

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO, ON BEHALF OF :	:	
THE OHIO ENVIRONMENTAL :	:	
PROTECTION AGENCY, :	:	
	:	
Plaintiff-Appellee, :	:	Case No. 20CA13
	:	
v. :	:	
	:	
WASHINGTON COUNTY BOARD :	:	<u>DECISION AND</u>
OF COUNTY COMMISSIONERS, :	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellee, :	:	
	:	
v. :	:	
	:	
DEVOLA AGAINST SEWERING :	:	
HOMES, :	:	
	:	
Intervenor-Appellant. :	:	

APPEARANCES:

Gregory J. DeGulis, McMahon DeGulis LLP, Cleveland Ohio, for Appellant-Intervenor.

Dave Yost, Ohio Attorney General, Amber Wootton Hertlein and Nicole Candelora-Norman, Assistant Attorneys General, Environmental Enforcement Section, Columbus, Ohio, for Plaintiff-Appellee.

Nicole Tipton Coil, Washington County Prosecuting Attorney, Marietta, Ohio, for Defendant-Appellee.¹

¹ Washington County Board of Commissioners has not filed a brief on appeal.

PER CURIAM.

{¶1} This is an appeal from a Washington County Common Pleas Court judgment entry denying Intervenor-Appellant, Devola Against Sewering Homes' (hereinafter "DASH"), motion to intervene in the underlying matter. On appeal, DASH raises a single assignment of error which contends that the trial court erred in denying its motion to intervene. However, because we have concluded that the trial court did not abuse its discretion in denying DASH's motion, we find no merit to the sole assignment of error raised on appeal. Accordingly, the assignment of error is overruled and the judgment of the trial court is affirmed.

FACTS

{¶2} This matter began in 2009 when the Washington County Board of Health notified the Ohio Environmental Protection Agency (hereinafter "OEPA") that the drinking water in the Devola area contained an elevated level of nitrates, rendering the water unsafe. OEPA conducted an investigation and determined that outdated, and in some cases failing, septic systems in the Devola area were the cause of the high nitrate levels. As a result, the Director of the OEPA entered into agreed Final Findings and Orders with the Putnam County Water Association (hereinafter "PCWA") on October 5, 2010, which required PCWA to submit a general plan that contained at least three different options that would address the elevated nitrate levels. It appears from the record that after additional testing

continued to indicate elevated nitrate levels, the Director of the OEPA further issued Director's Final Findings and Orders on September 12, 2012, which required that the Washington County Commissioners, within twelve months, "submit to Ohio EPA for approval a general plan for sewage improvements or other methods of abating pollution and correcting the unsanitary conditions, pursuant to ORC Chapter 6111." R.C. Chapter 6111 governs "Water Pollution Control" and provides in R.C. 6111.03(H)(2) that the director of environmental protection may issue orders to prevent, control or abate water pollution by such means that include requiring the construction of new disposal systems.

{¶3} It appears that the PCWA initially elected to address the nitrate problem by installing a reverse osmosis system, which the OEPA approved. The installation of the system was completed in 2014 at a cost of \$2.5 million and it appears that the use of the system reduced the nitrate levels in the drinking water within limits to below the maximum limit of 10 mg/L. It appears from the record, however, that water quality sampling of the ground water revealed there were still elevated nitrate levels even after installation of the reverse osmosis system.

{¶4} It further appears that the Washington County Commissioners initially elected to submit a plan to install a sewer system to service the Devola area but failed to submit the plan as required by January 18, 2015. Because of the Commissioners' continued failure to comply with the 2012 order, the OEPA filed

an enforcement action in the Washington County Court of Common Pleas on March 2, 2018. The trial court granted partial summary judgment in favor of OEPA on November 30, 2018, ordering the Washington County Commissioners to comply with the 2012 order. Since that time, the Commissioners have proceeded with plans to design and construct a sewer system in the Devola area and have entered into a contract in excess of \$500,000 for the design and construction of the sewer project.

{¶5} However, on March 18, 2020, nearly sixteen months after the partial grant of summary judgment, DASH filed a motion to intervene in the enforcement action pursuant to Civ.R. 24. DASH describes itself as “an unincorporated non-profit association under Ohio law” that was “formed to protect the 500+ Devola, Ohio residents from the anticipated installation of sanitary sewers.” The stated purpose of DASH’s motion to intervene was to invalidate the 2012 Director’s order and thus prevent enforcement of it in the Washington County Court of Common Pleas. In its motion, DASH contended that it met the requirements for both intervention of right and permissive intervention as set forth in Civ.R. 24, which governs motions to intervene. The trial court issued a three-page decision denying DASH’s motion to intervene on April 16, 2020. The trial court determined that in addition to failing to meet the requirements for intervention, DASH’s motion was untimely filed.

{¶6} It is from the trial court's April 16, 2020, order denying its motion to intervene that DASH now brings its appeal, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED IN DENYING APPELLANT- INTERVENOR'S MOTION TO INTERVENE.

{¶7} In its sole assignment of error, DASH contends that the trial court erred in denying its motion to intervene in the underlying matter. DASH contends that the issue presented on appeal is “[w]hether in its Order denying Appellant Intervenor’s Motion to Intervene, the Trial Court abused its discretion when the Trial Court failed to consider the unusual circumstances in denying the motion.” The State counters by arguing that DASH failed to establish any unusual circumstances that would justify intervention and also that the trial court properly denied DASH’s motion as untimely under Civ.R. 24. We begin by considering the proper standard of review that must be employed when addressing a trial court’s decision on a motion to intervene.

Standard of Review

{¶8} The parties agree that a trial court’s grant or denial of a motion to intervene should be reviewed under an abuse of discretion. This Court noted in a

prior case involving the review of a trial court's decision on a motion to intervene as follows:

When reviewing a trial court's decision on a motion to intervene, we must apply an abuse of discretion standard of review. *Widder & Widder v. Kutnick* (1996), 113 Ohio App.3d 616, 624, 681 N.E.2d 977, 981; *In re Stapler* (1995), 107 Ohio App.3d 528, 531, 669 N.E.2d 77, 79; *Young v. Equitec Real Estate Investors Fund* (1995), 100 Ohio App.3d 136, 138, 652 N.E.2d 234, 235. *See also, Thomas v. Cook Drilling Co.* (1997), 79 Ohio St.3d 547, 549, 684 N.E.2d 75, 77. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 566 N.E.2d 1181; and *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe 1; Berk v. Matthews* (1990), 53 Ohio St.3d 161, 559 N.E.2d 1301 citing *Buckles v. Buckles* (1988), 46 Ohio App.3d 102, 546 N.E.2d 950.

Brown v. Gallia County Bureau of Vital Statistics, 4th Dist. Gallia No. 97CA12, 1997 WL 802648, *3; *see also Johnson v. Adullam Ministries/Pastor Forte*, 4th Dist. Athens No. 99CA48, 2000 WL 343791, *4.

{¶9} However, this Court has also noted as follows regarding the applicable standard of review for intervention of right, as opposed to permissive intervention:

The standard of review for a trial court's decision to deny a Civ.R. 24(A) motion for intervention as of right is less settled. "Ohio courts of appeals have * * * routinely held that appellate review of trial court decisions respecting applications for intervention of right is limited to the deferential abuse of discretion standard." Klein and Darling, *Ohio Civil Practice* (Supp. 2009) Section 24:4 (footnote omitted). However, "[s]everal court of appeals decisions have expressed concern about the propriety of applying

that standard[.]” and Klein and Darling suggest that appellate courts review Civ.R. 24(A) motions under a “more searching scope of appellate review[.]” *Id.* They note that some recent court of appeals decisions have applied de novo review for at least some aspects of intervention of right. *Id.* See *In re Young*, Stark App. No.2008CA00134, 2008-Ohio-5435; *In re M.N.*, Wayne App. No. 07CA0088, 2008-Ohio-3049; and *In re Guardianship of Chambers*, Sandusky App. No. S-07-014, 2007-Ohio-6881.

In re Adoption of S.R.N.E., 4th Dist. Adams No. 09CA885, 2009-Ohio-6959, ¶ 7.

Importantly, this Court more recently noted in *In re. C.M.*, 4th Dist. Athens No. 17CA7, 2017-Ohio-9037, fn. 2 that “[t]he Supreme Court of Ohio has since clarified that the abuse-of-discretion standard governs both Civ.R. 24(A) and (B) decisions.” Citing *State ex rel. Merrill v. Ohio Dept. of Nat. Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶ 41.

Applicable Law

{¶10} Civ.R. 24 governs both Intervention of Right and Permissive

Intervention and provides, in pertinent part, as follows:

(A) Intervention of Right. *Upon timely application* anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant 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, unless the applicant's interest is adequately represented by existing parties.

(B) Permissive Intervention. *Upon timely application* anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (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. (Emphasis added).

This Court has summarized as follows with respect to intervention of right:

In order to be entitled to an intervention of right, a movant must meet four criteria: (1) the application must be timely; (2) the movant must claim an interest relating to the property or transaction which is the subject of the action; (3) the movant must show that the disposition of the action may, as a practical matter, impair or impede the movant's ability to protect that interest; and (4) the existing parties do not adequately represent the movant's interest. *Southern Ohio Coal Co. v. Kidney* (1995), 100 Ohio App.3d 661, 654 N.E.2d 1017, citing *Fouche v. Denihan* (1990), 66 Ohio App.3d 120, 122-123, 583 N.E.2d 457, and *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 352, 505 N.E.2d 1010.

Johnson v. Adullam Ministries/Pastor Forte, supra, at *4.

{¶11} When reviewing a motion to intervene, a trial court must initially consider whether the individual seeking intervention made a timely application. *See State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 503, 696 N.E.2d 1058 (1998). Further, the timeliness of a motion to intervene is addressed to the sound discretion of the trial court. *Id.*; *Assn. of Cleveland Firefighters, Local 93 I.A.F.F. v. Cleveland*, 2018-Ohio-2049, 113 N.E.3d 1007, ¶ 42 (8th Dist.). Additionally, “[t]he timeliness of a motion to intervene is dependent upon the facts and circumstances of the case.” *Miller v. Miller*, 2019-

Ohio-1886, 135 N.E.3d 1271, citing *State ex rel. First New Shiloh Baptist Church* at 503.

{¶12} As explained by the Supreme Court of Ohio in *State ex rel. First New Shiloh Baptist Church*, the following factors must be considered when determining the timeliness of a motion to intervene:

“(1) the point to which the suit had progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure after he knew or reasonably should have known of his interest in the case to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.”

Id. at 503, quoting *Triax Co. v. TRW, Inc.* (C.A.6, 1984), 724 F.2d 1224, 1228.

{¶13} Although DASH argues that “Ohio Rule of Civil Procedure 24 is construed liberally to allow intervention[,]” citing *State ex rel. Merrill, supra*, at ¶ 41 in support, we must also be mindful that courts will not generally permit a party to intervene in a matter once the court enters final judgment. *Miller, supra*, at ¶ 23. In fact, “ ‘ “[i]ntervention after final judgment has been entered is unusual and ordinarily will not be granted.” ’ ” *Id.*, quoting *Grove Court Condominium Unit Owners' Assn. v. Hartman*, 8th Dist. Cuyahoga No. 94910, 2011-Ohio-218, ¶ 22, in turn quoting *State ex rel. First New Shiloh Baptist Church* at 504; see also *Likover v. Cleveland*, 60 Ohio App.2d 154, 159, 396 N.E.2d 491 (8th Dist. 1978)

(stating that intervention after judgment is entered, “is quite unusual and seldom granted”); *Smoyer v. Smoyer*, 6th Dist. Wood No. WD-84-9, 1984 WL 7926, *3 (June 29, 1984) (stating that Civ.R. 24 is applied less liberally after judgment, thus resulting in a “heavy burden” on the proposed intervenor).

{¶14} Thus, prior to reaching the merits of the motion to intervene, according to the Supreme Court of Ohio in *State ex rel. First New Shiloh Baptist Church*, timeliness is a threshold determination. Further, although Civ.R. 24 should be liberally construed in favor of allowing intervention, when final judgment has already been granted Civ.R. 24 is less liberally applied and permitting intervention at such a late stage in the proceedings is unusual. It is with these principles in mind that we consider DASH’s arguments.

{¶15} Here, the trial court denied DASH’s motion to intervene because it found it was untimely filed. The trial court also found that DASH’s motion did not otherwise meet the criteria for intervention as set forth in Civ.R. 24. On appeal, DASH argues that the trial court abused its discretion in denying its motion to intervene, claiming that the trial court failed to consider the unusual circumstances militating in favor of intervention. Thus, DASH argues the trial court failed to give proper consideration to the fifth timeliness factor, the existence of unusual circumstances militating against or in favor of intervention, in reaching its decision that the motion to intervene was untimely. However, based upon the following

reasons, we cannot conclude the trial court abused its discretion in denying DASH's motion as untimely.

{¶16} First, DASH did not file its motion until after a final judgment had been entered. As set forth above, the Director of the Ohio Environmental Protection Agency filed Director's Final Findings and Orders on September 12, 2012. The order required the Washington County Commissioners to "submit to Ohio EPA for approval a general plan for sewage improvements or other methods for abating pollution and correcting the unsanitary conditions, pursuant to ORC Chapter 6111." The Washington County Commissioners did not appeal this order to the Environmental Review Appeals Commission, which according to R.C. 3745.04, has exclusive, original jurisdiction over any matter that may be brought before it from final actions of the Director of the OEPA. Nor did any citizen group such as DASH form at that time and request intervention in order to appeal the original 2012 order.

{¶17} Six years later, on March 2, 2018, after the approval and installation of a reverse osmosis system and several additional years of water quality testing, OEPA filed an action in the Washington County Court of Common Pleas seeking to enforce the 2012 OEPA Director's order. OEPA moved for partial summary judgment on July 20, 2018, which was granted on November 30, 2018. The partial grant of summary judgment was a final appealable order and was not appealed by

the Washington County Commissioners. Not only did DASH not form and seek to intervene at the time the enforcement action was filed in March of 2018, it did not seek to intervene until March 18, 2020, which was nearly sixteen months after partial summary judgment was granted in favor of OEPA in the enforcement action.

{¶18} Second, on appeal DASH states that its purpose in seeking intervention was to “invalidate the 2012 order” based upon its reasoning that “if the 2012 Order is enforced, it will impair the DASH members’ property interest, which is not currently represented by any of the original parties.” However, the time for invalidating the 2012 order has long since passed. Further, the proper method of invalidating that order was an appeal to the Environmental Appeals Review Commission, not intervention in an enforcement action filed in another forum six years later. Additionally, as will be discussed in more detail below, the stated purpose of DASH’s attempted intervention is not compelling because it would likely result only in reconsideration of arguments already presented by the Washington County Commissioners, which have been considered and rejected by the trial court.

{¶19} Third, even assuming it may have been difficult for the citizens that comprise DASH to have had the information needed to form and seek intervention after the 2012 order was filed, they were certainly on notice of the sewage issues

and the potential impact on the residents of the Devola area prior to, during, and immediately after the enforcement action that was filed in Washington County. For instance, the record indicates that the Washington County Board of Health sought to intervene in the enforcement action in 2018, however, intervention was denied by the court. The record also indicates the sewer issue was widely publicized and widely known by area residents.

{¶20} Fourth, DASH argues that permitting intervention will not unduly delay or prejudice the parties because the parties are still in the process of adopting a general plan and OEPA has not yet approved a general plan. However, despite the fact that a general plan had not been approved by the OEPA at the time the trial court considered this matter and actual construction of the sewer system had not yet begun, it appears from the record that the commissioners have entered into a contract for over \$500,000 for the design and construction of the sewer project. The trial court expressly cited this fact in its decision denying the motion to intervene. Although DASH argues on appeal that the expenditure of these funds “is not relevant to the Motion to Intervene * * *,” we disagree. DASH has simply failed to set forth any compelling explanation for not having sought intervention sooner and it appears that permitting it to intervene for its stated purpose at this late date would certainly unduly delay and prejudice the parties.

{¶21} Fifth, although DASH argues that unusual circumstances exist in this matter which should militate in favor of allowing intervention, the trial court disagreed. DASH argues the trial court did not properly consider the alleged unusual circumstances. However, a review of the trial court's order indicates the court acknowledged DASH's arguments regarding the presence of unusual circumstances but it rejected them. It did not fail to consider the arguments. More specifically, DASH argues in its brief the following unusual circumstances exist: 1) the Board of Health, not the OEPA, has the authority to require sewerage in Devola; 2) the statutory authority for the 2012 Director's order is invalid; 3) because the Washington County Board of Health will not issue a resolution confirming the water quality presents a health problem, the Washington County Board of Commissioners lacks authority to order DASH members to connect to the sewer; 4) the 2012 order is now based upon false factual findings (outdated findings regarding nitrate levels in the drinking water); 5) there is no public health nuisance in Devola so there is no need to require sewerage in Devola; and 6) the Washington County Board of Commissioners is not close to implementing a new sewer system, in part because the general plan it submitted to OEPA on November 26, 2019 was rejected. However, as argued by the State in its brief, the trial court has already considered these arguments during the enforcement action proceedings and it rejected them.

{¶22} Moreover, although DASH attempts to characterize these issues as “unusual circumstances,” we believe they are more properly characterized as opposing legal arguments based upon differing interpretations of the law and in some instances based upon underlying facts which DASH disputes. Thus, we are not persuaded that these issues constitute “unusual circumstances” for purposes of a timeliness analysis. In this regard, we agree with the trial court’s determination that “DASH has not established any unusual circumstances that require untimely intervention * * *.”

{¶23} Based on the foregoing, we cannot conclude that the trial court abused its discretion by denying DASH’s motion to intervene based upon its untimeliness. Further, because DASH failed to meet the threshold issue of timeliness, we need not review the trial court’s alternate finding that DASH’s motion failed to meet the substantive requirements for intervention. Accordingly, DASH’s sole assignment of error is overruled and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

For the Court,

Jason P. Smith, Presiding Judge

Michael D. Hess, Judge

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.