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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Honorable Paul M. Burch, Circuit Court Judge

Civil Action No.: 2019-CP-22-01116
Appellate Case No. 2020-001166

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

BRIEF OF RESPONDENT, THE BELLE W. BARUCH FOUNDATION

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court's Order denying DeBordieu Colony's motion to intervene should be reversed even though the Circuit Court did not abuse its discretion in determining that DeBordieu Colony did not satisfy all the requirements for intervention as a matter of right and in deciding that permissive intervention should not be granted?

II. Whether the Circuit Court erred as a matter of law in its alternative ground for denying the motion to intervene on the basis that there was no ripe controversy between it and the Baruch Foundation?

III. Whether the Circuit Court's Order denying DeBordieu Colony's motion to intervene should be affirmed for the additional alternative sustaining ground that it lacks standing and is not a real party in interest?

STATEMENT OF THE FACTS

Respondent, The Belle W. Baruch Foundation (the "Baruch Foundation" or "Respondent"), initiated this action against the State of South Carolina (the "State") on November 14, 2019, seeking a declaration of legal title to the marshlands[1] surrounding the uplands it owns in Georgetown County pursuant to the Uniform Declaratory Judgments Act, codified at S.C. Code Ann. § 15-53-10 et seq. (2019), and section 48-39-220 of the Coastal Zone Management Act of 1977. (Compl., ¶¶ 4-6).

The Baruch Foundation was created under the Last Will and Testament of Belle W. Baruch that was admitted to probate in 1964. (Compl., ¶ 1). It operates as a non-profit organization for the purpose of: "teaching and/or research in forestry, marine biology, and the care and propagation

[1] The Baruch Foundation claims ownership of the marshland that is contiguous to its uplands. (Compl., ¶ 2). In its Complaint, The Baruch Foundation describes the marshland in question as the land that "lies between the mean high water mark and the low water mark." (Compl., ¶ 2). This description is synonymous with the definition of "tidelands" in S.C. Code Ann. § 48-39-220(A) ("Any person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the Coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters…"). The use of the terms "marshlands" and "tidelands" herein are intended to be interchangeable with each other.

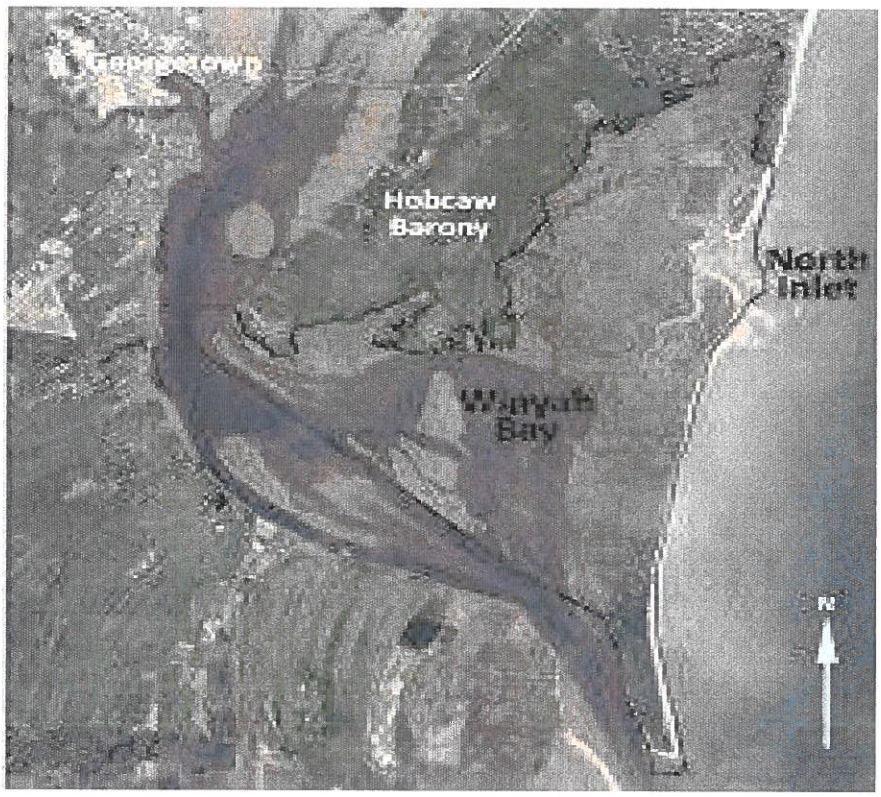
of wildlife and flora and fauna in South Carolina, in connection with the colleges and/or universities in the State of South Carolina." (Compl., ¶ 3; Tr. Hr'g 3/12/20, 6:6-7). The Baruch Foundation owns a large assemblage of approximately 8,000 upland acres in Georgetown County known as Hobcaw Barony. The Baruch Foundation alleges in its Complaint that it also holds legal title to approximately 8,000 acres of marshland abutting the eastern, western, and southern border of its upland acreage where it and the State's colleges and universities have conducted their research and educational missions for over fifty years. (Compl., ¶ 11) (Tr. Hr'g 3/12/20, 6:2-9; Mot. to Intervene, Ex. D).

Much of the marshlands that run contiguously along the Hobcaw Barony uplands are situated within North Inlet. (Mot. to Intervene, Ex. E, p. 2). North Inlet is a pristine estuary:

> North Inlet is one of the few pristine estuarine sites left in the United States and has been the site of long-term ecological studies for 25 years, playing a vital role as a test control site for the normal functions of estuaries. Scientists who have participated in research in North Inlet have compiled datasets that have national and international significance. The majority of the waters of North Inlet are classified Outstanding Resource Waters, the highest classification of waters within South Carolina.

(Mot. to Intervene, Ex. E, p. 2).

The North Inlet's borders are delineated below by the black outline:



Source: North Inlet/Winyah Bay National Estuarine Research Reserve Homepage, http://northinlet.sc.edu/about-us/ (last accessed 12/10/20 at 12:30 p.m.).

Within the North Inlet estuary is the Baruch Institute and the North Inlet/Winyah Bay National Estuarine Research Reserve. (Mot. to Intervene, Ex. E, p. 2). The Baruch Institute is owned by the Baruch Foundation and is operated by the University of South Carolina as a marine science lab. (Mot. to Intervene, Ex. E, p. 2). The Baruch Foundation, by and through the University of South Carolina and other State universities and colleges, uses the North Inlet marshlands to watch plots and conduct scientific studies. (Tr. Hr'g 3/12/20, 6:19-22). The North Inlet/Winyah Bay National Estuarine Research Reserve operates as a partnership between the National Oceanic Institute and Atmospheric Administration (NOAA) and the Baruch Institute for the purpose of preservation and management of valuable natural resources for long-term research of estuarine ecosystems. (Mot. to Intervene, Ex. E, p. 2).

The Baruch Foundation alleges that its title to the marshlands derives from not fewer than six sovereign grants and plats from King George II and King George III of England and another six from the State of South Carolina after the United States obtained its independence from England. (Compl., ¶¶ 12, 15-16). Prior to the passage of the Coastal Zone Management Act of 1977, predecessors in title and/or possession of the Hobcaw Barony lands obtained rulings in Federal Court over one hundred years ago upholding their claim to title of the marshlands pursuant to these grants. (Plf.'s Memo. in Opp. to Mot. to Intervene, p. 1).[2]

In the 1894 federal decision, Judge Simonton issued a preliminary injunction against the defendants, restraining and enjoining them from trespassing on the marshlands, except for the creeks and streams therein that were declared to be navigable streams, reasoning as follows:

> The body of marsh in question comprises a part of the Carteret barony, and its grant from the crown bears date 1733. The grant refers to a plat, and on that plat the boundary is Winyah Bay. The grant covers the marshes, eo nominee. . . . An exemplification of the grant, out of the office of the secretary of state, under the seal of the state, was put in evidence, and admitted. . . . **This grant was direct from the sovereign and must be recognized by the state,-- the successor of the sovereign. . . . The grant in question covers the marshes, and has been recognized by the colonial assembly of the province of South Carolina**. . . . [However] [t]he marshes and steams (sic.) in question are navigable waters, over and through which the public has the right to pass. . . . Even if the sovereign has alienated them, its alienee takes subject to the same rights in the public as the state held therein.

67 F. 289-91 (internal citations omitted) (emphasis added).

The Baruch Foundation brought this action to obtain a ruling confirming its title to the marshland as determined in this century-old Federal Court ruling and to comply with the current statutory requirements for determination of legal title to marshland set forth in S.C. Code Ann. § 48-39-220 (2019). (Plf.'s Memo. in Opp. to Mot. to Intervene, p. 1; Mot. to Intervene, Ex. D).

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[2] See Chisolm v. Caines, 67 F. 285 (D.S.C. 1894); Chisolm v. Caines, 121 F. 397, 398 (D.S.C. 1903); Chisolm v. Caines, 147 F. Supp. 188 (D.S.C. 1954).

The State answered the Baruch Foundation's Complaint asserting its presumptive ownership of tidelands. (Answer and Counterclaims, ¶ 3). The State acknowledged that its presumptive ownership can be defeated upon a showing that the tidelands at issue were granted by a sovereign grant and deeded to the Baruch Foundation under South Carolina law. (Answer and Counterclaims, ¶ 15). The State asserted two counterclaims. (Answer and Counterclaims, ¶¶ 17-24). If the Baruch Foundation is determined to own the tidelands in fee simple, the State seeks a declaration of a prescriptive easement or easement by prior use over them in favor of the public or, in the alternative, a declaration of a prior dedication of the tidelands to the public. (Answer and Counterclaims, ¶¶ 18, 20, 23-24).

On February 12, 2020, DeBordieu Colony Community Association, Inc. ("DeBordieu Colony" or "Appellant") filed a motion to intervene as a matter of right under Rule 24(a) of the South Carolina Rules of Civil Procedure ("SCRCP") and, alternatively, sought permissive intervention pursuant to Rule 24(b), SCRCP. (Mot. to Intervene, p. 1). According to its motion to intervene, DeBordieu Colony is a homeowners' association for a 2700-acre planned community immediately north of Hobcaw Barony with 1,220 platted home sites and approximately 875 constructed houses and villas. (Motion to Intervene, pp. 2-3). DeBordieu Colony claims that its owners have spent millions of dollars on docks, a boat landing, and dredging a tidal creek to preserve their boating access to North Inlet and the surrounding marshlands. (Motion to Intervene, p. 4) ("DeBordieu and its individual property owners have invested millions of dollars and significant work into guaranteeing their right of unfettered access to North Inlet and the Disputed Marshlands.").

DeBordieu Colony asserts its internal canals are part of the North Inlet estuary. (Mot. to Intervene, Ex. E, p. 2). Due to the canals' connection to the North Inlet estuary and the lack of a

permit from the State for the initial creation of the DeBordieu canals, DeBordieu Colony has faced resistance in its efforts to conduct "maintenance" dredging projects on the canals over the years. (Mot. to Intervene, p. 13 and Ex. E).

DeBordieu Colony states that some of the association's members have engaged in recreational activities in the marshlands in question for over forty years. (Motion to Intervene, pp. 3, 7). DeBordieu Colony rests its justification for its motion to intervene on its bold, unsupported assertion that "[i]f Plaintiff prevails in the Baruch Action, DeBordieu owners' rights of access to and use of the Disputed Marshlands will be terminated." (Motion to Intervene, p. 7). DeBordieu Colony assumes that an affirmation of the century-old Federal Court decision upholding the Baruch Foundation's ownership of the Hobcaw Barony marshlands will equate to the DeBordieu members' instant loss of access to the marshlands. (Mot. to Intervene, p. 14).

As part of its motion to intervene, DeBordieu Colony provided a copy of an op-ed article from the local newspaper from the Chair of the Board of Trustees of the Baruch Foundation. (Mot. to Intervene, Ex. D). The Chairman stated the exact opposite of DeBordieu Colony's contentions with respect to the Baruch Foundation's intentions:

> First and foremost, this court filing will not change the foundation's position on access to North Inlet, especially for fishing. People will be able to continue to enjoy lawful use of North Inlet and its resources as they have for generations. The court filing will, however, create the possibility for expansion and enhancement of recreational fishing in North Inlet by the foundation in the future...The foundation recognizes that tens of thousands of us responsibly use and enjoy North Inlet each year, and we are committed to continuing that use and enjoyment into the future, consistent always with our duty to protect and manage Hobcaw Barony for research, education, and the greater good.

(Mot. to Intervene, Ex. D).

With respect to its argument that it is entitled to intervention as a matter of right, DeBordieu Colony admits that it is <u>not</u> making a claim to title of the Hobcaw Barony marshlands, the subject

of the complaint brought by the Baruch Foundation. (App. Initial Brief, p. 4). Instead, DeBordieu Colony claims that it has a direct economic interest and a contingent property interest in the Hobcaw Barony marshlands such that it has a "personal stake" in the title action, standing, and a basis to intervene as a matter of right under Rule 24(a)(2), SCRCP. (Mot. to Intervene, pp. 3-4, 14).

DeBordieu Colony's claimed economic interest is three-fold: (1) boat access to North Inlet positively influences the value of the real properties of its members (Mot. to Intervene, p. 3; Mot. to Intervene, Ex. A, § 25); (2) the income it derives from boat storage and guest passes for use of its community boat ramp (Mot. to Intervene, Ex. A, §§ 20-23) that it speculates "surely will decrease if DeBordieu owners lose their right to access the Disputed Marshlands." (Mot. to Intervene, p. 8); and (3) its and its members' financial investments in the canal system and private docks (Mot. to Intervene, p. 3; (Mot. to Intervene, Ex. A, §§ 13, 17). DeBordieu Colony claims with more than a little hyperbole that "a ruling in favor of Plaintiff [the Baruch Foundation][that it has legal title to the marshlands] would . . . **destroy** the value of investments DeBordieu has made over the past forty years." (Mot. to Intervene, p. 5) (double emphasis added).[3]

The so-called property interest DeBordieu Colony alleges is a possible prescriptive easement in favor of DeBordieu Colony over the marshlands in question based on its members' alleged historical use of the marshlands for fishing, kayaking, boating, paddle boarding, crabbing, harvesting shellfish, and other recreational activities. (Mot. to Intervene, p. 3; Mot. to Intervene, Ex. B, ¶¶ 3-6). DeBordieu Colony speculates that "[i]f Plaintiff prevails in the Baruch Action,

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[3] DeBordieu Colony tones down this claim in its Opening Brief. (App. Br., p. 14) ("the value of DeBordieu's investments to date *may well be diminished* and the income streams it identified *may well be reduced.*") (emphasis added).

DeBordieu owners' rights of access to and use of the Disputed Marshlands **will be terminated**." (Mot. to Intervene, p. 3) (double emphasis added).

DeBordieu Colony claims that the State will not adequately represent and protect its financial investments in the Hobcaw Barony marshlands[4], its continued right of access into and through the marshlands, or litigate its claim to a prescriptive easement. (Mot. to Intervene, pp. 9, 11). DeBordieu Colony claims that a governmental entity's representation of its private interests is *per se* inadequate representation. (Mot. to Intervene, p. 14). DeBordieu Colony claims that the State "lacks the motivation that DeBordieu has to defeat Plaintiff's claim." (Mot. to Intervene, p. 11).

In its motion in the lower court, DeBordieu Colony also argued that it had the right to intervene as a matter of right pursuant to Rule 24(a)(1), SCRCP, which provides for intervention "when a statute confers an unconditional right to intervene." (Mot. to Intervene, p. 9). DeBordieu Colony asserted in its motion that S.C. Code Ann. § 48-39-220 (2019) conferred this right even though nothing in the text refers to a right to intervene, much less an unconditional right to intervene.[5] DeBordieu Colony did not raise this issue as a ground for reversal in its brief and has abandoned it on appeal.

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[4] DeBordieu Colony asserts in its Motion to Intervene that it has made "financial investments in the Disputed Marshlands." (Mot. to Intervene, p. 9). DeBordieu Colony's Motion to Intervene and submissions detail the financial investments that DeBordieu Colony and its owners have made in their private property (i.e., their private docks, community docks and amenities) and the canal system, but does not otherwise suggest or evidence that the association or its owners' recreational use of the Hobcaw Barony marshlands amounts to a financial investment in the marshlands.

[5] "(A) Any person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the Coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters, may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State. Service of process shall be made upon the State Fiscal Accountability Authority." S.C. Code Ann. § 48-39-220 (2019).

DeBordieu Colony alternatively seeks permissive intervention under Rule 24(b), SCRCP. DeBordieu Colony alleges that "[t]he legal question of ownership of the Disputed Marshlands is a question that is common to all parties." (Mot. to Intervene, p. 16).

Circuit Judge Paul Burch denied DeBordieu Colony's motion to intervene in a 15-page Order. (Order, 4/1/20). Judge Burch denied the Motion on multiple grounds: DeBordieu Colony's claims are not yet ripe (the exclusion of boaters and fishermen from the Hobcaw Barony tidelands that DeBordieu Colony anticipates is contingent and hypothetical); DeBordieu Colony fails to meet the criteria for intervention under either Rule 24(a)(1) or (2); and permissive intervention under Rule 24(b)(2), SCRCP, is not warranted because DeBordieu Colony did not raise a common issue of fact or law that will be litigated in the title action, because DeBordieu Colony did not establish the Attorney General would not adequately defend the title claim or prosecute the State's counterclaims, and there would be prejudice to the Baruch Foundation if intervention were granted. (Order, 4/1/20).

STANDARD OF REVIEW

The decision to grant or deny a motion to intervene in an action pursuant to Rule 24 lies within the sound discretion of the trial court. See Ex parte Builders Mutual Insurance Company (Ex parte Builders Mutual), 431 S.C. 93, 98, 847 S.E.2d 87, 90 (2020); Ex parte Gov't Emps. Ins. Co. (Ex parte GEICO), 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007); Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 704 (1990). "On appeal, this Court will not disturb the trial court's decision absent a manifest abuse of discretion that results in an error of law." Ex parte Builders Mutual, 431 S.C. at 98. "Moreover, the error of law must be so opposed to the trial court's sound discretion as to amount to a deprivation of the legal rights of the

party." Ex parte GEICO, 373 S.C. at 135 (quoting Jeter v. South Carolina Dep't of Transp., 369 S.C. 433, 439, 633 S.E.2d 143, 146 (2006)).

ARGUMENT

I. The Circuit Court did not abuse its discretion in denying DeBordieu Colony's Motion to Intervene under Rule 24(a)(2) and Rule 24(b), SCRCP.

DeBordieu Colony has failed to establish the lower court committed a manifest abuse of discretion that resulted in an error of law in denying DeBordieu Colony's request for intervention as a matter of right under Rule 24(a) SCRCP. Rule 24(a), SCRCP, governs intervention as a matter of right. Rule 24(a) describes the circumstances where a party may intervene as a matter of right:

> **(a) Intervention of Right**. 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.

Rule 24(a), SCRCP.

On appeal, DeBordieu Colony does not argue Section 48-39-220 of the South Carolina Code of Laws gives it an unconditional right to intervene under Rule 24(a)(1). Rather, it focuses on Rule 24(a)(2), arguing that the Circuit Court committed legal error by: (1) requiring it to claim an interest in title to support intervention; (2) determining that denial of intervention would not impair or impede DeBordieu Colony's ability to protect its supposed interests; and (3) finding that DeBordieu Colony will be adequately represented by the State.

The Circuit Court did not commit an error of law in determining that DeBordieu Colony did not meet the criteria for intervention as a matter of right under Rule 24(a)(2), SCRCP, because it did not satisfy all four elements to allow intervention as a matter of right.

a. DeBordieu Colony does not claim an interest relating to the title of the Hobcaw Barony tidelands, which is the property that is the subject of this action.

The first element of intervention as a matter of right under Rule 24(a)(2), SCRCP, is that the proposed intervenor claims an interest "relating to the property or transaction which is the subject of the action."

The Circuit Court found that the ***title to the tidelands*** was the property, which is the subject of the action, and, therefore, determined that DeBordieu Colony did not show any interest relating to the title to the marshlands. (Order 4/1/20, p.7). The Circuit Court's analysis of this first-prong of Rule 24(a)(2) was not a whimsical, *ultra vires* rewriting of a Rule of Civil Procedure as Appellant would have it; it was a thoughtful application of the rule.

DeBordieu Colony admits it is not claiming title to any portion of the tidelands. (App. Br., p. 13). That acknowledgment alone was sufficient for the lower court to find DeBordieu Colony did not meet the test for intervention as a matter of right and for this Court to affirm the lower court's decision.

The Circuit Court appropriately concluded that DeBordieu Colony's proposed Answer and Counterclaim seeking to establish a prescriptive easement has no effect on title:

> South Carolina law is clear – 'An easement gives no title to land on which servitude is imposed.' S.C. Pipeline Corp. v. Lone Star Steel Co., 345 S.C. 151, 153, 546 S.E.2d 654, 656 (2001). Putting aside the complete absence of legal precedent in South Carolina, or anywhere else, for the proposition that a person or group can establish a prescriptive easement across tidelands through boating and other recreational use, the allegation of a prescriptive easement does not assert an interest in ***title*** to the tidelands, which is the property in dispute.

(Order 4/1/20, p. 7) (emphasis in original).

DeBordieu Colony does not dispute this legal analysis on appeal. (See generally App. Br.). Rather, DeBordieu Colony argues its alleged interests are analogous to the interests of the intervening property owners in Hoyler v. State, 428 S.C. 279, 833 S.E.2d 845 (Ct. App. 2019),

reh'g denied (Oct. 17, 2019). (App. Br., p. 15) ("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 Circuit Court applied Hoyler to its Rule 24(a)(2) analysis and found the facts and allegations of this case to be much different. (Order 4/1/20, p. 7). As reasoned by the Circuit Court: "If DCCA had alleged it had a permit to build a dock across the tidelands in question or that it intended to build one, then the facts would be analogous to Hoyler, and the Court would grant its Motion to Intervene." (Order 4/1/20, p. 8). In other words, if DeBordieu owners could show that they had an interest relating to the tidelands such as permits to build a dock or existing docks situated thereon, then intervention might be warranted.

The Circuit Court was correct to find that this case does not come within Hoyler. The intervenors in Hoyler ***owned property that physically adjoined the tidelands in question.***[6] 428 S.C. at 303. The plaintiff in Hoyler alleged he wanted a determination of title to the marshlands so that he could prevent the intervenors from building docks. Id. at 302. One intervenor had a permit to construct a marina in hand. As this Court noted in Hoyler

> The complaint seeks not only a declaration that Hoyler owns the disputed marsh but also a declaration that he 'possesses all rights of a fee simple property owner[,] *including the right to exclude dock construction.*' (emphasis added). This language asserts a right to relief arising out of the then-existing and possible future dock construction by adjacent property owners.

Id.

DeBordieu Colony is not seeking to construct docks over the tidelands in question nor does it hold any permits to do so like the intervenors in Hoyler. Further, unlike the intervenors in

[6] The Hoyler intervenors owned highlands that abutted the disputed tidelands, which served as a buffer between the highlands and the Beaufort River, a navigable waterway. See id. at 286-87, 303, n. 17.

Hoyler, no member of DeBordieu Colony will lose immediate access to navigable waters if title to the marshlands is determined to rest in the Baruch Foundation.

Another controlling distinction of this case in contrast to Hoyler is in the attenuated interest asserted by DeBordieu Colony as compared to the direct interest of the intervenors in Hoyler. DeBordieu Colony claims an alleged economic interests that it asserts would be no less than *destroyed* if title to the marshlands is determined to rest with the Baruch Foundation. However, it is undisputed that the determination of title will not affect boating in North Inlet. As remarked by counsel at the hearing and as addressed by Judge Burch in his Order denying DeBordieu Colony's motion to intervene, all citizens of South Carolina have a statutory and constitutional right to traverse and recreate in navigable waters even if a private party holds title to the underlying tidelands:

> Similar to *Orr*, there is no showing in this case that the Foundation will take action against boaters who use these tidelands for recreational purposes. In fact, since the Constitution protects the right of the public to use navigable waters, the only reasonable conclusion is the opposite. S.C. Const. art. XIV, § 4 ('All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, toll, impost or wharfage shall be imposed ... unless the same be authorized by the General Assembly.')
>
> A determination of title to the tidelands does not equate to the exclusion of boaters and fishermen from North Inlet. Title has nothing to do with rights of navigation over waterways. As just explained, the South Carolina Constitution protects the right of the public to use navigable waters and that right is ensured regardless of whether the land underneath those waters is titled in the State or someone else. *State v. Head*, 330 S.C. 79, 498 S.E.2d 389 (Ct. App. 1998) (public's constitutional and statutory right to use navigable waters does not deprive the owner of title to the soil covered by navigable watercourse). Therefore, if there is a judicial determination that the Foundation owns the tidelands, the members of DCCA 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 DCCA will not suffer an injury if they have free navigable access over North Inlet and its surrounding the tidelands. ***DCCA 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 4/1/20, pp. 4-5) (double emphasis added).

DeBordieu Colony does its best to split hairs by arguing that the lower court misunderstood its position – that it is seeking to vindicate not just the right of its members to boat in the navigable waters in the marshlands but an alleged right of members to get out of their boats and walk in the tidelands. As the old saw goes, that is a distinction without a difference.

The supposed economic interests claimed by DeBordieu Colony are all premised *on lack of boating access to North Inlet*. There is no assertion in the filings in support of the motion to dismiss, much less proof, that if members of DeBordieu Colony have complete boat access to North Inlet but might in the future be prevented from leaving their boats and walking over the marshlands, then property values in DeBordieu Colony will fall, revenues from boat storage will plummet, and the community's expenditures to dredge the canals for boating will be rendered worthless. There is no showing or allegation of any connection at all between the right of a member to walk in the tidelands under study by the Baruch Institute and the alleged economic interests of DeBordieu Colony or its members.

The hypothetical and, at best, nominal or insignificant effect on the supposed economic interests of DeBordieu Colony is not sufficient interest to support intervention:

> ... [A] party must have standing to intervene in an action pursuant to Rule 24, SCRCP. A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a 'real party in interest. A real party in interest ... is one who has ***a real, actual, material or substantial interest in the subject matter of the action***, as distinguished *from one who has only a nominal, formal, or technical interest in, or connection with, the action.*

Kiawah Resort Associates, L.P. v. Kiawah Island Cmty. Assn., Inc., 421 S.C. 538, 552, 808 S.E.2d 521, 528 (Ct. App. 2017) (internal citations omitted) (double emphasis added).

Because the tidelands at issue do not border the DeBordieu Colony lands and there are not any docks within DeBordieu Colony (or permits for the construction thereof) that cross over the

marshlands in question, the Baruch Foundation will not be able to block any existing or future docks or require that any docks within DeBordieu Colony be removed if it is determined to be title owner of the marshlands. The current or prospective purchasers of lots within DeBordieu Colony can continue to build docks if they wish; their lands do not touch or concern the marshlands that are the subject of this suit. The DeBordieu Colony members and their guests will continue to be able to use their docks to access North Inlet and recreate in those waters (*including* those portions of North Inlet abutting Hobcaw Barony that are navigable waterways). The association's alleged economic interests and those of its members are not directly tied to the issue of title to the tidelands and will not be affected by the determination of title in any real, actual, material, or substantial way.

For these reasons, the Circuit Court did not commit an error of law in finding that DeBordieu Colony did not make the requisite showing of a property interest sufficient to support intervention as a matter of right. Giving every benefit of the doubt to DeBordieu Colony, the determination of title will not have any measurable effect on the alleged financial interests of DeBordieu Colony, which falls short of an interest sufficient to establish intervention as a matter of right under Rule 24(a)(2), SCRCP.

b. DeBordieu Colony's interest in the Hobcaw Barony tidelands (if any) will not be impaired or impeded as a practical matter if intervention is not granted.

The second element of intervention as a matter of right under Rule 24(a)(2), SCRCP, is that the proposed intervenor be "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." The lower court did not abuse its discretion and commit a legal error in finding that DeBordieu Colony's interest will not be impaired or impeded as a practical matter if it cannot intervene.

In its Order, the Circuit Court found that: "DCCA's position does not mirror that of SCE&G, the intervenor in Berkeley Elec. Co-op." (Order 4/1/20, p. 8) (citing Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990)). In Berkeley Elec. Co-op., the South Carolina Supreme Court endorsed intervention of SCE&G in a case brought by the plaintiff co-operating association, a competing electric company, because a determination of the issues joined in the original case would necessarily determine the exclusive right to service a particular customer territory. Id. The Supreme Court found that SCE&G was in a position such that if intervention were not granted:

> SCE&G may be impaired or impeded in its ability to protect its asserted interests unless allowed to intervene in this action. A declaration by the trial judge in favor of Berkeley would, as a practical matter, prevent SCE&G from serving customers that it believes it is legally entitled to serve and impair its ability to protect investments it has already made in reliance on its beliefs. Also, it would be extremely difficult for SCE&G to collaterally attack any ruling adverse to them if not made a party to the original action.

Id. at 191.

Unlike SCE&G, a declaration that the Baruch Foundation possesses legal title to the Hobcaw Barony tidelands will not practically prevent DeBordieu Colony from protecting its legally claimed interest (the right to continue using the tidelands for boating, fishing, and recreational purposes) pursuant to an alleged prescriptive easement in its favor. As just discussed, a determination of title in the Baruch Foundation has no effect on boating in the marshlands as a matter of law.

If DeBordieu Colony's concern is what may possibly happen to those members who may want to exit their boats and walk in the tidelands, DeBordieu Colony or any affected member can bring an action claiming a prescriptive easement if the Baruch Foundation in fact attempts to prevent that activity at some point in the future. The Circuit Court correctly found that "the

determination of legal title will not impair DCCA's ability to assert its so-called prescriptive easement if at some point there is a ripe controversy because the Foundation has attempted to exclude boating and other similar recreational use of North Inlet or any other navigable water." (Order 4/1/20, p. 9). The need for DeBordieu Colony to assert its claim for a prescriptive easement would, of course, also be not be necessary if the State is successful in either of its counterclaims.

c. DeBordieu Colony's interest is adequately represented by the State.

Even if a proposed intervenor can show the previously discussed elements of intervention as a matter of right under Rule 24(a)(2), it must also demonstrate that its interest is inadequately represented by the existing parties to the suit. Rule 24(a), SCRCP; Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). The lower court did not abuse its discretion and commit an error of law in finding that DeBordieu Colony failed to show that its alleged interest cannot be adequately represented by the State.

As with the foregoing analyses of Rule 24(a)(2), the Circuit Court conducted a detailed analysis of its findings on the adequacy of the State's representation of the public's interest, inclusive of the DeBordieu Colony boaters and fishermen. (Order 4/1/20, pp. 9-12). In applying the precepts from S.C. Tax Commn. v. Union County Treas., 295 S.C. 257, 260-261, 368 S.E.2d 72, 74 (Ct. App. 1988) and In re Horry Cnty. State Bank, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004), the Circuit Court emphasized that the State and DeBordieu Colony "***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 4/1/20, p. 10) (emphasis in original). Both the State and DeBordieu Colony have asserted a claim for a

prescriptive easement in the tidelands. Defeat of the Baruch Foundation's claim or resolution of either of the State's counterclaims in its favor achieves DeBordieu Colony's objectives.

DeBordieu Colony argues that the fact that the State is the existing party automatically undermines the adequacy of representation. (Mot. to Intervene, p. 12). The Circuit Court was correct in finding that the South Carolina Supreme Court did not adopt a *per se* rule that a governmental entity's representation of a private party's interest is *per se* inadequate in Berkeley Elec. Co-op. See Berkeley Elec. Co-op., 394 S.E.2d at 716. The Circuit Court found that:

> The Attorney General routinely advances the interests of the citizens of South Carolina in a representative capacity. In fact, that is the purpose of the Attorney General. We are not dealing with a mere municipality represented by its in-house or outside counsel. Here we are dealing with the State itself represented by the extremely experienced and able counsel of the Office of the Attorney General.

(Order 4/1/20, p. 11).

The Baruch Foundation agrees with the Circuit Judge that the Office of the Attorney General, and J. Emory Smith, Jr., are experienced and able counsel who have more experience that anyone in South Carolina litigating actions involving title to tidelands and defending the State's presumptive title.

The Baruch Foundation further disputes DeBordieu Colony's contention that the State is not willing, capable, or motivated to protect the rights of the public to access the tidelands at issue, and strongly disputes DeBordieu Counsel's suggestion that there is some under-handed, improper arrangement between the Foundation and the State enabling what DeBordieu Colony dubs as the Foundation's "title grab." Much to the contrary, the State has asserted counterclaims against the Baruch Foundation.

In Berkeley Elec. Co-op., the South Carolina Supreme Court determined that SCE&G's interests were not adequately represented by the Town of Mt. Pleasant because "Mt. Pleasant

lack[ed] a direct economic interest in the outcome of the proceedings in that it will receive franchise fees regardless of who supplies the property." 394 S.E.2d at 716. The State has something much greater than an economic interest in the outcome here. It is serving the entire public interest as a trustee for all the people of South Carolina. The State is the presumptive owner of all tidelands. McQueen v. S.C. Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003). This responsibility and interest are far greater than the far-fetched claim of injury to economic interest of DeBordieu Colony if members are not allowed to exit their boats.

Furthermore, as far as the adequacy of the legal representation, the General Assembly of South Carolina has deputized the Attorney General to protect the interests of the public in requiring that litigation to determine title to tidelands must name the State as a party. *See* S.C. Code Ann. § 48-39-220(D) (2019). No party and no attorney is more experienced in litigation over the title to tidelands that the State and the Attorney General.

It further bears noting that the alleged economic interest of DeBordieu Colony is nowhere on a par with the sparring utility companies in Berkeley Co-op. DeBordieu Colony has a fanciful theory that the possible prohibition of some of its members exiting their boats onto the tidelands sometime in the future might possibly have some adverse economic effect, yet to be alleged or proven. In Berkeley Co-op., there was nothing speculative about the economic interests of the two competing electric utilities. Whether the territory belonged to one utility company to the exclusion of the other had a direct, immediate, and considerable financial effect on the winner and loser because the outcome determined who would receive all the revenues for the provision of electric service in the area in dispute.

DeBordieu Colony falls back on the so-called Sagebrush factors in an effort to convince the Court that the Attorney General cannot be trusted to protect the public trust tidelands. (App.

Brief pp. 17-19). However, the application of the Sagebrush considerations does not demonstrate that Judge Burch abused his discretion as a matter of law but instead shows that he was well within the range of discretion afforded him in finding the State will adequately represent the public's interest in the tidelands in question.Quoting an excerpt from Berkeley Coop, DeBordieu Colony sets forth the Sagebrush factors as follows:

> (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.

App. Brief, pp. 17-18, referring to Berkeley Coop 394 S.E. 2d at 715-16.[7]

As far as the big difference between what it will argue and what the State is arguing, DeBordieu Colony states it will allege the defenses of estoppel and laches that were not asserted by the State in its answer, yet it does not proffer any legal precedent for these constituting a defense to a king's grant claim of title, no more than comparative negligence would constitute a defense. It argues as another difference that it will demand a jury trial even though the State did not, yet the mode of trial is neither a substantive position nor defense in an action to try title. As for the joint motion to bifurcate the trial of the title action from the State's counterclaims for prescriptive easement filed after this appeal was taken, the motion was for judicial efficiency to separate the issues for trial since the trial of the State's counterclaims and discovery related thereto will be unnecessary if the State prevails in the title action. (Proposed Consent Order of Bifurcation, Order denying Motion to Bifurcate; Motion to Reconsider Joint Motion, Order granting, in part, and denying in part, the Joint Motion to Bifurcate). The motion was not because the State was trying to "fast track" the trial as DeBordieu Colony asserts.

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[7] The Ninth Circuit propounded these considerations in its decision in Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983)

Finally, DeBordieu Colony claims in its brief that it will engage independent experts and that some of the owners within DeBordieu Colony have "particularized knowledge." DeBordieu Colony did not support or advance either of these assertions in support of its motion to intervene in the lower court. It made no showing of any expertise at all in litigating actions to try title to tidelands, or that it had ever previously litigated even a single king's grant tidelands case. DeBordieu Colony did not suggest it would use expert witnesses on the title issues nor proffer any supposed testimony or area of expertise of any experts on the title issues. These arguments were neither advanced nor supported below and have been put together on the fly on appeal.

Similarly, DeBordieu Colony has not explained the newly alleged particularized knowledge or expertise of some of its property owners and how that supposed knowledge or expertise bears on the title issues. It did not submit any proof in support of its motion showing how it would contribute anything constructive to the title action over and above what the State would do.

In short, DeBordieu Colony has no experts nor any expertise that comes close to rivaling the State's experience in litigating title to tidelands. Judge Burch acted well within his discretion in denying intervention when the Sagebrush factors are considered in the face of the utter lack of any showing by DeBordieu Colony what it brought to the table that the Attorney General did not that would make a substantive difference in the title action.

The Circuit Court's specific findings that DeBordieu Colony has failed to make a *prima facie* showing that the Attorney General of South Carolina is incapable of adequately representing the public's alleged ownership interest in the tidelands and advocating for a putative prescriptive easement over these tidelands in favor of the public if the Baruch Foundation establishes legal title to them is not affected by an error of law and must be affirmed.

d. The Circuit Court correctly denied DeBordieu Colony's Motion to Intervene under Rule 24(b), SCRCP.

DeBordieu Colony contends the lower court committed an error of law in denying its alternative motion to intervene pursuant to Rule 24(b)(2), SCRCP. As its title states, intervention under Rule 24(b)(2) is *permissive*. The lower court was well within its discretion in finding that intervention was unwarranted because the State adequately represented the public in asserting the State's title to the tidelands by way of its presumptive title and/or a prescriptive easement and because joinder of DeBordieu Colony would considerably expand the scope of the case, change the mode of trial, and prejudice the parties.

Rule 24(b), SCRCP, provides, in pertinent part, as follows:

> **(b) Permissive Intervention**. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"A reversal of a denial of permissive intervention has been termed 'so unusual as to be almost unique.'" Ex parte Builders Mutual Insurance Company (Ex parte Builders Mutual), 431 S.C. 93, 98, 847 S.E.2d 87, 90 (2020) (quoting New Orleans Public Svc., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 471 (5th Cir. 1984)). Permissive intervention is wholly within the discretion of the trial court. See New Orleans Public Svc., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 471 (5th Cir. 1984) (citing Wright & Miller, Federal Practice and Procedure: Civil § 1913 at 551). The question before this Court is as not whether the factors that enable a lower court to grant permissive intervention were present, but instead, whether the trial court committed an abuse of discretion in denying the motion for permissive intervention. Id.

The Circuit Court did commit an error of law in denying permissive intervention. The Circuit Court made several findings in support of its decision that show that the appropriate factors

were considered and support the Circuit Court's decision denying the motion, including the following:

> The matters that DCCA 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. Based on its filing, the subjects that DCCA seeks to introduce into the case are wide ranging and include such matters as DCCA's expenditure of funds for recreational amenities, the relationship of property values to boating in North Inlet, the use of private docks by DCCA members, and the use of North Inlet by its members over the last four decades. DCCA's intended expansion of the issues and discovery in the case in this fashion will shed no light on the title to the tidelands nor the alleged prescriptive easement of the public that the state has alleged.
>
> Another important consideration is that DCCA's proposed Answer demands a jury trial. Neither the Foundation nor the State demanded a jury trial in their pleadings. Switching to a jury trial and substantially expanding the scope of discovery and the issues as DCCA proposes will drastically increase the time, money, and other resources the nonprofit Foundation will have to expend simply to obtain a determination of whether it or the State holds title to the tidelands surrounding Hobcaw Barony. Yet, increasing the scope of the case and changing the method of trial as DCCA proposes will not shed any light on the issue of legal title to the tidelands.
>
> Because DCCA is not claiming to hold title to any of the tidelands, because the State has the same interests as DCCA in prosecuting a claim for prescriptive easement across the tidelands for the benefit of the public including DCCA's members, and because the intervention of DCCA will unduly prejudice the non-profit Foundation, the Court exercises its discretion to deny DCCA's Motion for Intervention under Rule 24 (b) as well.

(Order 4/1/20, pp. 13-14).

Whether there would be prejudice to the Baruch Foundation if DeBordieu Colony were allowed to intervene was a question entirely within the discretion of the trial judge. DeBordieu Colony has failed to show that the lower court abused its discretion and committed an error of law in denying its motion for permissive intervention.

II. The Circuit Court did not commit legal error in determining that DeBordieu Colony's claims are not ripe for adjudication where its alleged injury is speculative, hypothetical, and contingent upon events that have yet to occur and may never occur.

A fundamental principle of ripeness is that there must be an actual case or controversy between the adverse parties. Anticipated or hypothetical harm is not enough. Yet, that is all the DeBordieu Colony alleges. DeBordieu Colony claims if the Baruch Foundation prevails and is determined to hold title to the marshlands, it will have the power to terminate the public's access to and use of the tidelands and will certainly exercise such power. (Mot. to Intervene, p. 5). Despite the fears, hunches, and speculation of DeBordieu Colony, the alleged injury is not certain to occur, is speculative and hypothetical, and is dependent on a series of contingent events in the future.

"A threshold inquiry for any court is a determination of justiciability; *i.e.*, whether the litigation presents and active case or controversy." Holden v. Cribb, 349 S.C. 132, 136, 561 S.E.2d 634, 637 (Ct. App. 2002). "The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." Id. An issue that is "contingent, hypothetical, or abstract is **not** ripe for judicial review." Colleton Co. Taxpayers Ass'n v. School Dist. of Colleton Co., 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006) (emphasis added). "[A] court should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all." Id. (internal quotations omitted) (quoting Thrifty Rent-A-Car Sys., Inc. v. Thrifty Auto Sales of Charleston, Inc., 849 F. Supp. 1083, 1085-86 (D.S.C. 1991)).

The Circuit Court specifically found that the: "*anticipated* threat of expulsion of recreational boaters and fisherman from the North Inlet and the other tidelands is an event that has not occurred and may never occur." (Order 4/1/20, p. 4) (emphasis in original). The Circuit Court was right. The Baruch Foundation's ability to cause the effect that DeBordieu Colony anticipates is only *potentially* capable of realization *if* the declaratory judgment claims in the title action are determined in this precise manner:

1) the Baruch Foundation prevails on its claim to title (**Contingency #1**); and
(2) the State's request for a declaratory judgment for a prescriptive easement across the marshlands in favor of the public is denied (**Contingency #2**); and
(3) the State's request for a declaratory judgment that the marshlands were dedicated to the public is denied (**Contingency #3**).

Even if the rulings each come down this way (i.e., Contingencies 1-3 are all met), the DeBordieu Colony owners' still will not suffer any injury *unless* the Baruch Foundation attempts to restrict activity outside boats in those marshlands (**Contingency #4**), and then only to the degree that activity is restricted (**Contingency #5**) and as much as the restriction actually affects the alleged economic and recreational interests of DeBordieu Colony, if at all (**Contingency #6**).

a. The public will retain the right to navigate the Hobcaw Barony tidelands if the Baruch Foundation is determined to be the fee simple owner of the tidelands.

In its Brief, DeBordieu Colony argues the Circuit Court "missed the point entirely" when it determined that "if there is a judicial determination that the Foundation owns the tidelands, the members of [DeBordieu Colony] and the public still have the right to boat and navigate in the tidelands in question and North Inlet generally." (App. Br., p. 9) (citing Order 4/1/20, p. 5).

Contrary to DeBordieu Colony's assertion, the right of the public to boat in and use the navigable waters over the tidelands is fatal to its contentions of alleged economic harm, the primary interest it claimed supported its intervention. The Baruch Foundation has never sought to limit boating in the navigable waterways within the tidelands, has no intent to do so as shown by the comments of the Chair of its Board of Trustees in the newspaper article submitted by DeBordieu Colony, and most importantly – it has no right to do so. If there is an unfettered constitutional right to use of the navigable waters in the tidelands, there obviously cannot be the disastrous economic consequences claimed by DeBordieu Colony if the Baruch Foundation is determined to hold title. In fact, there can be no harm at all.

DeBordieu Colony conceded, and the Circuit Court properly determined, that the property rights of a private owner of tidelands are subject to Section 4 of Article XIV of the South Carolina Constitution. (Order 4/1/20, p. 5). Pursuant to the South Carolina Constitution: "All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, toll, impost or wharfage shall be imposed ... unless the same be authorized by the General Assembly." S.C. Const. art. XIV, § 4; see also S.C. Code Ann. § 49-1-10 (2019) (defining navigable streams as streams which can be rendered capable of being navigated by rafts of lumber or timber and declaring such streams as considered common highways and forever free to the inhabitants of the State in accord with S.C. Const. art. XIV, § 4).[8]

Accordingly, the public will retain the right to access and use the tidelands to the extent they are navigable no matter the outcome of the title action. The Circuit Court was correct in identifying these important limitations and got it entirely right when it concluded that DeBordieu Colony boaters will retain the right to boat and navigate in the North Inlet generally and in the navigable tidelands even if the Baruch Foundation prevails on all claims due to the South Carolina Constitution's guarantees with respect to navigable waterways. There is no case or controversy with respect to the allegation that a determination of title to the marshlands in the Baruch Foundation will result in the loss of boating in North Inlet or elsewhere. The public has an irrefutable constitution right of access over the navigable waters,

[8] At the hearing on DeBordieu Colony's Motion to Intervene, DeBordieu's counsel represented to the court that a determination that the Baruch Foundation owns the tidelands in fee simple means they "would own *everything up there*, all the tidelands, marshland and everything that our residents have enjoyed the use of and, in fact have invested millions of dollars to get the use of..." (Tr. Hr'g, 3/12/20, 2:18-23) (double emphasis added). That is patently not true.

b. There are no allegations that the Baruch Foundation intends to terminate DeBordieu Colony boaters' access to the Hobcaw Barony tidelands.

In its last resort to come up with a justiciable controversy since the claims of disastrous economic harm from the anticipated closing of North Inlet to all boaters is totally untenable, DeBordieu Colony speculates that the unstated motive of the Baruch Foundation in bringing the case is to exclude persons from walking on the tidelands in the future. This hunch is not enough to establish a justiciable controversy because the anticipated action from the motive that DeBordieu Colony unilaterally attributes to the Baruch Foundation has yet to happen and may never happen.

First, as the Circuit Court noted, the allegations in the pleadings (including DeBordieu Colony's proposed Answer and Counterclaim) do not allege that the Baruch Foundation is now prohibiting persons from walking or other activities on the tidelands outside their boats, namely:

> *The Complaint of the Foundation . . . seeks only a determination of title to the tidelands.[;]*
> . . .
> *The Foundation does not allege that it has excluded any members of DCCA from these tidelands nor that it intends to try to exclude them. [; and]*
> . . .
> *DCCA also does not allege that the Foundation has taken steps to prevent its members from using these tidelands.*

(Order 4/1/20, p. 4) (emphasis added).

These allegations and the limited relief that the Baruch Foundation seeks in this declaratory judgment action is of significance to the intervention analysis under Hoyler v. State, 482 S.C. 279, 833 S.Ed.2d 845 (Ct. App. 2019). As previously discussed, the pleadings of the plaintiff in Hoyler admitted the plaintiff's intent to prevent the intervenors from constructing docks across the tidelands in dispute in that case. 428 S.C. at 302. The Baruch Foundation does not seek any declaration against the DeBordieu Colony owners, nor do the owners or association allege that any exclusionary acts have taken place.

"[A] court should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all." Colleton Co. Taxpayers Ass'n v. School Dist. of Colleton Co., 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from this dispute of a contingent, hypothetical or abstract character." Orr v. Clyburn, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982).

In finding that the controversy here was not ripe, the Circuit Court compared this case to the South Carolina Supreme Court case of Orr v. Clyburn, 277 S.C. 536, 290 S.E.2d 804 (1982). In Orr, the plaintiff-sheriff sought to enjoin the Human Affairs Commission from initiating an investigation into a complaint of discrimination asserted against him. Id. at 539. The Supreme Court held that the sheriff's case did not present an actual, justiciable controversy because the Commission's investigatory might not lead to any charges or formal action against him. Id. at 541. The Circuit Court reasoned: "Similar to *Orr*, there is no showing in this case that the Foundation will take action against the boaters who use the tidelands for recreational purposes. In fact, since the Constitution protects the right of the public to use the navigable waters, the only reasonable conclusion is the opposite." (Order 4/1/20, p. 4).

Aware that it made no allegation of any current action by the Baruch Foundation to exclude persons from any of the tidelands and that it had failed to show a ripe controversy, DeBordieu Colony submitted a Certification in Lieu of Affidavit in support of its motion to reconsider, alter or amend of a member who received a citation from DNR two years ago for walking on the tidelands that was dismissed. (Mot. to Reconsider, Alter, or Amend, Ex. 1). The Certification submitted in support of its motion to reconsider was improper and cannot be considered since it was not presented to the Court before it ruled on the motion even though it could have been.

Hickman v. Hickman, 301 S.C. 455, 457, 392 S.E.2d 481, 482 (S.C. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). DeBordieu Colony alleged in its motion to reconsider that "counsel for DeBordieu has since [i.e., after the hearing and order of the Court] obtained a ticket for trespassing that a DeBordieu member was issued when fishing on the flats in the Disputed Marshland." (Mot. to Reconsider, p. 4). That ticket is a citation that was allegedly issued to Dale Lacy, a DeBordieu Colony member, in 2018 by the South Carolina Department of Natural Resources ("DNR") for trespassing into an area of marsh in the North Inlet. (Mot. to Reconsider, Ex. 1, p. 2 and Ex. A). DNR subsequently withdrew the citation and did not prosecute him. (Mot. to Reconsider, Ex. 1, p. 2).

Mr. Lacy's Certification clearly indicates that he received the DNR citation in-person and was aware of the trespass citation and its later withdrawal thereof. (Id.). There was no assertion in DeBordieu Colony's motion or Mr. Lacy's certification that Mr. Lacy or DeBordieu Colony did not have knowledge of the DNR citation at the time of the hearing such that it was "newly discovered" evidence; rather, the only suggestion is that counsel for DeBordieu Colony did not know of this incident prior to filing the Motion to Intervene. (Mot. to Reconsider, Alter, or Amend); (Mot. to Reconsider, Alter, or Amend, Ex. 1).

The Lacy Certification also does not constitute newly discovered evidence under Rule 60(b)(2), SCRCP. That Rule clearly states that new evidence must be "evidence by which due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Evidence is not "newly discovered" for the purposes of a motion for relief from judgment, if it is known to the party at trial and in the party's possession. The neglect of a party's attorney is the neglect of the client, and no mistake, inadvertence, or neglect attributable to the attorney can be

successfully used as a ground for relief from judgment, unless it would have been excusable if attributable to the client. Rouvet v. Rouvet, 388 S.C. 301, 696 S.E.2d 204 (Ct. App. 2010). As Mr. Lacy and DeBordieu Colony were aware of the information as of July 10, 2018, the citation and facts certified by Dale Lacy were not newly discovered evidence—but rather newly presently evidence.

Regardless, even if the Lacy Certification is considered, it does not create a justiciable controversy. The citation was issued by DNR two years ago and was dismissed by the State on its own volition. (Mot. to Reconsider, Alter, or Amend, Ex. 1, §§ 16-17). There is no pending citation against an DeBordieu Colony member or anyone else for walking in the marshlands, and there may never be one in the future.

In its Brief, DeBordieu Colony contends that the Circuit Court erred in conducting a ripeness analysis because it is preempted by Rule 24, SCRCP.[9] (App. Br., p. 5). However, ripeness relates to whether the court has subject matter jurisdiction, and the Circuit Court was correct to consider the question.[10] "It is well-settled that issues relating to subject matter jurisdiction maybe (sic.) raised at any time." Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 168, 485 S.E.2d 371, 372 (1997). The Circuit Court did not err as a matter of law in finding that the "*anticipated* threat of expulsion of recreational boaters and fisherman from the North Inlet and the other tidelands is an event that has not occurred and may never occur." (Order 4/1/20, p.

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[9] Appellant states this alleged rule of preemption in conclusory terms and without any legal support. To the contrary, see Holden v. Cribb, 349 S.C. 132, 136, 561 S.E.2d 634, 637 (Ct. App. 2002) ("A threshold inquiry for **any** court is a determination of justiciability).

[10] Appellant's Opening Brief in Section I(C) argues that the lower court erred in conducting a ripeness inquiry altogether. Declaratory judgment actions, like any other actions, "must involve an actual, justiciable controversy that is ripe for determination." Waters v. South Carolina Land Resources Conservation Com'n, 321 S.C. 219, n. 7, 467 S.E.2d 913 (1996) (citing Southern Bank & Trust Co. v. Harrison Sales Co., 285 S.C. 50, 328 S.E.2d 66 (1985)).

4) (emphasis in original). The lower court's alternative ruling for denying intervention on the basis that DeBordieu Colony did not present a ripe controversy should be affirmed.

III. DeBordieu Colony's lack of standing and lack of status as a real party in interest serve as additional sustaining grounds for the Order.

Appellant admits that a proposed intervenor must have standing to intervene. (Mot. to Intervene, p. 4) (citing Kiawah Resort Assocs., L.P. v. Kiawah Island Cmty. Ass'n, Inc., 421 S.C. 538, 552, 808 S.E.2d 521, 528 (Ct. App. 2017)). DeBordieu Colony's lack of organizational standing, including its lack of status as a real party in interest, furnish yet a third reason to affirm the Circuit Court's ruling.

"When an organization is involved, the organization has standing on behalf of its members if one or more of its members will suffer an individual injury by virtue of the contested act." Sea Pines Ass'n for Protection of Wildlife, Inc. v. South Carolina Dept. of Nat. Resources, 345 S.C. 594, 600-601, 550 S.E.2d 287, 291 (2001). The Supreme Court in Sea Pines elaborated on the constitutional test for standing in a case such as this one:

> In Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), the United States Supreme Court enunciated a stringent standing test. Lujan set forth the 'irreducible constitutional minimum of standing,' which consists of the following three elements:
>
> > First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'
>
> Id. at 559–61, 112 S.Ct. at 2136 (internal citations omitted); see also Beaufort Realty Co. v. S.C. Coastal Conservation League, 346 S.C. 298, 551 S.E.2d 588

(S.C. Ct.App. 2001). The party seeking to establish standing carries the burden of demonstrating each of the three elements. Id. at 561, 112 S.Ct. at 2136–37.

550 S.E.2d 291.

In Lujan, the United States Supreme Court found the plaintiff organization had no standing based on the affidavits of two members of the group who claimed they were harmed by the actions in question even though they were not exposed to the actions and might not be exposed. Lujan v. Defenders of Wildlife, 504 U.S. 555, 565, 112 S. Ct. 2130, 2139, 119 L. Ed. 2d 351 (1992). Justice Scalia held that plaintiffs did not assert sufficiently imminent injury to have standing: "As we have said in a related context, '***Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.***'" Id. at 564, 2138 (internal quotations omitted) (double emphasis added).

Similarly, just because Mr. Lacy received a citation from DNR two years ago that was dismissed does not establish imminent injury to any member of DeBordieu Colony if the Baruch Foundation is determined to hold title to the tidelands in question. (Mot. to Reconsider, Alter, or Amend, Ex. 1). In fact, if anything, his affidavit establishes a lack of controversy then and now. Mr. Lacy avers that DNR dismissed the citation even though he insisted that the agency prosecute him! (Mot. to Reconsider, Alter, or Amend, Ex. 1, ¶¶ 16-17).

A separate and additional reason DeBordieu Colony does not have organizational standing is that the lawsuit is not related to the purposes of the organization. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, ***the interests at stake are germane to the organization's purpose***, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 181,

120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000) (double emphasis added). The alleged interests at stake are not germane to DeBordieu Colony's purpose.

According to Blanche Brown, the general manager of DeBordieu Colony, the organization is "the vehicle by which the owners of property in DeBordieu Colony govern its internal and external affairs." (Mot. to Intervene, Ex. A, ¶ 5). The boating and fishing activities of individual members well outside the boundaries of DeBordieu Colony have nothing to do with the governance of the organization's internal or external affairs. The organization's purpose is not defending trespass citations that might be issued to members on waterways outside DeBordieu Colony any more than its mission includes defending speeding tickets they may receive on roads outside the neighborhood. Nor does the governance mission of DeBordieu Colony include establishing prescriptive easements for some of its members over real property outside of its boundaries. Because the anticipated actions that provoked the effort to intervene are not germane to the governance purposes of DeBordieu Colony, it has no organizational standing.

A third reason DeBordieu Colony does not have standing is that it is not a real party in interest. "A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." Bailey v. Bailey, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994) (intertwining standing and real party in interest requirements in the context of intervention).

Here, as previously discussed, DeBordieu Colony's alleged economic interest is nominal to nonexistent. There was no showing of harm to those economic interests if its owners can continue to use all the navigable waters in North Inlet. Unlike the intervenors in Hoyler, if there is a determination the Baruch Foundation holds title to the tidelands, the members of DeBordieu

Colony will not be prevented from building new docks, they will be able to continue to enjoy their existing docks and boat landings, they can still boat in the canals that their assessments paid to dredge, and they can still boat in North Inlet.

As discussed earlier, the Baruch Foundation, unlike the plaintiff in Hoyler, has not sought a declaration that it has the power to exclude others or restrict their rights to the tidelands. See generally Compl.; c.f. Hoyler, 428 S.C. at 302 (Hoyler's complaint sought a declaration that he possessed all rights of a fee simple property owner including the right to exclude dock construction). The Baruch Foundation's Chairman, Benjamin Zeigler, has publicly professed its position that North Inlet will remain open for recreation:

> First and foremost, ***this court filing will not change the foundation's position on recreational access to North Inlet***, especially for fishing. People will continue to be able to enjoy lawful use of North Inlet and its resources as they have for generations.

(Mot. to Intervene, Ex. D) (double emphasis added).

For these three separate reasons, DeBordieu Colony does not have standing, and the lower court's Orders should be affirmed based on this additional sustaining ground as well.

CONCLUSION

For the reasons discussed above, the Order of the Circuit Court denying DeBordieu Colony's Motion to Intervene should be AFFIRMED.

Respectfully Submitted,

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January 20, 2021
Charleston, South Carolina

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Honorable Paul M. Burch, Circuit Court Judge

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

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 hereby certify that I have served a true copy of the **RESPONDENT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** by delivering copies to the following counsel/parties on **January 20,** 2021, by electronic mail to the following via AIS e-mail address:

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