

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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May 06 2021

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Paul M. Burch, Circuit Court Judge

SC Court of Appeals

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 BRIEF OF THE STATE OF SOUTH CAROLINA

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INTRODUCTION

The Defendant State of South Carolina filed a Motion for Leave to File Abbreviated Brief as to DeBordieu's appeal of the denial of its motion to intervene. The State requested that it be relieved of requirements to include statements of the case and issues and tables of contest and authorities in the brief. This Court granted the State's Motion by Order dated February 1, 2021.

ARGUMENT

DEBORDIEU IMPROPERLY RELIES ON BASELESS SPECULATION ABOUT THE STATE'S INTEREST IN AND DEFENSE OF THIS CASE

The State consented to DeBordieu's intervention¹ and takes no position on the merits of its appeal except that the State does object to DeBordieu's speculation about and mischaracterization of the State's interest in and defense of this case. *See* Appellant's Brief at p. 19. These baseless arguments do not support DeBordieu's argument that its interests are not adequately represented.

DeBordieu asserts that "the State will not fight Respondent's claims with the same determination that DeBordieu would." Brief at p. 19. DeBordieu has provided no valid support for its statement. It relies on a proposed order for bifurcation submitted September 25, 2020, that falls outside the appropriate record for appeal of this case and should be struck or disregarded. R. p. 235. DeBordieu mischaracterizes the Order as seeking to "fast-track the title determination for trial." Brief at page 19. The Order, instead called for a trial on title not before January 11, 2021. That date would hardly be a "fast-track" when this case was filed over a year earlier on November 14, 2019. DeBordieu also says that "the State has no plans to engage independent experts to analyze

¹ *See*, email of March 6, 2020, of counsel for the State to the Court regarding the hearing of the motion to intervene. R. p. 214. Counsel did not attend that hearing because he had to be in Court in another case in a different county and had consented to the Motion.

Respondent's claims." DeBordieu cites nothing in the record to support this statement. The State has hired experts to testify in other tidelands cases when necessary, *See eg, Grant v. State*, 395 S.C. 225, 717 S.E.2d 96 (Ct. App. 2011); *Yelsen Land Co. v. State*, 397 S.C. 15, 18, 723 S.E.2d 592, 594 (2012)(State's Motion for Summary Judgment granted and affirmed on grounds not involving expert). DeBordieu also points to its request that the property rights be determined by a jury which it alleges is a position that "the State is unwilling to take" (Brief at p. 19). "Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), as amended (May 13, 2003). Certainly, a jury trial is not a requisite for the successful defense of a suit by a private party claiming an interest in tidelands. *See, eg, Hoyle v. State*, 428 S.C. 279, 294, 833 S.E.2d 845, 853 (Ct. App. 2019), reh'g denied (Oct. 17, 2019), cert. dismissed (Jan. 29, 2020); *Grant, supra*; *Yelsen, supra*.

The State does not represent DeBordieu as a party, but it does represent the public interest and will most certainly defend and assert that interest with determination. In fact, the State has brought counterclaims for a prescriptive easement and dedication in this case whereas DeBordieu has proposed only one counterclaim. The State has successfully defended against a motion to dismiss its counterclaims in this case. R. pp. 20 and 198. (Order of June 16, 2020; Memorandum in Opposition to Motion to Dismiss. The State has engaged in other significant work that is privileged or work product and not subject to disclosure now.

Although DeBordieu alleges a financial interest in this case, the State's public trust interest in tidelands is much more than what DeBordieu calls a "general interest" in this suit. "[O]ur supreme court captured the essence of the [public trust] doctrine as it applies to tidelands: 'Our State's tidelands are a precious public resource held in trust for the people of South Carolina.'"

Hoyler supra, 428 S.C. at 292, 833 S.E.2d at 852, citing *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control*, 411 S.C. 16, 22, 766 S.E.2d 707, 710 (2014). The State most certainly intends to defend that important public trust interest consistently with the law and the facts and will expend public resources to that end when appropriate and likely to be productive.

CONCLUSION

The State respectfully requests that this Court reject the arguments of DeBordieu as referenced above and exclude or disregard its misplaced reliance on a proposed order outside the record in this case and not properly before this Court. Although the State has consented to DeBordieu's intervention, the State defers to this Court as to how best to decide this appeal. If intervention is allowed, the State will certainly cooperate professionally with DeBordieu while taking positions consistent with the State's interests.

Respectfully submitted,

/s J. EMORY SMITH, JR.

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May 5, 2021

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RULE 211(B) CERTIFICATE

I hereby certify that the State of South Carolina's Final Brief complies with Rule 211(b),
SCACR.

May 6, 2021

/s J. EMORY SMITH, JR.
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