

ORIGINAL

IN THE SUPREME COURT OF OHIO

IRVIN W. HUTH, *et al.*,
Relators,
vs.
NEW PHILADELPHIA MUNICIPAL
COURT, *et al.*,
Respondents

) Case No. 14-1214
)
)
) (Original Action in Prohibition and
) Mandamus)
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FILED
AUG 12 2014
CLERK OF COURT
SUPREME COURT OF OHIO

MOTION TO INTERVENE

Pursuant to Rule 12.01(A)(2)(b) of the Rules of Practice of the Supreme Court of Ohio and Rule 24 of the Ohio Rules of Civil Procedure, Fitzpatrick Zimmerman & Rose Co., L.P.A. ("Fitzpatrick") and Steven A. Anderson, Esq. ("Anderson") (collectively, "Proposed Intervenors"), by and through their undersigned counsel, respectfully move the Court for an order allowing them to intervene as Respondents in this original action initiated by a "Complaint for Writs of Prohibition, Mandamus, Other Writ and Alternative Writs."

The Complaint filed by Relators Irwin W. Huth and Michela Huth (collectively, "Relators") names the New Philadelphia Municipal Court and The Hon. Richard D. Reinbold, a visiting judge of the Municipal Court, as Respondents. However, Relators do not allege any improper or unauthorized conduct by either Respondent. Instead, their Complaint focuses entirely on the roles of Anderson and Fitzpatrick with respect to the prosecution of criminal cases on behalf of the Village of Bolivar, Ohio. They allege that Anderson has acted as the

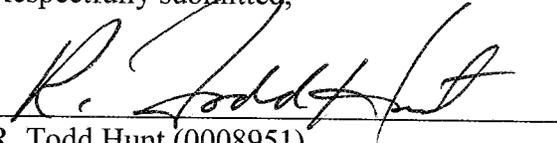
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contend that the Municipal Court and Judge Reinbold should be restrained from exercising jurisdiction over the criminal cases filed against them in the Municipal Court, and from exercising jurisdiction over any criminal cases filed or prosecuted by Anderson in the Municipal Court.

Because the merits of Relators' request for extraordinary relief depends entirely on whether Anderson has lawful authority to prosecute cases on behalf of the Village, and requires an interpretation of a Village ordinance establishing that Fitzpatrick is the legal counsel for the Village, Proposed Intervenors are entitled to intervention as of right pursuant to Ohio R. Civ. P. 24(A)(2), or in the alternative, to permissive intervention pursuant to Ohio R. Civ. P. 24(B). Proposed Intervenors request to be aligned with the named Respondents in opposition to the Relators' Complaint.

As grounds for this Motion, Proposed Intervenors rely on the Memorandum of Law attached to this Motion and incorporated herein. Also attached to this Motion is the Proposed Joint Intervenors' Answer to the Relators' Complaint as required by Ohio R. Civ. P. 24(C).

Respectfully submitted,



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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

I. RELEVANT AND UNDISPUTED FACTS

The Council of the Village of Bolivar (“Village”) enacted Ordinance No. O-88-2014, engaging the Intervening Respondent, the law firm of Fitzpatrick Zimmerman & Rose Co., L.P.A. (“Fitzpatrick”), as legal counsel for the Village for the term of January 1, 2014 through December 31, 2014. (Complaint at ¶ 32) Ordinance No. O-88-2014 authorizes a broad scope of legal services that Fitzpatrick, as “Village Legal Counsel,” is to perform for the Village. Specifically, Ordinance O-88-2014 reads, in pertinent part:

SECTION 1. That legal counsel shall be provided for this Village and the legal professional corporation of **Fitzpatrick, Zimmerman & Rose Co., L.P.A.**, of New Philadelphia, Ohio, is hereby contracted **as such counsel** and **shall be known as “Legal Counsel of the Village of Bolivar”**. Said Legal Counsel is hereby contracted for a term beginning January 1, 2014 and ending on December 31, 2014.

SECTION 2. Said Village Legal Counsel shall be the legal advisor for the Village and the officers thereof **in their official capacity** and as such, attorneys to **prosecute and defend all actions by or against the said Village** or any department or officer thereof, during the term of its contract; to render legal opinions to the said Council or any department or officer of the Village during the term of its contract upon the request in writing.

(Emphasis added.) (Complaint at Ex. E)

Intervening Respondent, Steven A. Anderson (“Anderson”), is an attorney employed by Fitzpatrick. (Complaint ¶17) During the term of the Village’s engagement of Fitzpatrick under Ordinance No. O-88-2014, Anderson has prosecuted criminal cases for the Village.

In or about May 2014, the Village of Bolivar Police Department issued Complaints and Summonses in the New Philadelphia Municipal Court, New Philadelphia, Ohio (“Municipal Court”) against Relators for various misdemeanor charges, including menacing (R.C. 2903.22(A)), disorderly conduct (R.C. 2917.11(A)(1)), and disturbing a lawful meeting (R.C. 2917.12 (A)(1)).¹ (Complaint at ¶ 8; Complaint at Ex. A) Anderson, acting as prosecutor for the Village of Bolivar through his employment with Fitzpatrick, was assigned to prosecute the criminal cases against Relators. The cases are pending before Respondent, the Honorable Judge Richard D. Reinbold (“Judge Reinbold”), who is a visiting Judge for the Municipal Court.

However, as recognized by the Relators, Anderson was “disqualified” by Judge Reinbold from prosecuting Relators’ pending criminal cases. (Complaint at ¶ 14) Thus, at the time of the filing of Relators’ Complaint in this action, Anderson was no longer the Village’s prosecuting attorney on the Relators’ criminal cases.

In their Complaint for writs of prohibition, mandamus, and “other writs,” Relators essentially argue that Anderson lacks legal authority to prosecute cases for the Village and,

¹ New Philadelphia Municipal Court Case Nos. CRB1400643 and CRB 1400642 (Complaint at ¶1)

therefore, the Municipal Court and Judge Reinbold have no jurisdiction over Relators' criminal cases or any other pending criminal cases instituted by Anderson acting as prosecutor for the Village. As summarized below, Relators seek writs of prohibition and mandamus to do the following:

- (A) Restrain the Municipal Court and Judge Reinbold from exercising jurisdiction over all pending criminal cases based upon alleged criminal offenses which occurred within the Village and which are pending in the Municipal Court, and are being filed or prosecuted by Anderson;
- (B) Restrain the Municipal Court and Judge Reinbold from exercising jurisdiction over the Relators' criminal cases;
- (C) Order the Municipal Court and Judge Reinbold not to accept any further criminal cases filed by Anderson on behalf of the Village;
- (D) Order the Municipal Court to dismiss any current criminal cases filed by Anderson on behalf of the Village;
- (E) Order the "Respondent"² to expunge any past criminal cases filed by Anderson on behalf of the Village;
- (F) Order the "Respondent" to seal all closed criminal cases filed by Anderson on behalf of the Village;
- (G) Order the Municipal Court and Judge Reinbold to dismiss the criminal cases against Relators; and
- (H) Restrain the Municipal Court and Judge Reinbold³ from continuing to adjudicate the criminal cases against Relators.

(Complaint at ¶ 1.)

² It is not clear which "Respondent" is referred to in subparagraphs (E) and (F).

³ Subparagraph (H) in the Complaint actually requests a writ to restrain "Relators" from continuing to adjudicate the two criminal cases. For purposes of this motion, Proposed Intervenors assume this is an error and Relators meant to say "Respondents."

II. APPLICABLE LAW

A. Intervention Under Ohio R. Civ. P. 24.

Pursuant to S. Ct. Prac. R. 12.01(A)(2)(b), the Ohio Rules of Civil Procedure are applicable in original actions brought before the Supreme Court of Ohio “unless clearly inapplicable.” Accordingly, Rule 24 of the Ohio Rules of Civil Procedure governs intervention in original actions for writs of prohibition and mandamus. *State, ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144 (1995) (citing then S. Ct. Prac. R. 10.2).

Civ. R. 24(A)(2) allows intervention as of right upon timely application by a person claiming an interest that may be impaired by the disposition of the action, where the interest is not adequately protected by existing parties. *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 247 (1992). Absent a statutory grant of the right to intervene, intervention as a matter of right is appropriate when the applicant “claims an interest relating to the property or transaction that is the subject of the action” and “is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest,” as long as the applicant demonstrates that his or her interest is not adequately represented by existing parties. *See* Civ. R. 24(A).

Alternatively, Civ. R. 24(B)(2) permits the court to allow a person to intervene upon timely application when “an applicant’s claim or defense and the main action have a question of law or fact in common.” Civ. R. 24(B)(2). In exercising its discretion under Civ. R. 24(B)(2), the court is required to consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Id.*

The procedure for intervention under Civ. R. 24 is set forth in subsection (C) of the rule, which provides that an applicant seeking to intervene must serve a motion to intervene upon the

existing parties setting forth the grounds for intervention, accompanied by a pleading, as defined in Civ. R. 7(A), setting forth the claim or defense for which intervention is sought. Civ. R. 24(C). In original actions filed in the Supreme Court, a motion to intervene under Civ. R. 24 will be denied if the moving party fails to file a pleading with its motion. See *State, ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St. 3d 437, 875 N.E.2d 902, 2007-Ohio-5379, ¶ 22.

This Court has held that Civ. R. 24 should be liberally construed to permit intervention. *LTV Steel*, 64 Ohio St.3d at 247, citing *Dept. of Admin. Services, Office of Collective Bargaining v. State Emp. Relations Bd.*, 54 Ohio St.3d. 48, 51 (1991); *State, ex rel. Smith v. Frost*, 74 Ohio St.3d 107, 108 (1995) (granting motion of village to intervene in landowner's action for writ of mandamus to compel trial court to vacate its permanent injunction against further proceedings on landowner's annexation petition). "Where an intervenor has a right to intervene, the scales tip in favor of allowing intervention despite the existence of conditions that might otherwise militate against intervention, including timeliness." 73 Ohio Jur.3d (Parties) § 74.

Non-public officials may intervene in a prohibition case if they meet the Civ. R. 24 requirements for intervention. *State, ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 504 (1998). "Intervention, as described by Civ. R. 24, is not clearly inapplicable to prohibition since there is as much reason for persons who will be affected by a prohibition action to be represented in the action as in other civil actions. In fact, there may be more reason for intervention of affected persons in a prohibition action since the action is directed against a judge who may not have adequate legal representation." *Schucker v. Metcalf*, 10th Dist. No. 84AP-548, 1984 WL 5986 (Nov. 15, 1984), *rev'd on other grounds*, 22 Ohio St.3d 33 (1986).

B. Applicants Are Entitled to Intervention as of Right.

Anderson and Fitzpatrick are entitled to intervene as of right under Civ. R. 24(A)(2) because they possess an interest relating to the property or transaction which is the subject of the action and are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest. Moreover, their interests are not adequately represented by the existing parties to this action.

First, Anderson and Fitzpatrick have a strong interest in the issues raised by Relators' Complaint. This includes the issue of whether Anderson, or any attorney at Fitzpatrick, is legally authorized to act as the prosecutor for the Village of Bolivar, Ohio, and to prosecute criminal cases in the New Philadelphia Municipal Court. Encompassed within this fundamental issue is the scope and extent of the authority granted by Ordinance #O-88-2014 which was enacted by the Council of the Village of Bolivar in 2014 to authorize the provision of legal services to the Village by Fitzpatrick and its attorneys, including Anderson. (Complaint at ¶¶ 32-35 and Exhibit.) Because Anderson and Fitzpatrick are the subjects of Ordinance #O-88-2014, their interests in the effect and enforcement of that legislation is readily apparent.

The disposition of Relators' Complaint for writs of prohibition and mandamus may directly impair or impede Anderson's and Fitzpatrick's indisputable contractual and business interests by way of its contract for legal services with Village being the issue in Relators' claims. Anderson, as the employee of Fitzpatrick primarily performing the services of prosecuting attorney for the Village under the contract for legal services, has a clear business interest that may be impaired by the disposition of Relators' Complaint.

Also, the disposition of Relators' Complaint may impair Fitzpatrick's and Anderson's professional and ethical interest in lawfully performing all legal services for its client, the

Village, and preserving the validity of criminal convictions arising from prosecutions for the Village by Anderson. Moreover, Relators allege that Anderson not only acted unlawfully in this case, but also fraudulently (in fact alleging that he committed a “fraud upon the Court”). (See Complaint at ¶¶ 3, 9, 18, 19, 78, 83, 85, 86, 91 and FN 1.) Thus, Anderson has a particularly strong professional and ethical interest in the issue of his authority to prosecute cases on behalf of the Village of Bolivar.

Under the present circumstances, Proposed Intervenors have met their minimal burden to establish that their interests may not be adequately represented by the current Respondents. As compared to Respondents, Proposed Intervenors stand in a more adversarial position with respect to Relators regarding the dispute over the prosecution of the cases against Relators and the prosecution of other criminal cases in the New Philadelphia Municipal Court. In their capacity as the primary actors and witnesses to the facts alleged in the Complaint, Proposed Intervenors have the greatest stake in the outcome of these proceedings. Thus, Proposed Intervenors are in the best position to assert that Fitzpatrick’s attorneys, including Anderson, are legally authorized to prosecute criminal cases on behalf of the Village of Bolivar and that the New Philadelphia Municipal Court has jurisdiction over both prior and pending criminal prosecutions handled by Anderson.

In comparison to the interests of Proposed Intervenors, the named Respondents have only a nominal interest in whether the Municipal Court is authorized to continue exercising jurisdiction over particular criminal matters that are now pending before it. Moreover, it is unknown whether Judge Reinbold will have the resources necessary to assert a strong and effective defense to Relators’ claims. By permitting Anderson and Fitzpatrick to intervene this Court can ensure that Relators’ claims for relief will be meaningfully and adequately opposed.

By allowing all parties with strong, adversarial interests to participate in this action, the Court will further the goal of maintaining an efficient and fair judicial system.

Lastly, Proposed Intervenors have satisfied the requirement of serving a pleading along with their motion to intervene. Civ. R. 24(C). (*See* “Joint Answer of Intervening Respondents Fitzpatrick Zimmerman & Rose Co., LPA and Steven A. Anderson, Esq. to Relators’ Complaint for Writs of Prohibition, Mandamus, Other Writ and Alternative Writs.”) Proposed Intervenors’ motion to intervene was timely approximately four weeks after the Verified Complaint was served on Respondents, when Proposed Intervenors became aware of that their substantial interests might be impaired or impeded by the issuance of the relief requested by Relators, and before any significant proceedings have taken place.

C. Alternatively, Proposed Intervenors Are Entitled to Permissive Intervention.

As an alternative to intervention of right under Civ. R. 24(A)(2), Anderson and Fitzpatrick should be permitted to intervene under Civ. R. 24(B)(2) because they seek to assert their fundamental rights in defense against the relief sought by Relators’ Complaint.

Indeed, it is difficult to imagine a more compelling case for permissive intervention. Proposed Intervenors have a strong interest in defending against Relators’ personal attack on their professional and contractual relationship with the Village of Bolivar, as well as Relators’ attack on the legality and professional ethics of Anderson’s actions as prosecutor for the Village. Proposed Intervenors’ position is aligned with the named Respondents regarding the propriety of Anderson’s conduct and the Municipal Court’s exercise of jurisdiction over cases filed and/or prosecuted by Anderson.

Because Relators herein are seeking to challenge the lawfulness of the named Respondents’ exercise of jurisdiction, it is beyond question that this original action and the

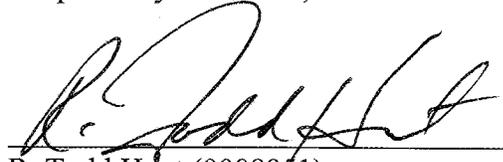
underlying criminal cases against Relators involve common issues of law and fact. Supreme Court jurisprudence suggests that a criminal defendant's motion to intervene in an original action seeking review of the trial court's interlocutory orders below should be granted unless the motion is untimely or fails to include the pleading required by Civ. R. 24(C). *See State, ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, ¶10. Likewise, a motion to intervene by a prosecutor and legal counsel for a municipal subdivision in an original action filed by criminal defendants to challenge the court's jurisdiction below should be granted as long as the motion to intervene was timely filed and otherwise satisfies Civ. R. 24(C). The interests justifying intervention by criminal defendants are no more compelling than the interests of the prosecutor and contractual legal counsel whose legal authority is being challenged by the relators' complaint. Here, Proposed Intervenors' motion to intervene satisfies both the timing requirement and Civ. R. 24(C), and therefore, should be granted.

Lastly, the existing parties will not be prejudiced by permitting Proposed Intervenors to intervene. There is no reason to believe the proceedings will be delayed or unduly complicated by permitting Proposed Intervenors to align with the named Respondents in opposition the Relators' claims.

III. CONCLUSION

For all of the above reasons, the motion of Proposed Intervenors Fitzpatrick Zimmerman & Rose Co., L.P.A. and Steven A. Anderson, Esq. to intervene as Respondents in this original action should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Motion To Intervene* has been sent via Regular U.S. Mail to the following this 11th day of August, 2014:

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Attorney At Law
P.O. Box 673
257 Canal Street
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Attorney for Relator Irvin W. Huth, and Pro Se

Marvin T. Fete
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138 Second Street NW
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Attorney for Respondents

A handwritten signature in black ink, appearing to read "R. Fitzpatrick Zimmerman", written over a horizontal line.

*One of the Attorneys for Intervening
Respondents Fitzpatrick Zimmerman & Rose
Co., LPA and Steven A. Anderson, Esq.*