

[Cite as *Cleveland v. State*, 2009-Ohio-6106.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92735

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

STATE OF OHIO

DEFENDANT-APPELLEE

**[APPEAL BY NATIONAL RIFLE
ASSOCIATION, ET AL.]**

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-618492

BEFORE: Cooney, A.J., Stewart, J., and Dyke, J.

RELEASED: November 19, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's

announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Applicants for intervention, appellants National Rifle Association (“NRA”) and Ohioans for Concealed Carry (“OCC”), appeal the trial court’s denial of their motion to intervene. Because we find no abuse of the court’s discretion, we affirm.

{¶ 2} This case arose in March 2007, when the city of Cleveland (“City”) filed a complaint for declaratory judgment to challenge the constitutionality of R.C. 9.68.¹ In May 2007, the NRA and OCC moved to intervene as defendants and to bring counterclaims against the City alleging that local firearm ordinances were unconstitutional. In July 2007, both the City and the state of Ohio moved for summary judgment. In January 2009, the trial court denied the NRA’s and OCC’s motion to intervene, denied the City’s motion for summary judgment, and granted the state’s motion for summary judgment.

¹ The instant appeal is a companion case to *Cleveland v. State of Ohio*, Cuyahoga App. No. 92663, 2009-Ohio-5968.

{¶ 3} The NRA and OCC now appeal, raising two assignments of error. First, they claim that the trial court abused its discretion in denying their application to intervene as of right pursuant to Civ.R. 24(A).

{¶ 4} We review a trial court’s decision to grant or deny a motion to intervene for an abuse of discretion. See *Univ. Hosps. of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 2002-Ohio-3748, 772 N.E.2d 105, ¶47; *In re Stapler* (1995), 107 Ohio App.3d 528, 531, 669 N.E.2d 77. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶ 5} The NRA and OCC argue that they are entitled to intervention of right under Civ.R. 24(A)(2), which provides:

“Upon timely application anyone shall be permitted to intervene in an action * * * when the applicant claims an interest relating to the property * * * 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 * * *.”

{¶ 6} Courts must liberally construe Civ.R. 24 in favor of intervention. *State ex rel. Watkins v. Eighth Dist. Court of Appeals*, 82 Ohio St.3d 532, 534, 1998-Ohio-190, 696 N.E.2d 1079. But the putative intervenor still bears the burden to demonstrate the following four elements under Civ.R. 24(A)(2):

“(1) the intervenor must claim an interest relating to the property or transaction that is the subject of the action; (2) the intervenor must be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor’s ability to protect his or her interest; (3) the intervenor must demonstrate that his or her interest is not adequately represented by the existing parties; and (4) the motion to intervene must be timely. *Fairview Gen. Hosp. v. Fletcher* (1990), 69 Ohio App.3d 827, 830-831, 591 N.E.2d 1312; *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 505 N.E.2d 1010, syllabus. All of these conditions must be met to establish a right to intervene. *Ashcraft v. Univ. of Cincinnati Hosp. Aring Neurological Institute* (Apr. 27, 1999), Franklin App. No. 98AP-948.” *State ex rel. Montgomery v. Columbus*, Franklin App. No. 02AP-963, 2003-Ohio-2658.

{¶ 7} In the instant case, the trial court did not state its reasons for denying the motion to intervene. And the NRA and OCC bear the burden of demonstrating that the trial court abused its discretion. They raise the following arguments to support the above four-prong test:

{¶ 8} “(1) Their representatives have an interest in the right to interstate and intrastate travel while lawfully possessing firearms, rights they claim that the Ohio and U.S. constitutions guarantee. They claim that nonuniform laws and ordinances regarding the transport of firearms within Ohio unreasonably burden the exercise of these rights. (2) If not allowed to intervene, their members may face arrest and criminal prosecution and be forced to challenge, individually, conflicting municipal ordinances under those circumstances. (3) The state has not sought to challenge directly the enforcement of ordinances that conflict with R.C. 9.68 and will not raise

federal constitutional challenges to the ordinances. (4) Their motion was timely because it was filed before the pretrial conference and eleven weeks after the City filed its complaint.

{¶ 9} We find no abuse of discretion in the court’s denying the NRA’s and OCC’s motion to intervene. The NRA and OCC rely on *Crittenden Court Apt. Assoc. v. Jacobson/Reliance*, Cuyahoga App. Nos. 85395 and 85452, 2005-Ohio-1993 (“*Crittenden*”), and *Blackburn*, in support of their argument. In *Crittenden* and *Blackburn*, however, the putative intervenors were the parties’ insurers, who had a real financial stake in the litigation. On the other hand, the NRA’s and OCC’s interests are more abstract (e.g., the possibility that their members will face prosecution and uncertainty regarding their ability to transport and carry firearms). Additionally, the NRA and OCC may still maintain their own actions concerning their alleged interests and challenging local ordinances.

{¶ 10} We conclude that the disposition of the underlying action will not impair or impede their ability to protect their interest, and the NRA and OCC have not demonstrated that the trial court abused its discretion. Thus, we overrule the first assignment of error.

{¶ 11} In the second assignment of error, the NRA and OCC argue that the trial court abused its discretion in refusing to grant permissive intervention.

{¶ 12} Civ.R. 24(B)(2) provides in relevant part:

“Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant’s claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. 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.”

{¶ 13} The City argues that allowing the two parties to intervene would have delayed the schedule that the trial court established, confused the issues before the court, and prejudiced the City. In *Fisher Foods, Inc. v. Ohio Dept. of Liquor Control* (N.D.Ohio 1982), 555 F.Supp. 641, 650, the federal court held that even when “a common question of law or fact exists it is still within the discretion of the Court whether to allow intervention and intervention will frequently be denied if collateral or extrinsic issues would be brought in.” Accord *Redland Ins. Co. v. Chillingsworth Venture, Ltd.* (N.D.Ohio 1997), 171 F.R.D. 206. The federal court interpreted Fed.Civ.R. 24(B), the language of which parallels that found in Ohio’s Civ.R. 24(B).

{¶ 14} The trial court was correct in concluding, under Civ.R. 24(B), that the NRA's and OCC's motion for permissive intervention must fail. In their argument in support of the previous assignment of error, the NRA and OCC claimed that they would raise many legal arguments that the state would not raise. Indeed, the issues the NRA and OCC would raise if allowed to intervene, would far exceed the narrow legal issue raised by the City's declaratory judgment—whether R.C. 9.68 as enacted by the General Assembly was constitutional under the parameters of the Ohio Constitution. These collateral and extrinsic issues justify the court's denial of the motion to intervene.

{¶ 15} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the 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.

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., CONCURS;

ANN DYKE, J., DISSENTS (WITH SEPARATE OPINION).

ANN DYKE, J., DISSENTING:

{¶ 16} I respectfully dissent with the majority and would find that in light of our decision in App. No. 92663, reversing the trial court’s decision and finding R.C. 9.68 unconstitutional, I would dismiss the NRA’s appeal as moot. A case or controversy is lacking and the “case is moot ‘when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.’” *Los Angeles Cty. v. Davis* (1979), 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642, quoting *Powell v. McCormack* (1969), 395 U.S. 486, 489, 89 S.Ct. 1944, 23 L.Ed.2d 491. The purpose of the NRA’s motion to intervene was to achieve the same result as the state of Ohio. Therefore, the case or controversy has been resolved and it is not necessary to indulge in a discussion of the NRA’s motion to intervene.