocated.(R. pp. 153, 153, 185, 186)(R. pp. 40-40a). The trial court should have stopped the trial and required plaintiffs to republish their notice, rather than move forward with differing relief than what was noticed in the plat to the world at large; therefore, this court should remand this matter for a new trial and

require written notice to all abutting land-owners of the roads and not just the tiny portion abutting the actual closed portion.

THE COURT ERRED IN DETERMINING THAT PROPOSED INTERVENERS WERE UNTIMELY IN FILING THEIR MOTION TO INTERVENE, ESPECIALLY IN LIGHT OF THE PROBLEMS WITH NOTICE BOTH OF THE ACTION FILED AND NOTICE OF THE HEARING ON THE MERITS

"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."[1] "Intervention should be liberally granted, particularly where judicial economy will be promoted by the declaration of rights of all parties who may be affected."[2] "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)." "Each case will be examined in the context of its unique facts and circumstances."" [3]

In the instant case, Save Windsor, whose property abuts Old Bell Road or Oak Ridge Club Road and who used said county roads for decades on a daily basis , filed a Motion to intervene in the lower Court's action (R. pp. 1-4) . Save Windsor, a group of greater than 50 Aiken County citizens and tax payers sought to prevent the closing of said roads based on their need to use the road; its nature and character as a public thoroughfare for a period greater than 50 years; and as affected property owners abutting the roads. The status of the county road was established by

[1] See Black's Law Dictionary 826 (7th ed.1999).
[2] Berkeley Electric Coop. Inc. v Town of Mt. Pleasant, 302 S.C. 186 (1990), and Rules 19 and 24 SCRCP
[3] In re Horry County State Bank, 361 S.C. 503, 604 S.E.2d 723 (S.C. App., 2004), quoting Berkley Electric

virtue of the presentation of the Official Road Atlas of Aiken County, it's designation as Aiken County Roads and Aiken County Plats evidencing the same.[4] (R. pp. 255-257)

As taxpayers, citizens of Aiken County, and property owners along the roads, Save Windsor sought to intervene as a matter of right. Additionally, Save Windsor had a legitimate interest in the closing of the roads as additional miles have would have to be traveled to reach their homes and emergency vehicles would be forced to take longer routes to reach homes in the area should the roads become closed. Save Windsor considers it their right as citizens and tax payers to have a say regarding the roads their taxes fund and which benefit the public good (R. pp. 67) .

In denying Save Windsor's motion to intervene, the Court relied on the factors set forth by the 9th Circuit Court of Appeals and as adopted by the South Carolina Supreme Court, specifically; "(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." [5] (R. pp. 24). In determining the timeliness of a motion to intervene the Court is to consider; (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.[6]

[4] See Exhibit Transcript of hearing, August 12, 2016 Exhibit 6 designating Oak Ridge Club Rd. as County Road C-800 and Old Bell Rd as C-7741. See also Transcript of Hearing, August 12, 2016 pg. 8, 9 paragraph 18, lines 1-25. See also Complaint filed March 10, 2016, Exhibit "A"

[5] Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir.1983)

[6] Ex Parte Reichlyn, 310 S.C. 495, 427, 500 (1993)

Save Windsor's Motion was Not Untimely Under the Specific Circumstances of this Case

The lower Court specifically denied intervention based on the timeliness of Save Windsor's motion.[7] (R. pp. 5-7). In making it's decision the Court failed to adequately consider the failure of notice on the part of the Farms. It is uncontested that the Farms put up signs stating that the roads would be closed and the phone number for information upon said sign was the Farms' attorneys. Nor is contested that when inquiries were made to the Farm's attorney regarding a hearing on the matter, the response from said attorney was self serving and indicative of encouraging non-participation by Save Windsor.[8] (R. pp. 247-257).

In terms of timeliness of intervention, the notice issues by the Farms impeded a more timely intervention. Had the newspaper notice not indicated the road would be relocated, numerous citizens of Save Windsor may well have obtained counsel for this case at an earlier date. Had they been provided written notice of the action prior to the filing, or if counsel for the Farms informed the parties who called that their failure to appear could result in the closing of the road, the Save Windsor folks might have attended the hearing and testified and/or sought legal counsel. "[9] (R. pp. 42). In the instant action, Save Windsor were making inquiries regarding what appeared to be a public notice.

In contacting the telephone number that appeared on the sign, the Save Windsor people could not have expected to know the nature of the relationship between said attorney and the Farms whose sole desire in the lower Court action was to close the roads notwithstanding their

[7] Order filed September 15, 2016 (R. pp. 23)
[8] Transcript exhibits
[9] "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. South Carolina Rules of Professional Conduct, Rule 4.3, see also the comments to Rule 4.3.

earlier notice of relocation. Therefore, the proper reply from the Farms' attorney's office should have been similar to what is contained in a summons; that the Farms were in opposition to the people in Save Windsor's goals; that the relief in the complaint could be rendered if they did not answer or otherwise appear; that they should therefore seek independent counsel and it is advisable to attend any and all hearings. Instead the attorney's staff simply told interested parties "you don't need to attend the hearing."[10] (R. pp. 21, L13). Given that the public at large was on notice that the roads in question were to be relocated based on the plats appearing in the public record declaring the same,[11] (R. pp. 31) interested parties were potentially dissuaded from participating in litigation by the Farms attorney.

Many in Save Windsor knew of the litigation only because of the sign posted by the Farms, yet were informed not to participate by the Farms' counsel (R. pp. 70-75) . The only information regarding the closing of the road were recorded plats indicating that the road would be relocated[12] (R. pp. 40-40a). Indeed, it was not until the merits hearing May 31, 2016 that the Farms declared that they desired the road closed and would not relocate said road.[13] (R. pp. 96). Therefore, even though the people making up Save Windsor knew of the litigation, they were misinformed of the Farms' intent due to the public record reflecting the road would be relocated, and still dedicated to public use after relocation, which should excuse the delay in the filing of the Motion to Intervene. Given the irregularities of notice, the responses to interested parties that called the number on the sign, and the fact that the notice stated there would be a relocation on the plat, the trial Court erred in deciding that Save Windsor's motion was untimely.

---

[10] Order filed September 15, 2016 (R. pp. 19)
[11] Complaint filed March 10, 2016, Exhibit "A"
[12] Refer to Plat
[13] Transcript of hearing May 31, 2016 (R. pp. 96)

Save Windsor have an Interest in the Subject Matter of the Litigation

Save Windsor are citizens and taxpayers who have relied on use of the subject roads for decades. Appellants/Respondents also have a vested interest in assuring that emergency vehicles arrive at their properties as quickly and efficiently as possible. Indeed the trial Court acknowledged as much in stating ".. interested parties will be allowed to offer some testimony"[14].

Save Windsor Interests are not Protected without Intervention

Save Windsor, having an acknowledged interest in the roads which are the subject matter to the litigation are prevented from protecting those interests if they are not permitted to intervene. Save Windsor as well as the Respondents to this action are either neutral in position or have a financial interest in closing the roads.[15] (R. pp. 9). Save Windsor, as individuals who utilize the roads and representing a class of citizens who have historically utilized the roads, have not had their interests represented in this action. "When an applicant for intervention and an existing party have the same interests or ultimate objective in the litigation a presumption arises that its interests are adequately represented and the application should be denied unless a showing of inadequate representation is made by demonstration of adversity of interest, collusion, or nonfeasance."[16] If the instant case, Save Windsor cannot rely on any of the defendants to assert their interests, since Ms. Gonshorowski reached an undisclosed settlement with the Farms, and the other two defendants rolled over and played dead.[17] (R. pp. 288) (R. pp.

[14] (R. Pp. 105)
[15] Order filed June 27, 2016
[16] South Carolina Tax Com'n v. Union County Treasurer, 295 S.C. 257 (S.C. App., 1988)
[17] Letter, Petition, Motion to intervene, and Tr. Pp. 8,9) (R. pp. 288) (R. pp. 289-292)(R. pp. 60)

289-292)(R. pp. 60) Respondents have adequately demonstrated that their interests are not protected without intervention.

No Other Party to the Action Represents Save Windsor Interests

"The burden of inadequacy of representation is on the applicant for intervention as a matter of right; this burden may be satisfied by a showing that the representation of the applicants interest "may be" inadequate."[18] This burden is minimal and the applicant need only show that the representation of his interests "may be" inadequate. [19] in determining whether the existing representation is adequate: (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent. On reviewing the trial judge's decision as to whether adequacy of representation exists, we must appraise all of the circumstances of a particular case as to whether interests sufficiently overlap so as to deny intervention.[20] Save Windsor are the only class of Parties that oppose The Farms desire to close the subject roads. "The movants interest will not be protected by the named Parties in this Action."[21] (R. pp. 28, L26) "... [I]t is clear that the interest of the movants was not protected by any of the named Parties."[22] (R. pp. 29,L2-3).

In the instant action, Save Windsor's interests are adverse to all of the named parties; no other party is willing or able to make arguments opposing the road closure and are unarguably,

[18] In re Horry County State Bank, 361 S.C. 503, 604 S.E.2d 723 (S.C. App., 2004)
[19] Berkeley Electric Coop. Inc. v Town of Mt. Pleasant, 302 S.C. 186, 191 (1990)
[20] Berkeley Electric Coop. Inc. v Town of Mt. Pleasant, 302 S.C. 186, 191 (1990)
[21] Order filed September 15, 2016, Pg. 6. (R. pp. 28)
[22] Id at pg. 7 (R. pp. 29,L2-3)

the only persons who have the desire, and loss to make arguments opposing the closing of said roads.

CONCLUSION

The Farms wish to close the road, irrespective of the rights of the citizens, taxpayers and residents of Aiken County who have resided on the roads for decades longer than the Farms have existed. The Save Windsor people have driven on these roads in some cases all their lives, and were not given adequate notice that the roads would be closed, as opposed to relocated. The Farms should not be rewarded for actions that tainted the course of litigation and the action below. The Farms did not give adequate notice and the folks of Save Windsor should not suffer because of deficient notice.

Respectfully submitted on this the 14th day of June, 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

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellants/Respondents' Final Briefs comply with Rule 211(b), SCACR.

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