BUTLER COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

ERIN GABBARD et al. *Plaintiffs-Relator*, v. MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al. *Defendants-Respondents,*	Case No. CV 2018-09-2028 Judge Charles L. Pater OPPOSITION TO MOTION TO INTERVENE

PLAINTIFFS' OPPOSITION TO MOTION OF BUKEYE FIREARMS FOUNDATION TO INTERVENE AS PARTY DEFENDANT

The plaintiffs, through undersigned counsel, hereby oppose Buckeye Firearms Foundation's motion to intervene as a party defendant (filed December 21, 2018). Buckeye's motion should be DENIED for the reasons that follow.

INTRODUCTION

The parties in this case have been diligently litigating for over four months, and they are six weeks away from trial. Discovery is scheduled to close in 14 days and depositions have already occurred. Yet now, at the eleventh hour, Buckeye Firearms Foundation moves to intervene in the action pursuant to Rule 24(A)(2) and 24(B)(2) despite the delay it will inevitably cause. In support of the motion, Buckeye largely eschews the standards that govern intervention as of right under Rule 24(A)(2) and permissive intervention under Rule 24(B)(2), instead arguing that it has a nebulous "interest" in the outcome of the case and that it knows a lot about its FASTER program. This falls far short of the requirements for intervention under either provision. Buckeye has no legally cognizable interest in the case, and it does not propose making any relevant arguments that differ from those of the current defendants. And allowing Buckeye to intervene at this late date would likely require throwing out the scheduling order this Court just signed and rescheduling

trial, thereby delaying resolution of a case of enormous concern to the Madison School community. Buckeye's motion to intervene should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

On September 12, 2018, the plaintiffs, concerned about the safety of their children, brought this action seeking declaratory relief that the Madison School District Board of Education's Resolution allowing teachers and staff to go armed while on duty during the school day was unlawful because it did not require armed staff to complete "an approved basic peace officer training program" or have twenty years of service as an active duty peace officer as required by R.C. 109.78(D). As part of that action, plaintiff-relator Erin Gabbard also filed a petition for mandamus based on the defendants' failure to respond to public records requests. On October 31, 2018, the plaintiffs filed a motion for preliminary injunction on their declaratory judgment claim. The Court subsequently consolidated the preliminary injunction motion with a trial on the merits and scheduled trial for February 25, 2019. Prior to Buckeye's motion, the parties negotiated an expedited schedule to complete discovery in advance of that trial date, and the Court approved the parties' joint proposed scheduling order on December 28, 2018.

On December 21, 2018, Buckeye Firearms Foundation moved to intervene pursuant to Ohio Rule of Civil Procedure 24(A)(2) and 24(B)(2).[1] While Buckeye does not specify which claim—the declaratory relief claim or the public records claim—it wants to defend, it has not advanced any argument with respect to the public records request or asked to intervene as a respondent and, therefore, presumably does not seek to intervene in the mandamus action.

[1] Buckeye does not move to intervene pursuant to Rule 24(A)(1) or 24(B)(1).

ARGUMENT

I. Buckeye does not meet the standard to intervene as of right under Rule 24(A)(2).

Pursuant to the Ohio Rule of Civil Procedure 24(A)(2), a person "shall be permitted to intervene in an action" if the applicant claims "an interest relating to the property or transaction that is the subject of the action." Civ.R. 24(A)(2). An intervenor arguing for intervention under Rule 24(A)(2) must demonstrate: (1) an interest relating to the property or transaction that is the subject of the action, (2) that disposition of the action may "impair or impede the intervenor's ability to protect [its] interest," (3) that its interest "is not adequately represented by the existing parties," and (4) that the application is "timely." *Clarke v. Warren Cty. Commrs.*, 12th Dist. Warren No. CA2000-02-009, 2000 WL 1336684, *1 (Sept. 18, 2000).

As outlined below, Buckeye fails to satisfy any of the four criteria. As a result, its motion to intervene as of right should be denied.

A. Buckeye has no proper interest in this case.

A purported intervenor will only satisfy Rule 24(A)(2) if it can demonstrate that it has a "direct, substantial, and legally protectable" interest in the property or transaction at issue in a case. *Grove Court Condominium Owners' Assn. v. Hartman*, 8th Dist. Cuyahoga No. 94910, 2011-Ohio-218, ¶ 16; *see also State ex rel. Dispatch Printing Co. v. Columbus*, 90 Ohio St.3d 39, 40, 734 N.E.2d 797 (2000) ("[T]he applicant's interest in the action must be one that is 'legally protectable.'" (quoting *In re Schmidt*, 25 Ohio St.3d 331, 336, 496 N.E.2d 952 (1986))). The interest cannot be "indirect or contingent." *Clarke* at *2.

Buckeye fails this prong because it has no legally protectable interest in this case, which concerns the validity of the District's Resolution.[2] The question is not whether state law permits Buckeye to sell its FASTER training to teachers or anyone else. It is whether the District's Resolution comports with state law. And Buckeye cannot demonstrate a cognizable property interest in whether its FASTER program is held to satisfy state law. Courts have concluded that where a case concerns a pure legal inquiry, intervention under Rule 24(A)(2) is particularly difficult. For example, the Twelfth District Court of Appeals held that property owners had no right to intervene in a case concerning the zoning of a neighboring piece of land because such surrounding property owners had "a practical interest in the outcome" of the action but "no legal interest in the outcome." *Liberty Twp. v. Woodland View, Inc.*, 12th Dist. Butler No. CA2001-02-038, 2001 WL 938757, *2 (quoting *Driscoll v. Austintown Assocs.*, 42 Ohio St.2d 263, 273, 328 N.E.2d 395 (1975)) Thus, because the case concerned "which zoning *legally* applies to the property, not which zoning is best for the property," surrounding property owners had no legally enforceable interest that would justify intervention. *Liberty* at *2 (emphasis added). So too here. Buckeye may *want* this Court to conclude that R.C. 109.78(D) does not require all persons armed in a school to attend an approved basic peace officer training program, but it has no *legally enforceable interest* in that outcome—or any other decision this Court might reach.

The Court of Common Pleas's order in *State ex rel. Walgate v. Kasich*, cited by Buckeye (at 5), is not to the contrary. In that case, plaintiffs sought declaratory judgment that video lottery terminal (VLT) games were illegal. Casinos were allowed to intervene because they had already spent

[2] Buckeye asserts, incorrectly, that the "subject of the litigation" is "the transaction." Mot. at 4. Buckeye does not specify *what* transaction it is referring to. Regardless, the assertion is wrong. The parties agree that the declaratory action in this case concerns only the meaning of Ohio's statute and the validity of the District's Resolution, not the validity of any transaction between Buckeye and the defendants.

millions of dollars to obtain licenses to operate VLTs or to construct new actual casino facilities. Decision and Entry Granting Intervenors' Motions to Intervene, *State ex rel. Walgate v. Kasich*, Franklin C.P. No. 11-cv-13126, 2–3 (Feb. 24, 2012). They had tangible property interests in these licenses and casinos, and a decision in the plaintiffs' favor would have rendered their property obsolete. *See id.* By contrast, Buckeye has no legally cognizable property interest in this Court's interpretation of R.C. 109.78(D). And while it may have a property interest in the FASTER program itself, disposition of this case will not rule on Buckeye's ability to run the FASTER program; Buckeye is free to continue to provide training regardless of the outcome of this case (as it has done for years prior to passage of the Madison Resolution) and to sell medical and trauma kits. There may be, perhaps, fewer persons that attend the FASTER program if teachers and staff require more training in order to carry a firearm at school under state law. But they have no legally cognizable right to a particular number of people that attend their program. That interest is, at most, an "indirect or contingent" interest that does not confer a right to intervene. *Clarke*, 2000 WL 1336684, at *2.

B. Buckeye's interest will not be impaired by disposition of this case.

Buckeye articulates no cogent explanation of how disposition of this case would impair any legally protectable interest. It would not. Even if Buckeye had a legally cognizable interest in Madison Schools using its FASTER program, which it does not, such interest would not be impaired by disposition of this case. Unlike the plaintiffs in *Walgate*, the plaintiffs here do not seek a declaration that would invalidate or eliminate the FASTER program. Nor would a disposition in the plaintiffs' favor prevent Madison Schools from sending teachers to the FASTER program. *See* Ex. E, Aff. of John Benner in support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, at ¶ 27 (explaining that FASTER trains "non-armed school staff"). Rather, the plaintiffs' desired disposition would mean only that Madison Schools would have to send

teachers to receive additional training that satisfies the requirements of R.C. 109.78(D) if they want those teachers to go armed while in school. And Buckeye itself suggests one reason why Madison Schools would likely continue to rely on Buckeye for at least some teacher training—it will continue to provide "advanced and updated medical training." Mot. at 5.

C. Buckeye's interests are adequately represented by Madison School District.

To demonstrate the inadequacy of a party to represent a proposed intervenor's interests, the applicant for intervention "must produce something more than speculation as to the purported inadequacy of representation by existing parties." *Clarke*, 2000 WL 1336684, at *3 (citation omitted). Moreover, where the party seeking to intervene "has the same ultimate goal as a party already in the suit, courts have applied a presumption of adequate representation, and to overcome that presumption, applicants ordinarily must demonstrate adversity of interest, collusion or nonfeasance." *Id.* (citation omitted). Buckeye's memorandum does not come close to satisfying this standard.

It is undisputed that Buckeye seeks the same outcome in this case that Madison seeks. *See* Mot. at 3. As a result, Buckeye must demonstrate that its interests are adverse to Madison's, or that there has been collusion or malfeasance. But it can do no such thing. That is because Buckeye's interests in this case are identical to those of Madison School District. The Court need look no further than Buckeye's proposed pleadings, which "adopt[] and incorporates by reference" the entirety of Madison School District's previous pleadings without adding any additional facts or defenses. Mot. Ex. A at 1.

Buckeye does not dispute that its interests perfectly align with the defendants'. Instead, it argues that it should be allowed to intervene based solely on its "expertise" on facts about the FASTER program, the Ohio legislature's funding decision, and "the need for school staff and

teachers to be armed." Mot. at 6. That is not the test for intervention as of right. *See* Civ.R. 24(A)(2). Nor are the majority of these facts relevant to the legal issue in this case, which is largely one of pure statutory interpretation: whether the text of R.C. 109.78(D) requires all employees going armed while on duty in a school to complete an approved basic peace officer training program or have twenty years of active peace-officer experience.[3] To the extent that some information held by Buckeye is relevant in this case, that does not justify intervention. Instead, the proper course is for the parties to subpoena Buckeye for the information, which the plaintiffs have already done here. *See* Entry Overruling Applicants' Motion to Intervene at 3, *Liberty Twp. v. Woodland View, Inc.*, Butler C.P. No. CV00-10-2248 (Jan. 26, 2001) ("If necessary, Applicants' concerns can be addressed if they appear as witnesses in this action and do not need to appear as parties to settle the dispute."); *see* Return of Service for Subpoena on Buckeye Firearms Foundation (attached as Exhibit A).

D. Buckeye's motion to intervene is not timely.

While the timeliness of a motion to intervene "depends on the facts and circumstances of the case," the Ohio Supreme Court has identified five factors that courts should consider: (1) the point to which the suit had progressed, (2) the purpose of intervening, (3) the length of time the applicant knew of its interest in the case before moving to intervene, (4) prejudice to the original parties, and (5) any unusual circumstances. *State ex rel. First New Shiloh Baptist Church v. Meagher,* 82 Ohio St.3d 501, 503, 696 N.E.2d 1058 (1998) (citation omitted).

[3] Buckeye argues that it should be allowed to intervene because "[t]he Plaintiffs' pleadings . . . are replete with criticism of the FASTER Program and the training which the Madison Local School District staff and teachers have received." Mot. at 5. The plaintiffs submitted evidence comparing the efficacy of the FASTER Program to the basic peace officer training program in order to demonstrate irreparable harm, a necessary element of a preliminary injunction. *See* Mot. for Prelim. Injunction at 12–14. However, the court has "consolidated the preliminary injunction motion with a trial on the merits," Dec. 28, 2018 Scheduling Order at 1, making the equitable factors from the preliminary injunction motion, including the efficacy of the FASTER program irrelevant to the case.

Applying the relevant factors, Buckeye's motion is untimely. Most important, the case has progressed too far to allow Buckeye to intervene at this late stage. Discovery on the declaratory judgment claim has nearly concluded: almost all depositions will be completed on the same date this opposition is filed and all discovery is scheduled to conclude January 25—one week after this motion is fully briefed. These dates cannot be extended without also rescheduling trial in this case: summary judgment motions and oppositions are due February 1 and February 11 respectively, pretrial materials are due February 15, objections are due February 20, and a hearing (and trial if necessary) will begin February 25. The parties agreed to an expedited schedule because they recognized that this case is of great concern to the students, parents, and teachers of Madison School District and requires speedy resolution. It should not be delayed because Buckeye has moved to intervene at the eleventh hour. Nor is such delay justified—Buckeye's interest in this case, to the extent it can demonstrate one, is at best loosely related to the case, and Buckeye can only speculate that a resolution in the plaintiffs' favor would cause it harm. As a result, any delay to allow Buckeye to intervene would be unjustifiable and would prejudice the parties in this case.

Moreover, Buckeye knew about this case for months. The initial complaint was filed on September 12, 2018. And even before that, Buckeye knew of the controversy regarding the defendants' Resolution and participated in public hearings regarding the Resolution. *See* Minutes, July 13, 2018 Special Board Mtg., available at https://perma.cc/JGY8-MC7T. Buckeye provides no justification for this delay in moving to intervene. It should not now be allowed to do so.

In short, Buckeye is not entitled to intervene as of right in this case. Its eleventh-hour motion is not timely and fails to identify any legally cognizable right that is at issue in the present case. Nor does it identify any reason why the current defendants do not adequately represent any interests Buckeye might have. As a result, Buckeye's motion should be denied.

II. Buckeye does not meet the standard to intervene permissively under Rule 24(B)(2).

Pursuant to Rule 24(B)(2), a court has the discretion to allow an applicant to intervene in a case if three criteria are satisfied. First, the applicant's "claim or defense and the main action" must "have a question of law or fact in common." Civ.R. 24(B)(2). As part of this analysis, it is appropriate to deny a motion to intervene under Rule 24(B)(2) if the applicant "fail[s] to demonstrate that they would raise any different issues than those set forth by the [current defendant]." *Clarke*, 2000 WL 1336684, at *4; *see also, e.g.*, *Liberty Twp.*, 2001 WL 938757, at *4 ("[T]he legal issue before the trial court in this action is very narrow and appellants' interests are already adequately protected by Liberty Township. Under these facts, the trial court's decision to deny permissive intervention was not an abuse of discretion."). Second, the intervention must not "unduly delay or prejudice the adjudication of the rights of the original parties." Civ.R. 24(B)(2). Third, the application to intervene must be "timely." *Id.*

Here too, Buckeye fails at each step. Buckeye does not have any "claims" or "defenses" to raise—it has not brought any counterclaims, and it cannot have a legal defense where it has no cognizable interest to protect. Buckeye's position is thus unlike that of the intervenors in *State ex rel. Merrill v. Ohio Dept. of Nat. Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935 (2011), upon which it relies (at 6). In that case, the intervenors asserted counterclaims against the plaintiffs and represented persons with a "legally protectable interest in public-trust lands" that could be defended. *Merrill* at ¶ 39. In short, the plaintiffs do not argue that Buckeye did anything wrong, and it therefore has nothing to defend. Moreover, as noted above, Buckeye has no additional, relevant issues to raise in this case. It broadcasts this clearly by incorporating the entirety of the defendants' pleadings without adding a single additional argument, fact, or defense. To the extent that it purports to have expertise about certain topics, that expertise is not a basis for permissive

intervention; such information can simply be provided to the parties voluntarily or pursuant to the subpoena that the plaintiffs have issued to Buckeye. As a result, the Court should not allow Buckeye to intervene in the action only to make legal arguments that are wholly redundant of the defendants' or provide facts that are irrelevant to the case.

Buckeye likewise cannot demonstrate that its application was timely or that granting its motion to intervene will not result in undue delay. Indeed, as the plaintiffs already articulated above, its motion is not timely, and granting the motion would inevitably delay the case and require rescheduling the February 25 trial date. *See Meagher*, 82 Ohio St.3d 501, 696 N.E.2d 1058 (1998). Such a delay would be particularly undue in this case, where intervention would provide no meaningful benefit to the parties, the Court, or the intervenor's interests.

Buckeye does not satisfy the criteria for permissive intervention. Buckeye has no meaningful contribution to make to the resolution of this case and adding it as a party would delay resolution of an issue of great significance.

CONCLUSION

For these reasons, the plaintiffs respectfully request that the Court deny Buckeye's motion to intervene.

Respectfully submitted,

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January 11, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2019, a copy of the foregoing opposition to the motion for partial dismissal was served via email on the following:

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EXHIBIT A

Transmission Report

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Case Number: CV 2018 09 2028

Judge: Charles L. Pater

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Defendants/Respondents

Case No. CV 2018 09 2028

Judge Charles L. Pater

RETURN OF SERVICE

On, January 2, 2019, service of the subpoena for Keeper of Records, Buckeye Firearms Foundation, Inc. d/b/a Faster Saves Lives was accepted via electronic mail by William A. Posey, Esq. (WPOSEY@kmklaw.com), counsel for Buckeye Firearms Foundation, Inc, who represents that he is authorized to accept service on behalf of Buckeye Firearms Foundation, Inc., as shown by the attached Exhibit A.

DATE: 1/7/19

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EXHIBIT A

Jed Miller <jedmiller@everytown.org>

Buckeye Firearms subpoena [IWOV-IMANAGE.FID1624346]

Posey, William A. <WPOSEY@kmklaw.com> Wed, Jan 2, 2019 at 3:27 PM
To: "jedmiller@everytown.org" <jedmiller@everytown.org>, "rachel@guptawessler.com" <rachel@guptawessler.com>
Cc: "Conover, Brodi J." <bconover@fbtlaw.com>, "Ewing, Alexander L." <AEwing@fbtlaw.com>, "Hicks, Drew M." <DHicks@kmklaw.com>

Jed,

Thank you for the telephone conferences today with you and Rachel. This will acknowledge that I will accept service of the subject subpoena on behalf of Buckeye Firearms Foundation.

You have agreed to allow us to produce relevant documents in the possession of BFF no later than January 25, 2019. I have agreed to produce documents prior to that date if we are able to do so.

Thank you for your consideration and cooperation.

Any questions, please let me know.

Bill Posey

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