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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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.

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Court should reject the arguments in Respondent's Response Brief and reverse the decision of the trial court for several reasons.

First, nearly all of Respondent's arguments, and nearly all of the findings in the trial court's Order, are based upon the same premise—namely, that resolution of the claims asserted by the existing parties does not "threaten[] [DeBordieu's] members' recreational use of the tidelands in question." (R. p. 8.) But this premise is false. To see that this premise is false, the Court need only review the pleadings.

Respondent filed this action against the State seeking a declaration that it has fee simple title to the property at issue (the "Property"). (*See generally* R. pp. 30-41.) The State filed an Answer denying that Respondent owns the Property and asserting counterclaims, including a counterclaim seeking to establish, in the alternative, that the public has a prescriptive easement over the Property. (*See generally* R. pp. 42-48.) Specifically, the State alleges in its first counterclaim that the public has an easement over the Property that authorizes the public to use the Property "for fishing, shrimping, crabbing and similar activities." (R. p. 46.) In its Reply to the State's counterclaims, Respondent *denies these allegations without qualification*. (R. p. 49.) Thus, in this litigation, Respondent is seeking to establish that members of the public, which includes members of DeBordieu Colony Community Association, Inc. ("DeBordieu" or "Appellant"), do not have the right to access the Property for fishing, shrimping, crabbing, and similar activities. DeBordieu has submitted unrebutted affidavits establishing that, for the past 45 years, its members have continuously used and accessed the Property for precisely these types of activities; DeBordieu has made significant investments to protect its interests in the Property; DeBordieu receives revenue streams that depend on continued access to the Property; and having access to the Property

for purposes of engaging in these types of activities is important to its and its members' property values. (*See generally* R. pp. 68-75.)

In its Response Brief, Respondent argues that, although the parties are actively litigating whether the public has the right to access the Property for "fishing, shrimping, crabbing, and similar activities"—and although DeBordieu's members are the subset of the public that has demonstrated the greatest interest in accessing the Property for these very purposes—DeBordieu's interests in this litigation are not sufficiently "ripe," and Debordieu does not have a sufficient interest in this litigation to support intervention under Rule 24. But Respondent fails to explain how the public at large could have a ripe dispute over access to the Property while the subset of the public most interested in accessing the Property somehow does not yet have a ripe dispute.

Moreover, like the trial court, Respondent ignores that DeBordieu seeks to protect the status quo where its members have rights of access to the Property. DeBordieu's primary interest in intervention is defending against the Respondent's efforts to declare approximately 8,000 acres of tidelands as its own.

Second, the trial court abused its discretion by applying the wrong legal principles with respect to both mandatory and permissive intervention. In assessing the first and most fundamental requirement for intervention—namely, that the intervening party claim "an interest relating to the property or transaction which is the subject of the action"—the trial court held that DeBordieu does not satisfy this requirement because it does not claim *ownership* of the Property. But, in disputes over real property such as this one, appellate courts have repeatedly (and uniformly) rejected this interpretation of Rule 24(a)(2). *See* Section II, *infra* (citing cases). The trial court also did not even mention, much less apply, the controlling test for the inadequacy of representation requirement of mandatory intervention, and the trial court applied the wrong legal principles

relating to permissive intervention. DeBordieu identified all these errors in its Initial Brief, but in its Response Brief, Respondent either ignores these errors or fails to provide any meaningful response. Because application of the wrong legal principles is, by definition, an abuse of discretion, these errors require reversal of the trial court's ruling. *See State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006) ("An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle . . . .").

Third, Respondent repeatedly mischaracterizes the nature of the Property in dispute and the interests DeBordieu has in the Property. Respondent would have this Court believe that DeBordieu's only interest in the Property is in boating on the portion of the Property that qualifies as a "navigable waterway." But this is simply untrue, and it is not supported by the record. As an initial matter, every portion of the Property reachable by boat is not a "navigable waterway," as that term is defined under South Carolina law. *See White's Mill Colony Inc. v. Williams*, 363 S.C. 117, 126–28, 609 S.E.2d 811, 816–17 (Ct. App. 2005) (holding that "[i]t is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable") (quoting *Heyward v. Farmers' Mining Co.*, 42 S.C. 138, 155, 19 S.E. 963, 972 (1894)). Moreover, DeBordieu's members have continuously accessed the Property for decades to engage in numerous activities, only one of which is boating. (*See, e.g.*, R. p. 70 (confirming that DeBordieu's members have continuously accessed the Property for over 45 years for purposes of "fishing, kayaking, boating, paddle boarding, crabbing, harvesting oysters, and other recreational activities").) Indeed, these are the very types of activities that the State has alleged the public may pursue on the Property pursuant to a prescriptive easement. As noted above, Respondent has denied these allegations in their entirety and is seeking to establish that no such easement exists. In any event, Respondent's attempt to characterize this litigation as primarily relating to navigable

waterways is belied by a simple truth that is never addressed in Respondent's Brief: because navigable waterways are freely accessible to the public, Respondent's motivation in bringing this litigation must be its desire to establish title over the portions of the Property that *are not* navigable waterways but are nevertheless valuable.

Fourth, Respondent fails to explain how two of the trial court's findings can be reconciled. On the one hand, the trial court found that the State is adequately representing DeBordieu's interests, and that DeBordieu's alleged interest in this litigation "is *identical* to that asserted by the State." (R. p. 14 (emphasis added).) On the other hand, the trial court also found that DeBordieu's intervention would "greatly expand the narrow reach of the issues joined in the pleadings." (R. p. 17.) These two findings are irreconcilable. Because DeBordieu seeks to introduce additional facts and make additional arguments based on its unique perspective as the next-door neighbor that has accessed the Property for decades, and because the counterclaim DeBordieu seeks to assert is not the same as the counterclaim asserted by the State, the State will not "undoubtedly" make "all" of DeBordieu's arguments, and therefore will not adequately represent DeBordieu's interests in this litigation. *See Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 191, 394 S.E.2d 712, 715 (1990) (holding that, in assessing adequacy of representation for purposes of Rule 24(a)(2), the Court must consider "whether the existing parties will undoubtedly make all of the intervenor's arguments").

In sum, DeBordieu has demonstrated, through unrebutted affidavits, that it has a material interest in the Property at issue in this litigation. Further, DeBordieu's interests will not be adequately protected if it is shut out of the courtroom when this case is tried. The South Carolina Supreme Court has held that it "interpret[s] the rules to permit liberal intervention, particularly where as here, judicial economy will be promoted by the declaration of the rights of all parties

who may be affected." *Berkeley Electric*, 302 S.C. at 189, 394 S.E.2d at 714. For these reasons, and because the trial court applied the wrong legal principles, this Court should reverse the decision of the trial court and remand with directions to grant DeBordieu's motion to intervene.

ARGUMENT

I. THE TRIAL COURT APPLIED THE WRONG LEGAL PRINCIPLES WITH RESPECT TO THE FIRST ELEMENT OF RULE 24(a)(2).

The trial court erred when it held that DeBordieu fails to meet the first element of Rule 24(a)(2) because it does not "claim an interest relating to *the title to* the tidelands in questions [sic]." (*See* DeBordieu Br. at 12-15 (quoting R. p. 10).) In its Response Brief, Respondent argues, with no citation to authority, that the trial court's interpretation 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." (Resp't Br. at 11.) Respondent is incorrect for several reasons.

First, the plain language of Rule 24(a)(2) forecloses the interpretation advanced by Respondent and applied by the trial court. The Rule requires only that the intervening party claim "an interest *relating to* the property . . . which is the subject of the action." Rule 24(a)(2), SCRCP (emphasis added). The drafters of Rule 24(a)(2) could have required intervening parties to claim "ownership of" or "title to" the property which is the subject of the action, but they chose to require only an interest "relating to" the property.

Second, in discussing the "interest" required for intervention, this Court has held that "[i]nterest means any interest in the action, legal or equitable, as would make a party a proper party to the action." *Bankers Tr. of S.C. v. Bruce*, 283 S.C. 408, 417, 323 S.E.2d 523, 529 (Ct. App. 1984). DeBordieu's claim to a prescriptive easement over the Property is a claim to a legal or equitable interest in the Property that would make it a proper party to this action. Moreover,

DeBordieu has an equitable interest in this action as a result of its financial investments in maintaining access to the Property, the impact that losing access to the Property would have on the property values of DeBordieu and its members, and the revenue streams that DeBordieu receives based in part on access to the Property.

Third, appellate courts routinely reject the interpretation of Rule 24(a)(2) advanced by Respondent and applied by the trial court. *See, e.g.*, *Kane Cty., Utah v. United States*, 928 F.3d 877, 891–92 (10th Cir. 2019) (reversing district court's decision denying a conservation group's motion to intervene in a quiet title action, and holding that, even though the conservation group did not claim title to the property at issue, Rule 24(a)(2)[1] "requires only that the applicant for intervention 'claim an interest *relating to* the property or transaction which is the subject of the action'") (emphasis in original) (internal citations omitted); *Vashon Island Comm. for Self-Gov't v. Washington State Boundary Review Bd. for King Cty.*, 903 P.2d 953, 956 (Wash. 1995) (rejecting argument that a nonprofit organization lacked a sufficient interest in the property at issue under Rule 24(a)(2), where the nonprofit organization did not claim ownership of any of the property but "exist[ed] to promote preservation of the rural nature of" the property). Moreover, appellate courts routinely hold that an intervening party claiming a right to an easement over the property in dispute—as DeBordieu claims here—has a sufficient interest to intervene. *See, e.g.*, *Rendler v. Lincoln Cty.*, 728 P.2d 21, 23–25 (Or. 1986) (rejecting the argument that intervening party's claim to an easement over the property at issue was not a sufficient interest to support intervention); *Lake Cty. Forest Pres. Dist. v. First Nat. Bank of Waukegan*, 571 N.E.2d 1115, 1117

[1] Federal Rule of Civil Procedure 24(a)(2) and South Carolina Rule of Civil Procedure 24(a)(2) are substantively identical.

(Ill. Ct. App. 1991) ("Easements are considered substantial property interests, and, as such, the City had standing to intervene in the condemnation action.").

Fourth, Respondent and the trial court have not cited *one* case, from any jurisdiction, supporting its rewriting of Rule 24(a)(2).

In sum, the trial court applied the wrong legal principles with respect to the most fundamental element of intervention—the interest required of the intervening party. This was an abuse of discretion and requires reversal. *See Allen*, 370 S.C. at 94, 634 S.E.2d at 656 ("An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle . . . .").

II. RESPONDENT MISCHARACTERIZES THE PROPERTY AT ISSUE AND DEBORDIEU'S INTEREST IN IT.

Under the South Carolina Constitution, "all navigable waters shall forever remain public highways free to the citizens of the State." S.C. Const. art. XIV, § 4. Thus, even if Respondent establishes ownership over the Property in this action, Respondent cannot exclude DeBordieu's members, or anyone else, from any portions of the Property that qualify as navigable waters. Throughout its Response Brief, Respondent argues or implies that DeBordieu's only interest in the Property is in boating on the portion of the Property that qualifies as navigable waters. (*See generally* Resp't Br.) Thus, according to Respondent and the trial court, DeBordieu has no interest in the Property that is not already protected by the public's right to access navigable waters. Again, Respondent and the trial court are incorrect for several reasons.

First, it is undisputed that much of the Property does not qualify as navigable waters. Notably, notwithstanding its unyielding effort to focus attention on navigable waters, Respondent's Brief is silent as to the percentage of the Property that it concedes qualifies as

navigable waters. In *White's Mill Colony Inc. v. Williams*, 363 S.C. 117, 126-29, 609 S.E.2d 811, 816-17 (Ct. App. 2005), this Court discussed at some length the types of waters that do and do not constitute "navigable waters." As this Court explained at the outset of its discussion:

> Of course, not every body of water is "navigable." The concept of navigability encompasses more than the capacity to support valuable floatage in a single, secluded spot. Rather, to be properly categorized as navigable, the watercourse in question must also be connected to other navigable bodies of water such that it forms a means of transportation or conveyance beyond an isolated locality. This requirement of a navigable connection to a broader system of waterways has been at the heart of the navigability concept since its earliest application in this jurisdiction and others.

Id. This Court then recognized that the South Carolina Supreme Court has "emphasized the primary policy objective that navigable waters remain open to ensure ease of travel, whether for commerce or recreation," and quoted an earlier Supreme Court opinion as stating that "[i]t is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable." *Id.* (quoting *Heyward v. Farmers' Mining Co.*, 42 S.C. 138, 155, 19 S.E. 963, 972 (1894)). As explained in DeBordieu's Initial Brief, the trial court repeatedly conflated "tidelands" with "navigable waters," and in its Response Brief, Respondent continues this practice.[2]

Second, DeBordieu has established through unrebutted affidavits that its members access the Property for many activities other than boating and have done so for decades. (*See generally*

[2] Under South Carolina law, "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." S.C. Code § 48-39-10(G).

R. pp. 68-75 (confirming that DeBordieu's members have continuously accessed the Property for over 45 years for purposes of "fishing, kayaking, boating, paddle boarding, crabbing, harvesting oysters, and other recreational activities").) DeBordieu seeks to intervene to assert counterclaims that will protect the right of its members to access the Property for all of these purposes.

Third, in its pleadings, Respondent denies that the public has the right to access the Property for purposes of engaging in precisely the types of activities in which DeBordieu's members seek to engage. (R. p. 49 (denying the State's allegations that the public has an easement over the Property that authorizes the public to use the Property "for fishing, shrimping, crabbing and similar activities").) Thus, if Respondent is successful in establishing fee simple title to the Property and in opposing the State's counterclaims, Respondent can be expected to claim that it has legally established that the public does not have the right to access the Property for these purposes. Accordingly, if Respondent is successful in this litigation, the undisputed right of the public to access navigable waters will not eliminate the harm to DeBordieu's members.

Finally, Respondent argues that DeBordieu is prematurely seeking to establish its rights in Property prior to any real case or controversy. But Respondent ignores that DeBordieu is merely seeking to protect its interests in the Property by maintaining the status quo. It is Respondent that started this fight by asking the court to grant it more rights than the current circumstances provide and, in addition, eliminate the rights of others including DeBordieu. Respondent is seeking a legal determination that it has title to approximately 8,000 acres of tidelands which would necessarily establish Respondent's right to exclude others from the Property, and Respondent is taking the position that the public, including DeBordieu's members, does not have an easement permitting access to these tidelands. Because DeBordieu's members have accessed these tidelands for decades, and because DeBordieu has made considerable investments to support such access,

DeBordieu should be permitted to intervene in this action and protect its legal and equitable interests in the Property at issue.

III. DISPOSITION OF THIS ACTION WILL, AS A PRACTICAL MATTER, IMPAIR OR IMPEDE DEBORDIEU'S ABILITY TO PROTECT ITS INTERESTS.

The second requirement for intervention under Rule 24(a)(2) is that the intervening party show that resolution of the action without the intervening party's presence "*may* as a practical matter impair or impede" the intervening party's ability to protect its interest. Rule 24(a)(2), SCRCP (emphasis added). Here, DeBordieu seeks to establish that Respondent does not have fee simple title to the Property and, in the alternative, that it has a prescriptive easement over the Property. (*See generally* R. pp. 76-84.) Respondent, on the other hand, is seeking to establish through this litigation that it *does* have fee simple title to the Property and that the public—which includes DeBordieu's members—does *not* have a prescriptive easement over the Property. Under these circumstances, it is undeniable that resolution of this action "may," as a practical matter, impair or impede DeBordieu's ability to protect its interests in this action.

Identifying ways in which the resolution of this action "may," as a practical matter, impair or impede DeBordieu's interests requires little imagination. In its Brief, Respondent again ignores the impact that a declaration of ownership would have on the rights DeBordieu claims. Instead, Respondent focuses on the prescriptive easement counterclaim and argues that, if it establishes through this action that it has fee simple title to the Property and that the public does not have an easement over the Property, DeBordieu will not be barred from bringing a later action to establish that it has an easement over the Property. (*See* Resp't Br. at 16-17.) Even the limited focus on the counterclaim is unavailing, however, because the ability to pursue a later action is not the test. *See Berkeley Electric*, 302 S.C. at 190–91, 394 S.E.2d at 715 (holding that, to satisfy the second

requirement of Rule 24(a)(2), "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"). If Respondent is successful in this litigation—meaning it has obtained a judgment confirming that it owns the Property and that the public does not have an easement over the Property—and if DeBordieu later seeks to establish that it has an easement over the Property, is there any doubt that Respondent will seek to use the judgment from this action offensively in its subsequent litigation with DeBordieu? No. And is there any doubt that Respondent's use of its success in this action will, as a practical matter, impair or impede DeBordieu's ability to prove that it has an easement over the Property? Again, no. Witnesses will have testified and the court will have issued orders without DeBordieu's participation, without DeBordieu having an opportunity to be heard. Respondent would then have the opportunity to assert issue preclusion on certain factual and legal issues. DeBordieu raised these important points in its Initial Brief (DeBordieu Br. at 17), and Respondent has refused to address them. (*See generally* Resp't Br.)

Moreover, under this scenario, the parties to this action will have litigated Respondent's ownership of the Property while DeBordieu was shut out of the courthouse. If DeBordieu is permitted to intervene and can establish that Respondent does not own the Property in the first place, it will have no need to establish a prescriptive easement over the Property through later litigation. It will have preserved its rights and prevented Respondent from eliminating them. Not only does Respondent seek to eliminate the rights DeBordieu claims to have without DeBordieu present, it is going to great lengths to try to prevent DeBordieu from having an opportunity to be heard on these issues.

For all of these reasons, DeBordieu easily satisfied the second element of Rule 24(a)(2), and the trial court's finding to the contrary was an abuse of discretion.

IV. THE TRIAL COURT APPLIED THE WRONG LEGAL PRINCIPLES WITH RESPECT TO THE INADEQUACY OF REPRESENTATION ELEMENT OF RULE 24(a)(2).

The third element of Rule 24(a)(2) requires the intervening party to show that its interests may not be adequately represented by the existing parties. Rule 24(a)(2), SCRP. The South Carolina Supreme Court has held that "[t]his burden is minimal and the applicant need only show that the representation of his interests 'may be' inadequate." *Berkeley Electric*, 302 S.C. at 191, 394 S.E.2d at 715. Further, the South Carolina Supreme Court has adopted the *Sagebrush* factors, as set forth in the Ninth Circuit opinion of *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983), as the test for determining whether this element of Rule 24(a)(2) is satisfied. *See Berkeley Electric*, 302 S.C. at 190, 394 S.E.2d at 715; *see also In re Horry Cnty. State Bank*, 361 S.C. 503, 508–09, 604 S.E.2d 723, 726 (Ct. App. 2004) (describing *Sagebrush* as "the leading case on intervention of right" and recognizing that the South Carolina Supreme Court has "adopted the . . . *Sagebrush* factors for determining the adequacy of representation").

In its Order denying DeBordieu's motion to intervene, the trial court never even cites the *Sagebrush* case, much less applies the *Sagebrush* factors. (*See generally* R. pp. 5-19.) In its Response Brief, Respondent does not explain why it was permissible for the trial court to ignore the controlling test for this element of Rule 24(a)(2), and instead criticizes DeBordieu for "fall[ing] back on the so-called *Sagebrush* factors." (Resp't Br. at 19.) Because applying the wrong legal principles is an abuse of discretion, the Court should reverse the trial court order for this additional reason. *See Allen*, 370 S.C. at 94, 634 S.E.2d at 656 ("An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle . . . .").

V. APPLICATION OF THE *SAGEBRUSH* FACTORS DEMONSTRATES THAT, AT A MINIMUM, THE STATE "MAY" NOT ADEQUATELY REPRESENT DEBORDIEU'S INTERESTS.

The *Sagebrush* factors that the Court must consider when assessing whether the existing parties "may" not adequately represent the interests of the intervening party are 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.

Berkeley Electric., 302 S.C. at 191, 394 S.E.2d at 715. Here, each of these factors weighs in favor of finding that DeBordieu has met its "minimal" burden of establishing that the State may not adequately represent its interests.

A. <u>The existing parties will not undoubtedly make all of DeBordieu's arguments.</u>

Respondent does not even argue, and the trial court did not find, that the State will undoubtedly make all of DeBordieu's arguments. (*See generally* Resp't Br.; R. pp. 5-19.) To the contrary, the trial court's Order acknowledged that DeBordieu and the State will not make the same arguments. (R. p. 17.) Likewise, at the hearing on DeBordieu's motion to intervene, Respondent acknowledged that the State will not advance all of DeBordieu's arguments. (*See* R. p. 228, lines 11-25 (Respondent's counsel opposing intervention on the basis that, "in the mode of trial that [the State's counsel] and I had agreed to, we could be before a judge trying this case ten days from now, and this is – if this motion to intervene is granted, it *will bog down this simple issue for, goodness, who knows how long*") (emphasis added). Of course, Respondent's counsel is concerned that DeBordieu will "bog down" what would otherwise be a simple issue because DeBordieu will make arguments and raise issues that the State will not.

Further, in its proposed answer, DeBordieu asserts the affirmative defenses of laches and

estoppel. (R. pp. 76-85.) The State has not asserted these affirmative defenses in its Answer. (*See generally* R. pp. 42-48.) This is fatal to any argument that the State undoubtedly will make all of DeBordieu's arguments. In its Response Brief, Respondent merely says that DeBordieu "does not proffer any legal precedent" for these affirmative defenses. (Resp't Br. at 20.) But it is not necessary (or even proper) for DeBordieu to litigate the merits of its affirmative defenses at the motion to intervene stage.[3] *See, e.g.*, *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980) (reversing district court's denial of a motion to intervene and holding that "a determination of the merits of [the intervenor's] claim is not appropriate at this threshold stage").[4]

Finally, the State will not make all of the same arguments that DeBordieu would make for the simple reason that the State's counterclaims are different from the counterclaim DeBordieu seeks to assert. If allowed to intervene, DeBordieu will make arguments in support of its

[3] Laches and estoppel are the same affirmative defenses asserted by the intervening party in *Hoyler*. *See Hoyler v. State*, 428 S.C. 279, 288, 833 S.E.2d 845, 850 (Ct. App. 2019). In *Hoyler*, as in this action, the plaintiff brought an action against the State to establish title to property under South Carolina Code Section 48-39-220.

[4] In the "Statement of the Facts" section of its Response Brief, Respondent argues that it received title to the Property from certain sovereign grants that were confirmed in a federal court decision in 1894. (Resp't Br. at 4 (quoting *Chisolm v. Caines*, 67 F. 285 (D.S.C. 1894).) Again, Respondent's attempt to argue the merits of the underlying case in the context of intervention is improper. *See Am. Tel. & Tel. Co.*, 642 F.2d at 1291; *see also Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999) ("An application for intervention cannot be resolved by reference to the ultimate merits of the claim the intervenor seeks to assert unless the allegations are frivolous on their face."); *DeVoe v. State*, 935 P.2d 256, 261 (Mont. 1997) ("DeVoe's argument is misplaced in the context of the City's motion to intervene as of right. It is premised on an ultimate resolution in DeVoe's favor of the substantive issues raised in the case and, as a general matter and specifically in this case, the resolution of substantive issues on the merits comes later in the proceedings than a motion to intervene in hopes of affecting that resolution. Thus, issues relating to the City's motion to intervene cannot be dependent on whether DeVoe ultimately prevails; indeed, if a plaintiff were allowed to prevent intervention at the outset of an action, by a person with an adverse interest in the action, by merely asserting that the plaintiff's position would prevail at the end of the action, no intervention as of right under Rule 24(a), M.R.Civ.P., could ever be accomplished.").

counterclaim that *DeBordieu* (not the public at large) has an easement over the Property based on, among other things, the extent to which DeBordieu's members (not the public at large) have accessed the Property over the years. There is no reason to believe the State may make—much less *undoubtedly* will make—the same arguments as DeBordieu because the State is not seeking to establish that DeBordieu has an easement over the Property. DeBordieu should not be forced to rely on the State's much broader—and likely more difficult—counterclaim to protect its members' interests.

B. The existing parties are unwilling or incapable of making DeBordieu's arguments.

In this case, the second *Sagebrush* factor weighs in favor of finding that the State may not adequately represent DeBordieu's interests for many of the same reasons as with the first *Sagebrush* factor. DeBordieu has asserted affirmative defenses that the State has not. The prescriptive easements the parties are seeking are substantively different and would require different facts to prove. Respondent and the trial court both acknowledged the State's unwillingness to address DeBordieu's "wide ranging" concerns related to DeBordieu's previous investments, its members' property values, and its members' historic use of the Property. (R. p. 17.) Moreover, the State's decision not to demand a jury trial, along with the joint motion to bifurcate filed by Respondent and the State, underscore the State's inability or unwillingness to make DeBordieu's arguments. While Respondent insists there has not been any attempt to "fast track" the trial, it argued to the trial court that permitting intervention in this case would "bog down" the proceedings. (R. p. 228, lines 23-25.) These facts are sufficient to establish the second *Sagebrush* factor.

C. DeBordieu offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

In its Response Brief, Respondent does not dispute that DeBordieu represents a community of neighboring property owners who have used the Property for decades. Nor does Respondent dispute that the State lacks knowledge of DeBordieu's specific history of using and investing in access to the Property. Respondent also does not dispute that DeBordieu is asserting affirmative defenses and counterclaims that are different from those being asserted by the State. For all of these reasons, DeBordieu offers knowledge, experience, or perspective that would otherwise be absent.

In its Response Brief, Respondent argues that DeBordieu lacks experience and expertise in litigating king's grant tidelands cases. (Resp't Br. at 21.) But this is not the test, and Respondent does not cite any case, from any jurisdiction, holding that the third *Sagebrush* factor requires the intervening party to have experience litigating similar cases.

VI. RESPONDENT'S OTHER ARGUMENTS REGARDING THE INADEQUACY OF REPRESENTATION ELEMENT FAIL.

Both Respondent and the trial court rely on the Attorney General's qualifications and experience to support the conclusion that the State is adequately representing DeBordieu's interests. (Resp't Br. at 19; R. p. 14.) But the Attorney General's qualifications and ability are irrelevant to the intervention analysis. In *Sagebrush*, the court specifically held that "Rule 24 requires that we look to the adequacy or inadequacy of representation by 'existing parties,' not counsel." *Sagebrush Rebellion, Inc.*, 713 F.2d at 529. Notably, neither Respondent nor the trial court cite to any case, from any jurisdiction, in which the question of adequate representation was decided based on the qualifications or ability of counsel.

Also, in arguing that the State adequately represents DeBordieu's interests, Respondent

contends that the State and DeBordieu have the same interests in this litigation and thus that, under *S.C. Tax Comm'n v. Union Cty. Treasurer*, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988), a presumption of adequacy arises. In its Order denying DeBordieu's Motion to Intervene, the trial court accepted this argument. (R. pp. 14-16.) Respondent and the trial court are incorrect for several reasons.

First, this Court issued its opinion in *S.C. Tax Commission* before the South Carolina Supreme Court adopted the *Sagebrush* factors in *Berkeley Electric.* Thus, to the extent *S.C. Tax Commission* adopts a test for adequacy of representation that is different from the *Sagebrush* factors test adopted in *Berkeley Electric*, the *S.C. Tax Commission* holding no longer remains good law.

Second, even if *S.C. Tax Commission* remains good law, the presumption of adequacy that applied in that case does not apply here. In *S.C. Tax Commission*, this Court held that a presumption of adequacy of representation arises "[w]hen an applicant for intervention and an existing party have *the same* interests or ultimate objective in the litigation." *S.C. Tax Comm'n*, 295 S.C. at 260, 368 S.E.2d at 74. Here, DeBordieu's interests in this litigation are not the same as the State's interests. The State and DeBordieu are claiming two *different* easements and are alleging that these different easements arise as a result of *different* facts. (*Compare* R. p. 46 (alleging that *the public* has a prescriptive easement as a result of *the general public* using the Property at issue) *with* R. pp. 80-81 (alleging that *DeBordieu* has a prescriptive easement as a result of *DeBordieu's owners* using the Property at issue). An easement held by the general public is simply not the same as an easement held by a specific group of property owners. Likewise, the facts that the State must prove to establish an easement held by the general public are different from the facts that DeBordieu must prove to establish an easement held by DeBordieu. Further,

DeBordieu and the State have asserted different defenses to Respondent's declaratory judgment claim.

Third, as the South Carolina Supreme Court has recognized, the State's interests are the interests of the general public, which often are not the same as the interests of a private party like DeBordieu. Accordingly, because the government must prioritize the general public's interests over any narrower interests held by the intervenor, courts often find that representation by governmental entities is inadequate, especially where, as here, an intervenor has private financial interests in an action. *See, e.g.*, *Dimond v. D.C.*, 792 F.2d 179, 192–93 (D.C. Cir. 1986) (holding that intervenor held "more narrow and 'parochial' financial interest" in action, not shared by general public); *Nat'l Farm Lines v. I. C. C.*, 564 F.2d 381, 384 (10th Cir. 1977) ("We have here also the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible.").[5]

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[5] *See also Nat'l Parks Conservation Ass'n v. U.S. E.P.A.*, 759 F.3d 969, 977 (8th Cir. 2014) (distinguishing EPA's interests in ensuring compliance with regulatory procedures with intervenor's financial interest in power plant at issue in underlying regulatory action); *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 1001 (8th Cir. 1993) ("Because the counties and the landowners seek to protect local and individual interests not shared by the general citizenry of Minnesota, no presumption of adequate representation arises. . . . The interests that the counties and the landowners assert in their property are different from the state's interests in its lands. The mere fact that the state has interests in land is no guarantee that it will adequately represent the counties and the landowners' interests.").

Respondent makes much of the fact that the South Carolina Supreme Court stopped short of adopting a *per se* rule that a governmental entity can *never* adequately represent a private party's interests. (Resp't Br. at 18.) But DeBordieu is not arguing that a *per se* rule exists, only that the Supreme Court and other courts recognize that the general public's interests are often not the same as a private entity's interests. In such cases, when the government's litigation efforts are driven by the broad, general interest of the public, as they must be, the government often does not adequately represent a more pointed private interest.

Finally, Respondent's and the trial court's reliance on *In re Horry Cnty. State Bank*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004) is misplaced. In *Horry County*, a mortgagor bank sought to intervene in an action to terminate its mortgagee's easement. The *Horry County* court recognized that both parties held a financial interest in preserving the mortgagee's easement and held that the mortgagee adequately represented the bank's interest in the action because "the [b]ank's mortgage on the parking easement is only as good as [its mortgagee's] right to use it." *Id.* at 510, 604 S.E.2d at 727. Thus, in *Horry County*, this Court found that the intervening party's interests were adequately represented by an existing party because both the intervening party and the existing party sought to protect their interests in *the same easement*. Moreover, *Horry County* did not involve a governmental entity. Thus, *Horry County* is inapposite.

VII. THE TRIAL COURT APPLIED THE WRONG LEGAL PRINCIPLES WITH RESPECT TO PERMISSIVE INTERVENTION.

In its Initial Brief, DeBordieu argued that the trial court applied the wrong legal principles when deciding whether to grant DeBordieu's motion for permissive intervention under Rule 24(b). Specifically, DeBordieu argued that the trial court erred by requiring DeBordieu to show that it raised a question of law or fact that was common to Respondent's *Complaint*, whereas Rule 24(b) requires only that the intervening party raise a question of law or fact common to "*the main action*." (DeBordieu Br. at 21.) This was no harmless error because the trial court specifically found that DeBordieu *did* raise a question of law or fact in common with the State's counterclaim (i.e. in common with "the main action"). (DeBordieu Br. at 21 (citing R. p. 16).) In its Response Brief, Respondent simply ignores this argument. (*See generally* Resp't Br.)

Further, in its Initial Brief, DeBordieu argued that the trial court erred by imposing a requirement that does not exist under Rule 24(b)—namely, the requirement that DeBordieu show

the existing parties do not adequately represent its interests. (DeBordieu Br. at 21-22.) Again, in its Response Brief, Respondent simply ignores this argument. (*See generally* Resp't Br.)

The trial court's application of the wrong legal principles with respect to permissive intervention is an abuse of discretion that requires reversal. *See Allen*, 370 S.C. at 94, 634 S.E.2d at 656 ("An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle . . . .").

VIII. DEBORDIEU HAS STANDING, AND DEBORDIEU'S INTERESTS IN THIS LAWSUIT ARE "RIPE."

Respondent argues that, even if DeBordieu meets the requirements for intervention under Rule 24, DeBordieu should not be permitted to intervene because DeBordieu lacks organizational standing. (Resp't Br. at 31-34.) Respondent also argues that DeBordieu's interests in this litigation are not "ripe." (Resp't Br. at 23-31.) Respondent is incorrect on both counts.

A. DeBordieu has standing.

In its Response Brief, Respondent argues for the first time that DeBordieu lacks standing and that this is an additional sustaining ground for the trial court's ruling. (Resp't Br. at 32-33.) Respondent is incorrect for at least two reasons.

First, Respondent's argument that DeBordieu lacks standing assumes that an organization must rely on "associational standing" or "representational standing" to establish its standing in a lawsuit. But this assumption is incorrect. An organization may have standing in its own right, without any need to rely on associational standing or representational standing, where, as here, the organization itself will suffer an injury if the plaintiff is successful in the litigation. *See Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012) ("An organization may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission."); *Kane Cty., Utah v. United States*,

928 F.3d 877, 891–92 (10th Cir. 2019) (holding that SUWA, which was "a member-based nonprofit dedicated to preserving the wilderness of the Colorado Plateau," had "its own independent standing" because "SUWA's environmental concern is a legally protectable interest," and because the plaintiffs' lawsuit seeking the right to widen certain roads was sufficient to establish an "imminent injury" to SUWA). DeBordieu has submitted unrebutted affidavits confirming that it has a financial interest in maintaining access to the Property. (*See generally* R. pp. 68-75 (confirming that DeBordieu has invested millions of dollars in reliance on access to the Property, and confirming that DeBordieu receives revenue from boat registrations, boat storage, and guest boating passes, all of which depend on continued access to the Property)).

Second, DeBordieu also has "associational standing" or "representational standing," based on the standing of its members. An organization has standing to act on behalf of its members when three conditions are met:

> (1) at least one member would otherwise have standing (statutory, constitutional, or otherwise) to sue in his or her own right,
> (2) the interests at stake are germane to the organization's purpose, and
> (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control, 430 S.C. 200, 211, 845 S.E.2d 481, 487 (2020).

To the extent Respondent argues that DeBordieu has failed to meet the first condition, it simply restates the arguments regarding DeBordieu's members' supposed lack of interest in this litigation. DeBordieu has addressed those arguments at great length in the initial brief and above and will not repeat them here.

Respondent primarily relies on the second element, arguing that the interests at stake in

this litigation are not "germane" to DeBordieu's purpose as an organization. (Resp't Br. at 32-33.) In support of this argument, Respondent relies on Blanche Brown's affidavit describing DeBordieu as "the vehicle by which owners of property in DeBordieu Colony govern its internal and external affairs." (Resp't Br. at 33 (citing R. pp. 69-70).)

The South Carolina Supreme Court recently recognized that "the germaneness requirement is undemanding." *Preservation Society of Charleston*, 430 S.C. at 217, 845 S.E.2d at 490 (quoting *St. Louis Ass'n of Realtors v. City of Ferguson*, 354 S.W.3d 620, 625 (Mo. 2011)). This "undemanding" standard is intended to promote the policy aims of organizational standing, such as "promot[ing] judicial economy and efficiency by avoiding repetitive and costly independent actions by individual members, and [allowing] members . . . to pool their financial resources and legal expertise to help ensure complete and vigorous litigation of the issues." *See id.* at 211, 845 S.E.2d at 487; *St. Louis Association of Realtors*, 354 S.W.3d at 625 ("Requiring otherwise would undermine the primary rationale of associational standing, which is that organizations are often more effective at vindicating their members' shared interests than would be any individual member.").

DeBordieu's interests in this case easily satisfy the "germaneness" requirement. As an initial matter, the word "germane" indicates that the interests at stake in the litigation need only be relevant to the organization's purpose. *See* Black's Law Dictionary (11th ed. 2019) (defining "germane" as "relevant" or "pertinent"). This requirement does not require that the action fall within the specific contours of an organization's governing documents, as Respondent suggests. DeBordieu property owners' rights to access the Property are plainly relevant to DeBordieu's internal and external affairs. This is particularly true considering DeBordieu investing approximately three-million dollars into dredging projects to preserve its access, financed by

reserve funds, dues, and special assessments on its members. DeBordieu also collects funds through the registration of boats, provision of boat storage spaces, and issuance of guest boating passes, all of which depend on DeBordieu's access to the Property. (*See* R. pp. 68-75.)

B. DeBordieu's interests in this lawsuit are ripe.

Respondent's arguments regarding ripeness are almost entirely rehashes of Respondent's arguments relating to intervention under Rule 24. As a result, Respondent's arguments regarding ripeness suffer from the same deficiencies as Respondent's intervention arguments. DeBordieu has addressed those deficiencies above, *see* Sections II, III, and IV, *supra*, and will not repeat those arguments here. DeBordieu will, however, briefly address a few arguments made by Respondent relating to ripeness that are not subsumed in the discussion of Rule 24.

First, Respondent argues that DeBordieu's interests in this lawsuit are too "contingent" because DeBordieu will only suffer an injury if six separate contingencies occur. (Resp't Br. at 24-25.) But the six "contingencies" that Respondent identifies can be boiled down to two contingencies: (1) Respondent is successful in this litigation, and (2) Respondent exercises its legal right to exclude others from the Property. (*See id.*) As an initial matter, all of these contingencies need not occur for DeBordieu to experience an injury. If Respondent is successful in this litigation and therefore gains the right to exclude DeBordieu's members from approximately 8,000 acres of tidelands, this constitutes an injury to DeBordieu, irrespective of whether and to what extent Respondent exercises its right to exclude. Moreover, Respondent assumes that an injury is too speculative to confer standing if the injury is contingent on the outcome of the litigation. This is incorrect. *See Kane Cty.*, 928 F.3d at 888 (holding that, for purposes of the injury required for an intervening party to have standing, "[a]n injury may be imminent even though contingent upon an unfavorable outcome in litigation"); *Hoyler v. State*, 428 S.C. 279, 305–06, 833 S.E.2d 845, 859

(Ct. App. 2019) (finding that the intervening party had standing where a decision favoring the plaintiff would cause an injury to the intervening party by giving the plaintiff the right to exclude the intervening party from the property, but where a decision favoring the defendant "redresses [the intervening party's] injury-in-fact").

Next, Respondent and the trial court both rely on *Orr v. Clyburn*, 277 S.C. 536, 290 S.E.2d 804 (1982) to demonstrate that DeBordieu's claims are not ripe. In *Orr*, a plaintiff-sheriff's attempt to enjoin the Human Affairs Commission from initiating an investigation into a complaint against him was deemed unripe because there was no guarantee the investigation would result in charges. *Id.* at 540-43, 290 S.E.2d at 806–07. Respondent and the trial court seek to analogize this case to the investigation in *Orr*, claiming that DeBordieu would suffer harm only if Respondent decides to enforce the rights it claims. (Resp't Br. at 28.) This analogy fails. The court in *Orr* rested its decision on the fact that the Human Affairs Commission's investigatory powers were "non-adjudicatory." *Id.* at 541, 290 S.E.2d at 806. As the Court explained:

> [T]he final step in the respondents' investigation, even if adverse to appellant (a determination that there was reasonable cause to believe that the employer discriminated unlawfully against the applicant) would be lifeless, could fix no obligation, could impose no liability, would have no determinative consequences, and would not be binding on the employer . . . .

Id. at 540–41, 290 S.E.2d at 806. Of course, this action does not involve "non-adjudicatory" or "investigatory" powers. Indeed, this case is less analogous to the pre-suit investigation in *Orr* and more analogous to the legal action the Sheriff sought to avoid. If DeBordieu had sought to enjoin Respondent from investigating their title claims, hiring counsel, or even filing this action, *Orr* would be on point. But, at this juncture, the parties' rights and obligations are being litigated. *Orr* is not just inapposite; its distinction demonstrates DeBordieu's point.

Finally, Respondent's arguments regarding ripeness fail to address how the State's counterclaims could be ripe while DeBordieu's counterclaim is not. There is no dispute with respect to ripeness or standing vis-à-vis the State's counterclaim seeking to establish an easement over the Property for purposes of fishing, shrimping, crabbing and similar activities. Respondent never explains how the State's counterclaim seeking to establish a public easement over the Property is ripe, but DeBordieu's claim seeking to establish an easement over the Property for the same purposes is not ripe. Put differently, how could litigating the public's right to an easement be ripe, while litigating an easement of the subset of the public most interested in using the Property not be ripe?

CONCLUSION

For the foregoing reasons, and for the reasons set forth in DeBordieu's Initial Brief, this Court should reverse the trial court's denial of DeBordieu's Motion to Intervene and remand with directions to allow DeBordieu to intervene as a party to this action.

Respectfully submitted,

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May 4, 2021
Charleston, South Carolina

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SC Court of Appeals

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

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.

CERTIFICATE OF COUNSEL

I, Robert L. Wehrman, certify that the Final Brief, Final Reply Brief of Appellant, and Final Reply Brief to the State's Brief comply with Rule 211(b) of the South Carolina Rules of Appellate Practice.

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May 4, 2021
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