

IN THE SUPREME COURT OF KANSAS

GEORGE R. TILLER, MD)	
)	
Petitioner,)	
)	
Vs.)	
)	
HONORABLE MICHAEL CORRIGAN,)	Original Action No. 07-99434-S
PRESIDING JUDGE, and HONORABLE)	
PAUL BUCHANAN, ASSIGNED SENIOR)	
JUDGE OF THE EIGHTEENTH)	
JUDICIAL DISTRICT COURT,)	
SEDGWICK COUNTY, KANSAS,)	
)	
Respondents,)	
)	
OPERATION RESCUE, and)	
MARK S. GIETZEN,)	
)	
Movants / Intervenors)	

MOTION TO INTERVENE AS A DEFENDANT / RESPONDENT

COMES NOW, THE MOVANTS / INTERVENORS, Operation Rescue and Mark Gietzen (hereafter collectively "Intervenors") and move for leave to intervene as a respondent in this action. In support of its Motion, the Intervenors rely on the record in this case together with the facts stated in the following affidavits: (1) Affidavit of Troy Newman in Support of Motion to Intervene, attached as Exhibit A, and the Affidavit of Mark S. Gietzen in Support of Motion to Intervene, attached as Exhibit B.

REASONS WHY INTERVENTION SHOULD BE GRANTED

The Motion to Intervene should be granted both as a matter of right and as a matter of permission. The Petitioner in this matter, i.e., George R. Tiller, MD, is the subject of an underlying grand jury investigation. In the underlying matter, Tiller has not

been charged with crimes. However, citizens and citizen groups have utilized the authority of Kansas law (*K.S.A.* §22-3001(2)) to summon a grand jury to investigate the facts to determine whether the Petitioner has engaged in certain crimes. Rather than address the charges of a legally impaneled grand jury, Tiller seeks to terminate the grand jury before its inception by submitting a grossly unsupported and extraordinary "Petition for Writ of Mandamus."

Tiller's Petition is based almost entirely upon accusations of fact that are leveled at the Intervenors and the Kansans for Life Educational Fund, who has also submitted a proper "Motion to Intervene As a Defendant." Petitioner's accusations involve allegations of misconduct and illegal activity. While, the Honorable Respondents to the above action are in a position to defend the clear meaning of the law – which unambiguously requires the impaneling of a grand jury within sixty (60) days of the submission of the petition – the Honorable Respondents are not in a position to rebut the allegations of fact that are leveled at the Intervenors and which form the basis of Petitioner's Writ. Accordingly, it is necessary for Intervenors to participate in this action and to aid this honorable court in determining all issues of law and fact so that this court can arrive at a well-informed and proper result.

Certainly there are times when it is appropriate to allow parties to intervene in legal proceedings. Kansas law recognizes this fact and provides for intervention at *K.S.A.* §60-224 which states in its entirety:

(a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter substantially impair or impede his 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 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.

(c) *Motion to intervene and practice in intervention.* (1) A person desiring to intervene shall serve a motion to intervene upon the parties as provided in K.S.A. 60-205. The motion shall state the grounds therefor, and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene. (2) When the validity of a statute, regulation or constitutional provision of this state, or an ordinance or regulation of a governmental subdivision thereof affecting the public interest, is drawn in question in any action to which the state or governmental subdivision or an officer, agency or employee thereof is not a party, the court may in its discretion notify the chief legal officer of the state or subdivision thereof affected, and permit intervention on proper application.

Kansas law provides for intervention in certain cases. For the reasons stated below, intervention is appropriate in this case is appropriate in both the mandatory and permissive contexts.

I. The Motion to Intervene is Due to Be Granted as a Matter of Right Because Tiller Seeks to Overturn the "Substantial Interest" of the Intervenors, i.e., their Statutory Remedy as Signers of the Grand Jury Petition.

The Kansas Supreme Court has held that a motion to intervene is a matter addressed to the court's discretion; *American States Ins. Co v. Hartford Accident & Indemnity Co.*, 218 Kan. 563, 573 (Kan. 1976) and should be granted when (1) a timely application has been made, (2) the movant has a substantial interest in the subject matter, and (3) the movant's interest is not already adequately represented in the action. See

Hukle v. City of Kansas City, 212 Kan. 627, 630 (Kan. 1973); *Herrmann v. Board of County Commissioners of Butler County*, 246 Kan. 152, 155 (Kan. 1990); *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1 at 11 (1984). All three factors are present in this case.

A. The Intervenors' Application is Timely.

The Intervenors have filed their motion for intervention during the pendency of the appeal and during the time set for initial briefing by the parties. In fact, the Intervenors have filed the present motion before the deadline for the filing of arguments by the Honorable Respondents to the Writ. Neither party will be prejudiced by the granting of the Motion to Intervene.

B. The Movants have a Substantial Interest in the Subject Matter.

The Movants have more than a substantial interest in the subject matter of the litigation. In short, the Petition itself is the direct result of the Intervenors, and other similarly situated citizens, choosing to exercise their statutorily guaranteed right to petition the government for the impaneling of a jury to investigate a matter, pursuant to K.S.A. §22-3001(2). Were there any doubt about the substantial nature of the Movants' interest in this matter, one need look no further than the face of George Tiller's "Petition for Writ of Mandamus," which makes numerous indirect ad hominem references to the Intervenors and makes direct and express reference to Operation Rescue no less than seven (7) times. See Tiller's "*Petition for Writ of Mandamus*" at 5, 6, 7, 8, and 10.

While Petitioner Tiller will no doubt disagree with the Intervenors' argument in favor of denying the Writ, Petitioner Tiller, acting in good faith will have to concede in light of the face of his own Petition, that the Intervenors' have a substantial interest in the

subject matter of the underlying action. Any assertion to the contrary by Petitioner Tiller would be an implied admission that this Honorable Court should strike most of the assertions of fact in his Petition.

C. The Movants' Interests Are Not Already Adequately Represented in this Action Because the Present Honorable Respondents Are Well Able to Rebut the Legal Flaws of the Petition, But are Not Familiar With the Factual Errors Asserted in the Petition.

The Movants' interests are not adequately represented by the present Honorable Respondents. The Honorable Respondents are judges and as members of the bench are well able to represent the interests of the law as applied to this case so far as those interests are not divergent from the interests of the Movants.¹ However, even if the Movants' interests and the Honorable Respondents' interests were legally identical, the Honorable Respondents and the Intervenors would still be at a substantial disadvantage in this case because the Respondent is not familiar with the facts of this case.

As is discussed in detail above in Section B, *supra*, Petitioner Tiller makes numerous assertions of fact including assertions directly referencing the actions of Intervenor Operation Rescue no less than seven (7) times in just his "Petition for Writ of Certiorari." Honorable Respondents are not familiar with the facts and, accordingly, are not in a position to address the application of the law to the facts, neither are they able to address mixed questions of law and fact for the benefit of this honorable court.

Intervention as a matter of right is appropriate in this instance because a timely application has been made, the Movant has a substantial interest in the subject matter, and the Movant's interest is not already adequately represented in the action.

¹ Intervenor Kansans for Life Education Fund ("KFL") correctly raise and address the issue of the divergent legal interests of the present Honorable Respondents and KFL, and the present Intervenors. See Kansas for Life Educational Fund "Motion to Intervene as a Defendant," at 3-5. Intervenors incorporate those arguments herein.

II. The Motion to Intervene Should be Granted Under the Guidelines for Permissive Intervention as Well

Even if the Intervenors had not satisfied the requirements for Intervenors as a matter of right, this Court still has the authority to grant permissive intervention in situations where: (1) "an applicant's claim or defense and the main action have a question of law or fact in common [and (2)] intervention will [not] unduly delay or prejudice the adjudication of the rights of the original parties."

As is discussed in detail above, the Intervenors claim that this Honorable Court should follow and apply the clear meaning of *K.S.A. §22-3001(2)* and permit the statutory authorized impaneling of the grand jury. The Petition on the other hand argues against the clear meaning of the law and asks this court to depart from established law and interrupt the application of *K.S.A. §22-3001(2)*. Certainly, the first prong of permissive intervention is satisfied because the parties raise the same issue of fact and law: the application or non-application of *K.S.A. §22-3001(2)*.

The second prong of the permissive intervention test is satisfied also in that the parties to the present action – the Petitioner and the Honorable Respondents – will not be prejudiced by this court's granting of the Motion to Intervene. The Motion to Intervene will not delay this matter, and will not only not prejudice the interests of the parties – but will actually aid the interests of the Honorable Respondents by allowing them to have access to the facts and make correct application of the law to the facts.

CONCLUSION

Justice dictates that this court have access to all available information in order to determine whether to grant or deny the Writ. Kansas law provides for Intervenor both as a matter of right and permissively in circumstances like those present in this matter. It is important to note that the granting of this Motion to Intervene does not in and of itself lead to a ruling for or against the Petitioner or the Honorable Respondents; although Intervenor and the Honorable Respondents certainly will argue for that result on the merits. Rather the granting of the Motion to Intervene will simply aid this Court in gathering all arguments regarding the law, the facts, and the application of the law to the facts in order to arrive at the proper and just result in this case.

WHEREFORE, PREMISES CONSIDERED, the Intervenor respectfully request that this Honorable Court grant the "Motion to Intervene," and allow the Intervenor to file a response to the Petition for Writ of Mandamus, and participate in this action as a party Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICES

I hereby certify that a true and correct copy of the foregoing was sent this the _____ day of _____, 2007 via certified mail to the following:

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