THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2020-001166
Case No. 2019-CP-22-01116

Ex Parte: DeBordieu Colony Community Association, Inc., Appellant,

In Re: The Belle W. Baruch Foundation, Plaintiff,

v.

The State of South Carolina, Defendant,

Of which The Belle W. Baruch Foundation is the Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises from the denial of DeBordieu Colony Community Association, Inc.'s Motion to Intervene in an action regarding the Belle W. Baruch Foundation's claim to establish fee simple title to 8,000 acres of tidelands that the DeBordieu community has used and invested in to secure that use for over forty years.

On November 14, 2019, the Belle W. Baruch Foundation ("Respondent") filed suit against the State of South Carolina ("the State") seeking a declaration that it has fee simple title to these tidelands—which span nearly twelve miles—that surround an area known as Hobcaw Barony in Georgetown County. Respondent contends that its title to the tidelands at issue (the "Property") can be traced back to six grants from King George II and King George III of England and six grants from the State of South Carolina. (Compl. ¶ 1.) On January 24, 2020, the State answered

and asserted its claim to title to the Property based on its presumptive ownership of all tidelands within the State's borders and counterclaimed for dedication and prescriptive easement. (Answer ¶¶ 17-24.)

DeBordieu Colony Community Association, Inc. ("DeBordieu" or "Appellant") is a neighboring landowner to the Property and an association of residents whose property borders Hobcaw Barony to the north. (Mot. Intervene 2.) DeBordieu moved to intervene on February 12, 2020 to dispute Respondent's claim to title and to assert its counterclaim for a prescriptive easement. (*Id.* at 3.) The State consented to DeBordieu's motion. (*Id.* at 1.)

On March 12, 2020, the trial court heard argument on DeBordieu's Motion to Intervene and denied the motion on April 1, 2020. (*See* Transcript of Hearing, dated Mar. 12, 2020; Order Den. Mot. Intervene, April 1, 2020.) DeBordieu moved the trial court to reconsider, or in the alternative, for relief under Rule 60(b) on April 13, 2020. (Mot. Recons., April 13, 2020.) On August 13, 2020, the trial court denied DeBordieu's motion. (Order Den. Mot. Recons., Aug. 13, 2020.) On August 21, 2020, DeBordieu served its notice of appeal of both of the trial court's orders. DeBordieu seeks this Court's reversal and remand to the trial court with instruction that DeBordieu be permitted to intervene as a party to this action.

FACTS

DeBordieu's residential community consists of approximately 2,400 property owners, ranging from young families to retirees.[1] (Mot. Intervene 7; *see also* Mot. Intervene, Ex. A, Affidavit of Blanche Brown, ¶ 9.) The DeBordieu development itself is situated immediately to the northeast of Hobcaw Barony, as shown in the encircled area on the below map. The Property

[1] The community's property owners govern their external and internal affairs through the "DeBordieu Colony Community Association, Inc." (Mot. Intervene 2, 7.)

at issue encompasses portions of marsh and other tributaries which ultimately lead to "the North Inlet." (Brown Aff. at ¶ 3.) The access to and use of the Property has been central to the community's way of life for generations. (*Id.* at ¶ 10, 24.) Since its founding nearly forty years ago, the DeBordieu community has continuously used and accessed the Property for many recreational purposes: boating; swimming; fishing; fishing while wading; kayaking; paddle-boarding; and harvesting oysters and other shellfish on foot at low tide. (*See id.*; *see also* Mot. Intervene 3.) Accordingly, DeBordieu has made significant investments to preserve and secure such access and generates income from its members' use of facilities related to that purpose.

It is important to note exactly what Respondent claims is its own in this litigation. The Property as described in the Complaint is "marsh land that lies between the mean high water mark and the low water mark." (Compl. ¶ 2.) The State is the current, presumed titleholder of these tidelands under the public trust doctrine, which provides that lands below the high-water mark are presumptively owned by the State and held in trust for the benefit of the public. *Hoyler v. State*, 28 S.C. 279, 291, 833 S.E.2d 845, 851 (Ct. App. 2019). Respondent now claims its ownership

interest in these tidelands, "an interest that would allow [it] to exclude the public," including members of neighboring DeBordieu. *Id.* at 292, 833 S.E.2d at 852.

DeBordieu does not assert that it has title to these tidelands; however, DeBordieu does assert that it has rights to access and use the property, that it has done so historically, and that it has acted in reliance on those rights of unfettered access. (Mot. Intervene 3, 5-9.) DeBordieu's reliance on its ability to use and access the Property has been demonstrated by significant financial investments since the founding of DeBordieu. (Brown Aff. ¶ 14-15.) In addition to purchasing homes in the community with the expectation that they would be able to use the Property, the DeBordieu community has invested millions of dollars and significant labor into guaranteeing their access to the Property. (Mot. Intervene, Ex. B, Affidavit of Geoffrey Groat, at ¶¶ 7, 9; Brown Aff. ¶¶ 13-14.) DeBordieu plainly has an interest in this action.

In the early 1970s, DeBordieu's developers dredged and built canals within the community, enabling access to these 8,000 acres of tidelands. (Mot. Intervene 7; *see also* Ex. E to Mot. Intervene.) Since the 1990s, DeBordieu has completed three additional dredging projects in order to maintain the canals and ensure access to the Property and to North Inlet. (Brown Aff. ¶ 13.) These projects involved obtaining critical area permits—which Respondent did not challenge. (Mot. Intervene, Ex. E.) The associated costs for the completed projects exceeded $3,000,000 and were each funded by DeBordieu's property owners through HOA assessments and fees. (Brown Aff. ¶ 14-15.)

DeBordieu's financial investment in the Property extends beyond building and paying for community canals. The most highly valued properties within the community are the 129 lots with boat access. (Groat Aff. ¶ 7.) Individuals have paid a premium to have docks which can provide access to the Property via boat. (*See id.*) The community has approximately 120 private docks,

two community docks, and a community boat ramp—all used by DeBordieu members to enter and enjoy the Property. (Brown Aff. ¶ 17, 19.) The financial investments by DeBordieu's members in private docks alone is well over $1 million since 1971. (*Id.* at ¶ 18.) DeBordieu also generates revenue from annual boat passes and storage fees. There are presently 1,007 boats registered in the community and 163 storage spaces, which produces approximately $31,000 annually. (*Id.* at ¶¶ 21-22.) The registration is necessary for individuals to use DeBordieu's boat ramp, which ultimately offers access to the Property.

DeBordieu has demonstrated property interests and financial interests in the Property which supported its Motion to Intervene. DeBordieu flatly rejects Respondent's claim of ownership and seeks to challenge fully Respondent's allegations in the underlying suit. (*See* Mot. Intervene, Ex. C, Answer and Counterclaim of DeBordieu Colony Community Association, Inc.) The stakes are high: DeBordieu stands to lose its existing right to access and use the Property by a declaration of fee simple title in Respondent. Respondent would have the Court believe otherwise, claiming that "a determination of title [in favor of Respondent] doesn't do anything to DeBordieu. They still have the rights; it doesn't exclude them." (Hr'g Tr. 12:21-24; *see also* Mot. Intervene, Ex. D.)

Respondent's efforts to assuage concerns of the trial court or Appellant not only are misstatements of basic legal principles, they also are belied by Respondent's own actions. In July of 2018, DeBordieu owner Dale Lacy was issued an Arrest Report and Trial Summons for trespassing on the Property. (Mot. Recons., Ex. 1, Certification of Dale Lacy, ¶¶ 11-15.) Mr. Lacy is not alone; other members recently have been warned of their alleged "trespassing" on the Property. (*Id.* at ¶ 19.) Respondent recently has erected "No Trespassing/Private Property" signs

on the Property. (*Id.* at ¶ 8.) DeBordieu can only conclude that Respondent seeks title to continue its efforts to exclude its members from the Property.

At issue in this appeal is whether Respondent can properly proceed with litigating its alleged ownership of the Property while DeBordieu is shut out of the courthouse without an opportunity to be heard to protects its own interests.

STANDARD OF REVIEW

A trial court does not have discretion to commit legal error or to make factual conclusions without evidentiary support. *See Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009). In reversing the trial court's denial of a motion to intervene, the supreme court provided:

> In analyzing the facts of this particular case, we recognize that intervention controversies arise in a myriad of contexts. We interpret the rules to permit liberal intervention particularly whereas here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected. Accordingly, 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.

Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). Accordingly, legal error in denials of motions to intervene must be reversed on appeal.

ARGUMENT

I. THE TRIAL COURT MISAPPREHENDED BOTH THE IMPORT OF THE UNDERLYING CASE AND THE NATURE OF DEBORDIEU'S INTERESTS WHICH PREORDAINED LEGAL ERROR IN ITS RIPENESS INQUIRY.

The trial court misunderstood the implications of the underlying case and the nature of DeBordieu's interests in the Property at issue, resulting in a domino effect of legal errors. The trial court misunderstood the impact that a declaration of title in one has on others who claim rights to use real property. The trial court erroneously equated tidelands with navigable waters and thus never appreciated DeBordieu's interests in the action. Consequently, the trial court incorrectly

held that DeBordieu's claim was not ripe. DeBordieu's interests in participating are ripe, now, and it should have been permitted to intervene as a party to this action. The trial court's holdings were errors of law that warrant reversal.

A. Determination of fee simple title threatens DeBordieu's access to and use of the Property.

This case is not an abstract effort to adjust the history books and property records, as Respondent's false assurances suggest. (*See* Hr'g Tr. 14:2-10.) A declaration that Respondent, a private entity, owns roughly 8,000 acres of heretofore public tidelands will have immediate, real-world impact, and on no one more so than the neighboring landowners who use those tidelands. The presumption that such a declaration in Respondent's favor would mean nothing and change nothing is nearly as short-sighted as it is fundamentally incorrect. (*See id*.)

The trial court refused to acknowledge the basic principles of property law as well as the implications of what Respondent asks the trial court to do. For example, the trial court falsely concluded:

- "There is no allegation in the Complaint that requests a determination that threatens [DeBordieu's] members' recreational use of the tidelands in question or the navigable waters of North Inlet." (Order Den. Mot. Intervene 4.)

- "But, here a determination that [Respondent] has legal title to the tidelands will not prevent [DeBordieu]'s members from boating or other similar recreational uses in those tidelands." (*Id.* at 8.)

It is axiomatic that one who holds fee simple absolute title has the power to devise, to alienate, and, significantly, to exclude others from entering or using the property. *See Hoyler*, 428 S.C. at 292, 833 S.E.2d at 852 ("It is through this lens that we examine the claim of a private individual to an ownership interest in tidelands, an interest that would allow him to exclude the public."); *see also Morris v. Townsend*, 253 S.C. 628, 634, 172 S.E.2d 819, 822 (1970) (concluding that a fee simple owner of land clearly has "the right to exclude plaintiffs and all other

persons claiming by, under or through them, from any use whatsoever of the [owner]'s lands"); *White's Mill Colony Inc. v. Williams*, 363 S.C. 117, 135, 609 S.E.2d 811, 820 (Ct. App. 2005) (holding that a fee simple owner has the exclusive right to use its property and may exclude all others from access).

To be clear: the consequence of a declaration of fee simple title in Respondent determines and denies the rights DeBordieu asserts. DeBordieu intends to disprove that Respondent has fee simple title. If Respondent is declared the fee simple owner, DeBordieu loses its current right to access and use the Property—without being afforded the ability to defend against Respondent's grab for these tidelands. The trial court failed to grasp the gravity of what is at stake and erred in this conclusion. The result of the trial court's legal error was to facilitate the threatened deprivation of DeBordieu's legal rights while denying DeBordieu an opportunity to be heard as a party to this action.

B. <u>The trial court failed to understand the Property at issue.</u>

The Property is tidal marsh. (Compl. ¶ 2.) In layman's terms, the Property is wetlands; the water level depends on lunar tides.[2] Streams and canals may cut through the Property, but the Property is not necessarily a navigable waterway; certainly not all of it is.[3] The significance of this distinction is that, pursuant to the South Carolina Constitution, "all navigable waters shall

[2] According to S.C. Code Ann. Sec. 48-39-10 (G), "Tidelands" means "all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved. Coastal wetlands include marshes, mudflats, and shallows and means those areas periodically inundated by saline waters whether or not the saline waters reach the area naturally or through artificial water courses and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction."

[3] A navigable waterway is a "stream inherently and by its nature [that] has the capacity for valuable floatage, irrespective of the fact of actual use or the extent of such use." *See Hughes v. Nelson*, 303 S.C. 102, 105, 399 S.E.2d 24, 25 (Ct. App. 1990). Examples would include the North Inlet, or other rivers and creeks.

forever remain public highways free to the citizens of the State[.]" Article XIV, Section 4 of the Constitution of South Carolina. The point is simple: whatever portion of the Property is navigable is not subject to Respondent's claim—navigable waters are constitutionally excepted from Respondent's title grab. However, tidelands are different. Portions of the Property that are tidelands can be vested in private parties. *See, e.g., Lowcountry Open Land Tr.* v. *State*, 347 S.C. 96, 111, 552 S.E.2d 778, 786 (Ct. App. 2001) (holding the Trust, a private party, owned the tidelands in fee simple). And that is what Respondent is trying to do here—claim ownership of the tidelands for itself.

The problem is that the trial court conflated tidelands and navigable waters, yielding legal errors that led the trial court to improperly deny DeBordieu's Motion to Intervene. Specifically, the trial court concluded:

> [I]f there is a judicial determination that [Respondent] owns the tidelands, the members of [DeBordieu] and the public still have the right to boat and navigate in the tidelands in question and North Inlet generally. According to their own filings, the members of [DeBordieu] will not suffer an injury if they have free navigable access over North Inlet and its surrounding . . . tidelands. [DeBordieu] and its owners will still have the benefit of all their described improvements to facilitate boating in North Inlet, and their docks and property values will not be diminished based on loss of navigable access to North Inlet.

(Order Den. Mot. Intervene 5.)

This is not only incorrect but also misses the point entirely. DeBordieu's interest in the Property is separate from its right to traverse navigable waters. (Hr'g Tr. 3:6-25.) The trial court recognizes DeBordieu's asserted interest in *rights to access and use the marshlands* (Order Den. Mot. Intervene 3), but then considers only the more limited interests of "the right to boat and navigate" and "have free navigable access" through the North Inlet (a navigable waterway). (*Id.* at 4, 5, 8, 9.) DeBordieu's interests will be harmed even if its members can navigate through to the North Inlet.

C. The trial court erred in conducting a ripeness analysis and in its conclusion; DeBordieu's interests in the Property present a ripe dispute.

The trial court preempted the analysis dictated by Rule 24, SCRCP with an erroneous ripeness inquiry. The underlying action involves Respondent's claim for title to a vast expanse of adjacent tidelands which DeBordieu seeks to defend against. What could be more ripe than defending the very claim that Respondent brought? Moreover, DeBordieu's counterclaim for a prescriptive easement also is ripe; the State's similar claim certainly is and has not been challenged on a manufactured ripeness argument. These are the claims at issue in the case, and they are justiciable. Any question as to DeBordieu's interests in participating in the resolution of these claims must be governed by Rule 24.

Even within the analysis it conducted, the trial court erred in holding that DeBordieu's claim was not ripe. (Order Den. Mot. Intervene 4.) As described above, a declaration of fee simple title to 8,000 acres adjacent to DeBordieu and used by it and its members would have an immediate, actual impact. Instead, the trial court dismissed DeBordieu's concern as one of "anticipated exclusion" of persons from the Property, concluding, "[t]he anticipated exclusion of recreational boaters and fishermen from North Inlet and the other tidelands is an event that has not occurred and may never occur. At this stage, the anticipated threat is contingent and hypothetical, and is not yet ripe." (*Id*.) The trial court added that there was "no showing in this case that [Respondent] will take action against boaters who use these tidelands for recreational purposes." (*Id.*) Even conceding this improper diversion of this analysis, the trial court still got it wrong.

There is nothing contingent or hypothetical about this action. "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *S. Bank & Tr. Co. v. Harrison Sales Co.*, 285 S.C. 50, 51, 328 S.E.2d 66, 67 (1985). Aside from the obvious fact that

Respondent's efforts would make little sense if it truly intended nothing to change, DeBordieu presented evidence to satisfy the concerns raised by the trial court. (S*ee* Lacy Cert., ¶¶ 11-15.) Specifically, DeBordieu showed that Respondent has already attempted to exclude DeBordieu's members from the Property and therefore likely will continue to do so should it be declared the true, fee simple titleholder. In support of its Rule 60(b) motion, DeBordieu provided the sworn certification of DeBordieu member Dale Lacy, wherein he detailed his arrest for trespassing while wading in the Property. (*Id.* at ¶¶ 11-15.) The trial court ignored this evidence and instead concluded the threat of exclusion was "anticipated" and "hypothetical." (Order Den. Mot. Intervene 4.)

In an analogous case concerning parties' interests in marshlands, *Hoyler v. State*, this Court found that the plaintiff's claim of ownership of marshland presented risks to interests of adjacent owners which were "concrete and particularized" and "actual or imminent" and which "resulted from" the filing of the action. 428 S.C. 279, 306, 833 S.E.2d 845, 859 (Ct. App. 2019). The adjacent owners would have lost their ability to access the Beaufort River upon a ruling that the plaintiff held fee simple title to the disputed tidelands. *Id.* Just as in *Hoyler*, DeBordieu's present rights to access and use the Property will be lost depending on the outcome of Respondent's declaratory judgment action. The trial court's Orders should be reversed: the harm to DeBordieu is actual and imminent such that this matter is ripe.

The trial court's failure to understand both the import of the underlying action and the nature of the Property at issue yielded the wrong result on DeBordieu's Motion to Intervene. These errors of law necessitate the reversal of the trial court's Orders which deprived DeBordieu its right to be a party to this action.

II. GRANTING DEBORDIEU'S MOTION TO INTERVENE WAS MANDATED BY RULE 24(A)(2) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

The trial court's determination that DeBordieu did not demonstrate the requirements for intervention under Rule 24(a)(2), SCRCP was legal error. This Court should reverse and instruct the trial court that DeBordieu shall be entitled to intervene.

Rule 24 of the South Carolina Rules of Civil Procedure sets forth the rule on intervention, the mechanism by which a third person becomes a party to an action originally between other persons. This is an important tool that is fundamental to the purpose of our civil justice system—it allows non-parties whose interests will be affected by a lawsuit to become parties so that they will have an opportunity to have their legal positions heard in the process before a final resolution is reached. *See* 67A C.J.S. Parties § 87 (explaining that Rule 24 is designed to protect the interests of those who may be affected by a judgment in an action and to prevent delay and multiplicity of actions). The goals underpinning Rule 24 are so vital that our Supreme Court has directed courts to liberally construe the rules of intervention where judicial economy will be promoted by declaring the rights of all affected parties. *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990).

A. DeBordieu has a right to intervene under Rule 24(a)(2), SCRCP.

In South Carolina, Rule 24(a)(2) mandates intervention when an intervenor demonstrates the following criteria:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: . . . (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.

Rule 24(a), SCRCP. This Rule—like each of the South Carolina Rules of Civil Procedure—cannot be rewritten or disregarded at the whim of a trial court. *See* Rule 81, SCRCP

(The South Carolina Rules of Civil Procedure are to apply equally "to every trial court within this state, within the limits of the jurisdiction and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable."). Rule 24(a)(2) and the purposes for it dictate that the trial court committed legal error in denying DeBordieu's Motion to Intervene.

1. It was legal error for the trial court to require DeBordieu to claim an interest in title to the Property to warrant intervention.

Rule 24(a)(2) plainly states that a proposed intervenor's interest in the suit is sufficient when it is "an interest relating to the property . . . which is the subject of the action." Without question, DeBordieu claims interests relating to the property which is the subject of the underlying action. The trial court, however, determined that intervention by DeBordieu was improper because DeBordieu did not "claim an interest relating to *the title to* the tidelands in questions [sic]." (Order Den. Mot. Intervene 6.) (Emphasis added.) An interest relating to title is not required under Rule 24(a)(2). The trial court inserted this extra requirement found nowhere in the governing rule and then denied DeBordieu's intervention motion for its failure to satisfy this new, fabricated burden. (*See id.* at 6-7 (emphasis in original)) ("[DeBordieu] does not allege that it holds title to any of the tidelands surrounding Hobcaw Barony"; "the allegation of a prescription [sic] easement does not assert an interest in *title*"). The trial court's creation of a new test under Rule 24(a)(2) was wholly improper. Trial courts do not craft our procedural rules—much less do so on a case-by-case basis. *See* Rule 81, SCRCP.

While DeBordieu does not allege title for itself, DeBordieu's interests do directly relate to title to the Property. Most simply, DeBordieu seeks to prove that Respondent *does not have title* to the tidelands. If DeBordieu successfully defends against Respondent's grab for fee simple title, DeBordieu will have secured the rights it asserts in defense of the action. However, if Respondent

has title, DeBordieu's members will be trespassing on private property any time they access or use the Property. If they did continue the use, such trespassers could not defend a trespass charge on the basis that Respondent was not the true owner. Moreover, the value of DeBordieu's investments to date may well be diminished and the income streams it identified may well be reduced.

In *Hoyler*, this Court affirmed the decision to permit neighboring property owners to be parties in an action between Hoyler and the State regarding ownership of marshland. 428 S.C. at 303-04, 833 S.E.2d at 858. The trial court permitted the intervention of Merry Land, a property owner whose efforts to build a marina would have been frustrated by the declaration of title. *Id.* at 288, 833 S.E.2d at 850. The trial court also joined as defendants additional owners of property adjacent to the disputed tidelands *sua sponte*. *Id.* Hoyler argued the master erred by allowing Merry Land and the other adjacent property owners to intervene because "they did not claim an interest in tidelands, their boundary lines would not change as a result of the action, and therefore, they had no interest in the outcome." *Id.* at 301, 833 S.E.2d at 857.

This Court disagreed and explained that Hoyler's complaint "called into question not only the State's competing claim of ownership but also the rights of adjacent property owners to use the marsh to access the Beaufort River[.]" *Id.* at 303, 833 S.E.2d at 858. If the master had granted Hoyler's request for a fee simple title declaration, the rights of the joined parties to access the river would have been extinguished. *Id.* Therefore, the court held the master properly joined the adjacent property owners as defendants. *See id.* Notably, the joined parties had interests in the disputed marshlands by their status as upland, neighboring property owners; they did not have an interest "relating to the title" to the tidelands. *See id.*

Here, the trial court misapplied *Hoyler*, stating, "[u]nlike the plaintiff in *Hoyler*, [Respondent] has not alleged in its Complaint that it has the right to terminate the recreational use

of the proposed intervener or that it intends to do so." (Order Den. Mot. Intervene 8.) Respondent and the plaintiff in *Hoyler* both sought to be declared fee simple title holders. Hoyler, however, merely added the elementary legal point in his complaint that such status would include the right to exclude others from building on his property. Respondent did not add in its Complaint the basic explanation of the law that being fee simple title holder of property would allow it to exclude others from the Property. The result is the same, nonetheless. A determination of fee simple title in Respondent would give Respondent the right to refuse DeBordieu's members' access to and use of the Property. *Hoyler*, 428 S.C. at 292, 833 S.E.2d at 852 (explaining that the claim of a private individual to an ownership interest in tidelands would allow him to exclude the public).

Like the neighboring landowners in *Hoyler*, DeBordieu has demonstrated interests in the Property that are in jeopardy should Respondent be declared the fee simple titleholder. The trial court ignored *Hoyler* and the language of Rule 24(a)(2), SCRCP in favor of its own, newly-created test. This was an error of law that must be reversed.

2. The disposition of the main action will impact DeBordieu's ability to protect its interests in the Property.

The trial court erred in determining that denying DeBordieu's intervention would not impair or impede DeBordieu's ability to protect its interests. (Order Den. Mot. Intervene 6, 8-9.) The trial court focused only on DeBordieu's assertion of a prescriptive easement and ignored its primary aim of defending against Respondent's claim in the first instance. (*Id.* at 9) ("[T]he determination of legal title will not impair DCCA's ability to assert its so-called prescriptive easement."). The main action presents DeBordieu with its only opportunity to challenge Respondent's claim of fee simple title.

The trial court also erred when considering the claim for prescriptive easement. It determined that "there is no concern or consideration about collateral attack similar to that in

Berkeley Electric Co-op." (*Id.*) This conclusion is simply incorrect. In that case, Berkeley Electric brought an action against the Town of Mount Pleasant seeking a declaration that it had the exclusive right to provide services to the property in question pursuant to a franchise agreement with the Town. *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 188, 394 S.E.2d 712, 713 (1990). SCE&G moved to intervene on the basis that it had an interest in the action in that it had the exclusive, legally authorized right to serve the same property. *Id.* at 190, 394 S.E.2d at 715.

The *Berkeley Electric* Court found that SCE&G's ability to protect its asserted interests would be impaired or impeded if not a party to the action. *Id.* at 191, 394 S.E.2d at 715. A declaration giving Berkeley Electric exclusive rights to an area would impair SCE&G's ability to protect investments it had already made in reliance on its belief that it was legally entitled to serve customers in that area. *Id.* The supreme court further explained that it would have been "extremely difficult for SCE&G to collaterally attack any ruling adverse to them if not made a party to the original action." *Id.*

The concern identified by the *Berkeley Electric* Court is equally present here: it would be extremely difficult for DeBordieu to "collaterally attack" a determination that Respondent owns the Property in fee simple after this determination has been made. *Id.* In attempting to distinguish *Berkeley Electric* from the facts in the instant action, the trial court only further revealed its failure to appreciate what is being decided:

> a ruling in this case will not prevent [DeBordieu] from doing anything at all; its members will still be able to boat and exercise their constitutional right to navigate over the waters of these tidelands. A ruling as to legal title to the tidelands does not prevent or hinder [DeBordieu] from doing anything it can do now or later.

(Order Den. Mot. Intervene 9.) DeBordieu's right to access and use the Property is separate and distinct from its right to access and use a navigable waterway, and a ruling as to Respondent's legal title to the Property would impact DeBordieu's interests.

Next, the State has counterclaimed for a general easement by prescription. Litigation of those issues in this case without DeBordieu presenting its own claim almost assuredly will—and certainly "may," as Rule 24(a)(2) requires—impair or impede the claim DeBordieu would be forced to make in a subsequent action. Boundaries for discovery will have been drawn and testimony elicited without DeBordieu's involvement, and Respondent would have the opportunity to assert issue preclusion on certain factual and legal issues. Even considering only the counterclaim for prescriptive easement, DeBordieu satisfies Rule 24(a)(2)'s standard. *See Berkeley Elec.*, 302 S.C. at 190, 394 S.E.2d at 715 ("To meet [the impair or impede] requirement, a party need not prove that it would be bound in a res judicata sense by the judgment, only that it would have difficulty adequately protecting its interests if not allowed to intervene."). DeBordieu's ability to protect its interests has been impaired by the trial court's denial of its Motion to Intervene, and it will continue to be impaired unless the trial court's Orders are reversed.

3. DeBordieu's interests are not adequately represented by the State's defense of the main action.

DeBordieu's interests are not "identical" to the interests of the State. (Order Den. Mot. Intervene at 10.) This conclusion was legal error. In reaching this determination, the trial court again applied an incorrect test for evaluating intervention. Under Rule 24(a)(2), an intervenor must demonstrate that its interest is inadequately represented by the other parties to the suit. Rule 24(a)(2), SCRCP. The South Carolina Supreme Court has adopted the following factors ("the *Sagebrush* factors") for determining adequacy of representation:

(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.

Berkeley Elec., 302 S.C. at 191-92, 394 S.E.2d at 715-16 (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)).

Instead of applying the *Sagebrush* factors, the trial court quoted this Court's analysis in *S.C. Tax Comm. v. Union Cty. Treas.*, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (1988) for the proposition that, "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." (Order Den. Mot. Intervene at 10.) Our State's highest court, however, has recognized that in many instances "a governmental entity's representation of a private party's interests does not constitute adequate representation." *Berkeley Elec.*, 302 S.C. at 192, 394 S.E.2d at 716. This is especially true when the governmental entity lacks a direct economic interest in the outcome of the proceedings—the exact situation DeBordieu faces. *See id.*

The trial court's order denying intervention warrants reversal because when applying the correct, *Sagebrush* factors here, DeBordieu clearly satisfied its "minimal" burden of showing that the representation of its interests "*may be*" inadequate. *Berkeley Elec.*, 302 S.C. at 191, 394 S.E.2d at 715 (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 92 S. Ct. 630 n. 10 (1972)) (emphasis added). First, DeBordieu seeks to assert different arguments and defenses than the State. (Mot. Intervene 13.) For example, DeBordieu will assert the defenses of laches and estoppel based on DeBordieu's permitting history and past dredging projects. (*Id.; see also* Brown Aff. ¶ 13-15.) The State has not asserted, and likely cannot assert, these arguments.

Second, DeBordieu has taken other positions the State apparently is unwilling to take, such as requesting that the rights to the Property be determined by a jury. (Mot. Intervene 13-14.) Since the filing of DeBordieu's Notice of Appeal, the State and Respondent submitted a proposed, consent "Order of Bifurcation and Related Provisions" which sought to fast-track the title determination for trial. (*See* proposed "Order of Bifurcation and Related Provisions," dated Sep. 15, 2020.) This move revealed that DeBordieu's concern has come to fruition: the State will not fight Respondent's claims with the same determination that DeBordieu would. It further appears that the State has no plans to engage independent experts to analyze Respondent's claims, as DeBordieu intends to do.[4] The reason for the different approaches to the defense of the claim is clear: neighboring DeBordieu's particular interests are more pressing than the State's general interest.

Third, DeBordieu contributes different and particularized knowledge, experience, and perspective on the proceedings that would otherwise be absent, as the neighboring property owners who have relied on their ability to use the Property since the 1970s. (*See* Brown Aff. ¶¶ 8, 10, 18-19, 24; Groat Aff. ¶¶ 6, 8-9.) The State lacks knowledge of DeBordieu's investments, income streams, and uses of the Property; it lacks the economic interest that DeBordieu has in the Property; and it lacks the same motivation to defeat Respondent's claims. These interests supported intervention in *Berkeley Electric*, yet the trial court determined they did not here. The trial court erred: DeBordieu's interest is not "identical to that asserted by the State." (Order Den. Mot. Intervene 10.) Accordingly, this Court should reverse.

[4] The proposed Bifurcation Order called for discovery in the first part to be completed by December 1, 2020, with the case being subject to trial by January 11, 2021. (*See* proposed "Order of Bifurcation and Related Provisions," dated Sep. 15, 2020.) Any discovery pertaining to issues in the second part would be stayed.

III. DEBORDIEU'S INTERVENTION IS PROPER UNDER RULE 24(B)(2) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

The trial court erred when it determined that DeBordieu did not satisfy the requirements of permissive intervention pursuant to Rule 24(b)(2), SCRCP. (*Id.* at 12.) Intervention is permissible when an intervenor demonstrates that its "claim or defense and the main action have a question of law or fact in common." Rule 24(b)(2), SCRCP.[5] The trial court disregarded the common questions of law and fact posed by DeBordieu's claims, and wrongfully interjected the Rule 24(a)(2) consideration of adequacy of representation into its analysis of permissive intervention under Rule 24(b)(2). This was legal error.

A. DeBordieu identified several questions of law and fact that are common to the main action; the trial court agreed in part but then amended Rule 24(b)(2) to circumvent its finding.

The trial court's determination that "[DeBordieu's] filings do not raise a common question of law or fact with respect to the Complaint brought by [Respondent]" is an error of law. (Order Den. Mot. Intervene 13.) As discussed throughout this brief, DeBordieu disputes Respondent's claim of fee simple title to the Property, which is plainly the primary question of law in the main action. *See Hoyler v. State*, 428 S.C. 279, 302-04, 833 S.E.2d 845, 858 (Ct. App. 2019) (finding permissive intervention proper where legal question of ownership of disputed marshlands was common to action and to intervenors' assertions). The trial court again ignored DeBordieu's interest in defending against Respondent's title claim and insists that DeBordieu did not raise a common question because it does not claim title for itself. In *Hoyler*, the plaintiff's complaint

[5] Timeliness of the intervention application and prejudice to the original parties are additional considerations under Rule 24(b); however, this Court is not being asked to determine whether DeBordieu's Motion to Intervene was timely. The Motion was filed 17 days after the State answered and barely two months after Respondent's Complaint was filed. DeBordieu's satisfaction of this requirement for permissive intervention was not at issue and appears undisputed.

"called into question not only the State's competing claim of ownership to tidelands but also the rights of adjacent property owners to use the marsh to access the Beaufort River" and their eligibility to build docks extending into the disputed marsh. *Id.* at 303, 833 S.E.2d at 858. As interested adjacent property owners whom the title declaration would affect, DeBordieu likewise should be permitted to intervene.

In any event, the trial court actually determined that DeBordieu had raised "a question of fact in common with the Answer filed by the State." (Order Den. Mot. Intervene 13.) The trial court agreed that DeBordieu's proposed counterclaim for a prescriptive easement raised a question of law or fact in common with the counterclaim filed by the State. (*Id.*) The legal inquiry under Rule 24(b)(2) is whether the proposed intervenor asserts a claim or defense that has a question of law or fact in common with "*the main action*." S.C. R. Civ. P. 24(b)(2) (emphasis added). Accordingly, the inquiry should end there and in DeBordieu's favor.

The trial court, however, discounted the common questions of law and fact because of two patent legal errors, one addressed here and the other below. First, the trial court ignored the dictates of the rule looking to "the main action" and instead confined the scope of its inquiry "*to the Complaint*" in the underlying action. (Order Den. Mot. Intervene 13.) DeBordieu established a basis for permissive intervention under Rule 24(b)(2), yet the trial court refused to permit DeBordieu to intervene. The trial court abused its discretion in denying intervention under this Rule.

B. The trial court improperly added an element to its analysis under Rule 24(b)(2), SCRCP.

Forced by its acknowledgment of the common questions, the trial court next interposed a novel requirement for intervention under Rule 24(b)(2)—adequacy of representation. (*See id.*) ("[DeBordieu] has not shown that the State, represented by the Attorney General, does not

adequately represent the interests of the public in prosecuting this counterclaim."). The test for permissive intervention is plainly laid out in South Carolina Rule of Civil Procedure 24(b). Nowhere in Rule 24(b) can one find an adequacy of representation requirement that the trial court lifted from Rule 24(a)'s mandatory intervention analysis. The trial court cannot simply modify or add to these elements; again, that is the purview of the South Carolina Supreme Court, who creates and revises our procedural rules. But even if the trial court did not err in fashioning its own test for permissive intervention, DeBordieu satisfied this new test. DeBordieu demonstrated that it has interests distinct from the State, and that it seeks to advance arguments that the State is apparently unwilling or incapable of asserting. (*See supra*, Sec. II.A.3.)

Finally, the trial court erred in concluding that DeBordieu's participation in the main action would delay or prejudice the adjudication of the rights of the State and Respondent. (Order Den. Mot. Intervene 13-14.) According to the trial court, "The matters that [Appellant] desires to litigate will greatly expand the narrow reach of the issues joined in the pleadings, with the exception of the counterclaim for prescriptive easement of the State." (*Id.* at 13.) The trial court's qualification exposes the flaws that permeate its permissive-intervention analysis. The "wide ranging" matters that DeBordieu would introduce to the litigation—such as DeBordieu's members' recreational use of the Property over the past four decades—directly bear on the prescriptive easement claim. Yet the trial court held that DeBordieu's "intended expansion of the issues . . . will shed no light on the . . . alleged prescriptive easement of the public that the State has alleged." (*Id.* at 14.) If the neighboring community's use of the Property for nearly half a century would shed no light on the prescriptive easement counterclaim, then what would?

Allowing the claims of all interested parties to be determined in a single action would not cause undue delay or prejudice, but instead would accomplish the goals behind Rule 24. *See*

Backus v. South Carolina, No. 3:11-CV-03120-HFF, 2012 WL 406860, at *3 (D.S.C. Feb. 8, 2012) (stating that "the purpose of Rule 24—to prevent multiplicity of suits involving common questions of law or fact—should not be ignored."). DeBordieu's intervention would avoid the prejudice that would result from forcing DeBordieu's prescriptive easement claim to be decided in an additional, subsequent action, and it would promote efficiency. *TPI Corp. v. Merch. Mart of S.C., Inc.*, 61 F.R.D. 684, 689 (D.S.C. 1974) (granting motion to intervene under Rule 24(b) because it appeared facts common to all the claims of petitioner-intervenors would, of necessity, find their way into the present controversy).

Where "judicial economy will be promoted by the declaration of the rights of all parties who may be affected[,]" our Supreme Court interprets Rule 24 to permit liberal intervention. *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). It was legal error, and an abuse of the trial court's discretion, to shun these directives.

CONCLUSION

This Court should reverse the trial court's denial of DeBordieu's Motion to Intervene and remand with directions to allow Appellant to intervene as a party to this action.

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October 21, 2020
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2020-001166
Case No. 2019-CP-22-01116

Ex Parte: DeBordieu Colony Community Association, Inc., Appellant,

In Re: The Belle W. Baruch Foundation, Plaintiff,

v.

The State of South Carolina, Defendant,

Of which The Belle W. Baruch Foundation is the Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant, and the Designation of Matter to be Included in the Record on Appeal on all attorneys of record by email on October 21, 2020 to the following:

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