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**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001233-MR

JOHN ROBERTS, GEORGE MCARTHUR KING,  
GEORGE MICHAEL KING, AND  
JOSEPH ANTHONY KING

APPELLANTS

v. APPEAL FROM MAGOFFIN CIRCUIT COURT  
HONORABLE KIMBERLEY CHILDERS, JUDGE  
ACTION NO. 07-CI-00006

THE ESTATE OF LAHOMA SALYER BRAMBLE,  
JOAN AGONESE,  
ANACONDA DRILLING OF KY, LLC,  
MICHAEL R. ANSELM,  
BERNICE BAILEY, NETTA LYNN BAILEY,  
LAVARIA BEDINGFIELD, HENRIETTA BERRY,  
RUTH BROCK, JOHN D. CARTY,  
BEAUREDA WILLIAMS COLLEY,  
COMMUNITY TRUST BANK, COUNTRY GAS, LLC,  
WANDDA LEE COX, AMELIA CRAFT, CHARLES V. CRAFT,  
CONROY CRAFT, MAXINE CRAFT, OPEL SUE CRAFT,  
JUDY DOWN CROCKETT, BETTY DOBSON, DOUG DOWNS,  
SANDY DOWNS, CAROLYN DYKHUIZEN, VANESSA W. EASON  
EQUITABLE PRODUCTION COMPANY,  
ESTATE OF DORSEY CLAXTON MCCARTY,  
ESTATE OF EVALEE BLAYLOCK EDWARDS,  
FAST FLOW GROUP, LLC, MARY FIFIELD,

LILLIAN F. WHITAKER FLOYD,  
GWENDOLYN R. FORGE, MAXINE FRENCH,  
PAULINE FRITTS, MIELANG GAMBELE,  
JERRY B. GIBBS, MELYNDE HARTMAN,  
RONALD HARTWELL, MYRTLE HOWARD,  
PAM HOWARD, MAYOLA HUMES,  
JERRY INGRAM, OTTO INGRAM,  
J.D. CARTY RESOURCES, LLC, JEFFERSON GAS, LLC,  
GAIL KAHLEY, LINDA KRONTZ,  
KY-AZ TRANSMISSION, LLC, NEVA LOUISE LOVELY,  
ROGER LOVELY, HAROLD LOVELY,  
KAREN L. LYON, LILLY MAY MADISON,  
CATHY SUE MAGGARD, MARK MANNING,  
ONEDA MARCHETTI, DAVID MARTIN,  
JAMES MCCARTHY, ALLEN MCCARTY,  
BEATRICE MCCARTY, BETTY MCCARTY,  
CAROLLE E. MCCARTY, DANNY MCCARTY,  
KEVIN MCCARTY, RANDALL MCCARTY,  
RAYMOND MCCARTY, ROBERT MCCARTY,  
ROBIN MCCARTY, RONNIE MCCARTY,  
KIMBERLY D. MCCORD, MELANIE M. MILLER,  
MINION ENERGY, LLC (AND NORTHERN COAL & COKE),  
AUDREY MINIX, EARNESTINE MINIX, LILLIAN MINIX,  
JAMES PHARES, JAMES R. PHARES (JAMIE),  
JASON PHARES, CHERYL L. PIPER,  
INA SALYER PYLES, R&R ENERGY, LLC,  
MOLLIE W. RICHARDSON, WANDA GAYE ROKOSZ,  
RANDALL RUDD, VERLA M. SALYER RUSSELL,  
BILL SALYER, CORA SALYER, DAVID R. SALYER,  
DONNA SALYER, DWAYNE SALYER, EMORY CAIN SALYER,  
FORD SALYER, GEMALIA SALYER, GLEN SALYER,  
HAPPY SALYER, HARRY SALYER, JAMES SALYER,  
KELLY SALYER, KEVIN G. SALYER, LAHOMA SALYER,  
LARRY SALYER, LARRY KEITH SALYER,  
MARK STEVEN SALYER, MARY E. SALYER,  
MAXINE SALYER, PATCHELL SALYER,  
RAMEY SALYER, JR., RANDY SALYER,  
ROBERT E. SALYER, ROTHEL SALYER,  
ROY SALYER, TIMOTHY O'DELL SALYER,  
TRACEY SALYER, VENA SALYER,  
WISEMOND SALYER, GARY SLAYER,  
LAVINIA W. SMITH, BARBARA STALBAUM,  
SUE STALBAUM, BRENDA STANLEY,

ANNA M. STEPHNES, JAMI M. TAYLOR, DANIEL E. WHITAKER,  
CARYL LAWRENCE WHITAKER, JACK WHITAKER,  
KAREN J. WHITAKER, MARVIN WHITAKER,  
JAMIE WHITWORT, DARREL G. WILLIAMS,  
DEN DELBERT WILLIAMS, GARY WILLIAMS,  
GERALDINE WILLIAMS, GLEN ALBERT WILLIAMS,  
GREG WILLIAMS, RANDALL WILLIAMS,  
KAREN WORTMAN, AND  
SANDY G. ZIMMERMAN

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Appellants appeal from an order of the Magoffin Circuit Court denying their motion to intervene in an action for trespass to mineral property. We affirm.

Appellees filed suit against J.D. Carty Resources, LLC (“JDCR”) and Anaconda Drilling of Kentucky, LLC in the Magoffin Circuit Court for trespass, claiming that the defendants drilled a well and produced natural gas from mineral property owned by Appellees. Appellants, as members of Country Gas, LLC holding four membership interests out of a total of 160 outstanding units, had previously filed suit against J.D. Carty, individually, as well as JDCR and Anaconda in the Harlan Circuit Court for breach of contract and securities fraud.

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

*John D. Roberts, et al. v. J.D. Carty Resources, et al.*, Harlan Circuit Court, Civil Action No. 06-CI-00237. That case remains pending at this time. Appellants filed a *lis pendens* notice of the Harlan County suit with the Magoffin County Court Clerk on March 29, 2007, detailing their claimed interest in the wells in the Country Gas package.

Attorney Gordon Long answered the complaint filed in the Magoffin Circuit Court on behalf of the defendants, defending in part by alleging that the Magoffin plaintiffs had failed to join all indispensable parties, including Country Gas. The allegation was that JDCR had assigned 12 oil and gas leases and 25 gas wells to Country Gas, including the Claxton McCarty Well #2, which was the primary subject of the trespass action.

Thereafter, the trial court ordered that Appellees file an amended complaint joining Country Gas, and Country Gas was made a defendant by an amended complaint dated July 30, 2007. After having brought Country Gas into the suit, Long answered the First Amended Complaint as the attorney for Country Gas, as well as the attorney for the original defendants, JDCR and Anaconda.

On March 12, 2008, the trial court entered partial summary judgment on liability for trespass against JDCR, Anaconda, and Country Gas, and the matter was set for trial on the issue of damages. However, before trial, the court entered an order and judgment on December 17, 2008, confirming a settlement agreement between the parties and finding that JDCR and Country Gas were to pay \$628,000 to the plaintiffs. Appellees subsequently filed several orders of garnishment

against banks with which JDCR and Country Gas had accounts, as well as with creditors of JDCR and Country Gas.

On April 1, 2009, Appellants moved to intervene, which motion was denied. This appeal followed.

After the filing of this appeal, Country Gas filed a motion for relief from the court's December 17, 2008 judgment confirming the settlement on July 6, 2009. This motion was filed by Attorneys Stephen W. Switzer and Joseph A. Tarantelli. Additionally, Attorney Susan C. Lawson filed a notice of entry of appearance as counsel for Country Gas on January 7, 2010.

An order denying a motion to intervene as a matter of right is immediately appealable. *Carter v. Smith*, 170 S.W.3d 402, 407 (Ky. App. 2004). Our standard of review as to whether intervention should have been granted is a clearly erroneous standard. *Id.* at 409 (citing *Gayner v. Packaging Serv. Corp. of Ky.*, 636 S.W.2d 658, 660 (Ky. App. 1982)).

The primary issue in this appeal concerns whether Appellants can intervene pursuant to Kentucky Rules of Civil Procedure (CR) 24.01(1). An applicant must meet a four-prong test before being entitled to intervene in a lawsuit pursuant to CR 24.01(1): (1) the motion must be timely; (2) the applicant must have an interest relating to the subject of the action; (3) the applicant's ability to protect his interest may be impaired or impeded, and (4) none of the existing parties could adequately represent the applicant's interests. CR 24.01(1)(b);

*Carter*, 170 S.W.3d at 407. The burden of proof in proving each of these requirements rests with the party desiring to intervene. *Carter*, 170 S.W.3d at 409.

Here, assuming, without deciding, that Appellants have met the first three prongs of the test in CR 24.01, Appellants have failed to meet the fourth prong of the test. Appellants' interests in the underlying lawsuit, which are avoiding or reducing Country Gas's liability for trespass to property, are the same as those of Country Gas, and therefore Country Gas could adequately represent Appellants' interests. *See Donald v. City of Glenview*, 723 S.W.2d 861, 862 (Ky. App. 1986) (city's interest adequately represented by resident who contested incorporation).

Appellants argue that they could not be adequately represented because Country Gas has not been adequately defended in this matter thus far. Appellants allege that Country Gas's previous counsel acted adversely to the company's interests and had numerous conflicts of interest. However, the linchpin supporting intervention, namely, the putative conflict of interest resulting from the joint representation of Country Gas, J.D. Carty, and JDCR, has now largely abated in light of the entities having separate counsel. Thus, Appellants do not meet all four prongs of the test for intervention as of right under CR 24.01, and the trial court's decision denying Appellants' motion to intervene was not clearly erroneous.

Appellants next argue that they have a right to intervene because they are indispensable parties of record pursuant to CR 19.01 and are necessary parties

under the Declaratory Judgment Act under KRS 418.075. We disagree. “[KRS 418.075 and CR 19.01] can be invoked only by parties, not by a person who seeks to become a party.” *Murphy v. Lexington-Fayette County Airport Bd.*, 472 S.W.2d 688, 690 (Ky. 1971). “Thus, only CR 24.01 governs the determination of the question of [Appellants’] right to intervene.” *Id.* at 690.

The order of the Magoffin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

H. Kent Hendrickson  
Harlan, Kentucky

BRIEF FOR APPELLEES, THE  
ESTATE OF LAHOMA SALYER;  
ET AL:

Michael Dean  
Irvine, Kentucky

BRIEF FOR APPELLEES, BETTY  
McCARTY, ROBERT J. McCARTY,  
RONALD McCARTY, RAYMOND  
McCARTY AND RANDALL  
McCARTY:

Thomas M. Smith  
Prestonsburg, Kentucky

BRIEF FOR APPELLEE,  
EQUITABLE PRODUCTION  
COMPANY:

R. Burl McCoy  
Lexington, Kentucky

