

LEXSEE 1998 U.S. APP. LEXIS 9506

JOHN J. HORRIGAN, et al., Plaintiffs-Appellees, v. WILLIAM J. THOMPSON,
Defendant-Appellee, SHARP & LANKFORD, Appellant.

No. 96-4138

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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May 7, 1998, Filed

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SUBSEQUENT HISTORY: Reported in Table Case Format at: 1998 U.S. App. LEXIS 19635.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. 91-00253. Aldrich. 9-10-96.

DISPOSITION: Case REMANDED to the district court for a determination on the motion to intervene.

CASE SUMMARY:

PROCEDURAL POSTURE: Intervenor law firm appealed a denial of its motion to intervene as a matter of right by the United States District Court for the Northern District of Ohio in an underlying federal action against defendant client brought by plaintiff shareholders.

OVERVIEW: The law firm had a contingency fee contract with the client when he entered into a settlement agreement with the shareholders. After the settlement, but before all of the payments to the client were made pursuant to the settlement, the client discharged the firm. The firm contended that it should have been allowed to intervene in the dispute between the parties concerning the interpretation of the settlement agreement in order to protect its contingent fee agreement. The client argued that the discharged firm did not have a protectable inter-

est in the lawsuit because a discharged attorney was entitled to recover only the reasonable value of services rendered prior to the discharge. The shareholders argued that the law firm did not have a protectable interest in the suit because the client's claims were meritless. The court found that intervention was required because the discharge occurred after the law firm performed a considerable amount of post-judgment work to enforce the settlement. Consequently, the law firm might have been entitled to the full price of the contract. Further, it was premature to deny intervention on the basis that the underlying action was meritless.

OUTCOME: The court reversed and remanded the case to the district court for a determination on the motion to intervene, in the event that the merits of the issue concerning attorneys fees have not been concluded in the state court action.

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Joinder of Claims & Parties > Intervention

[HN1] A district court's denial of a party's motion to intervene as a matter of right is reviewed de novo. In determining whether intervention should be allowed, a reviewing court must accept as true the non-conclusory allegations of a motion to intervene.

Evidence > Procedural Considerations > Inferences & Presumptions

Civil Procedure > Joinder of Claims & Parties > Intervention

[HN2] An applicant for intervention under *Fed. R. Civ. P. 24(a)(2)* must show that (1) the applicant has timely applied to intervene, (2) has a substantial legal interest in a pending litigation, (3) the ability to protect that interest

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is impaired, and (4) the parties before a court do not adequately represent that interest.

Civil Procedure > Counsel

Civil Procedure > Costs & Attorney Fees > Attorney Fees

[HN3] An attorney who is discharged by his or her client is entitled to recover only the reasonable value of services rendered prior to the discharge on a basis of quantum meruit. However, an attorney who substantially performs under a contract may be entitled to the full price of the contract in the event of discharge "on the courthouse steps," or just prior to settlement.

Civil Procedure > Joinder of Claims & Parties > Intervention

[HN4] Intervention should be allowed when a party might be practically disadvantaged in its ability to protect its interests by the disposition of an action, not just when a party will be legally bound as a matter of res judicata.

Evidence > Procedural Considerations > Inferences & Presumptions

Civil Procedure > Joinder of Claims & Parties > Intervention

[HN5] The burden of making a showing that the parties before a court do not adequately represent the interests of a would-be intervenor should be treated as minimal. A party's opposition to a motion to intervene is evidence that the party does not adequately represent an intervenor.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction

Civil Procedure > Joinder of Claims & Parties > Intervention

Civil Procedure > Costs & Attorney Fees > Attorney Fees

[HN6] Although attorneys' fee arrangements are contracts under state law, a federal court's interest in fully and fairly resolving any controversies before it requires a federal court to exercise supplemental jurisdiction over fee disputes that are related to a main action before the court. Hence, judicial economy is a relevant consideration in deciding a motion for intervention because unlike a state court judge hearing a separate contract action, a federal judge who has presided over the case is already familiar with the relevant facts and legal issues.

COUNSEL: For JOHN J. HERRIGAN, Plaintiff - Appellee: James F. Burke, Jr., Burke, Kainski & Van Buren, Akron, OH.

For JOHN J. HERRIGAN, Plaintiff - Appellee: Dale F. Kainski, Law Firm of Dale F. Kainski, Cleveland, OH.

For WILLIAM J. THOMPSON, Defendant - Appellee: A. Russell Smith, Laybourne, Smith, Gore & Goldsmith, Akron, OH.

For WILLIAM J. THOMPSON, Defendant - Appellee: Paul V. Castellitto, Washington, DC.

For SHARP & LANKFORD, Appellant: Thomas R. Bagby, Woods, Rogers & Hazlegrove, Roanoke, VA.

JUDGES: BEFORE: GUY, DAUGHTREY, and GIBSON *, Circuit Judges.

* The Hon. John R. Gibson, United States Court of Appeals for the Eighth Circuit, sitting by designation.

[*2]

OPINION:

PER CURIAM. Sharp & Lankford, an Ohio law firm, appeals the district court's denial of its motion to intervene as a matter of right in the present lawsuit, pursuant to *Fed. R. Civ. P. 24(a)(2)*. Sharp & Lankford represented and had a contingency fee contract with William J. Thompson, the defendant in the present lawsuit, when Thompson entered into a settlement agreement with the plaintiffs. After the settlement, but before all of the payments to Thompson were made pursuant to the settlement, Thompson discharged Sharp & Lankford. The firm now contends that in order to protect and enforce its contingent attorney fee agreement with Thompson, it must be allowed to intervene in the ongoing dispute between Thompson and the plaintiffs concerning the interpretation of the settlement agreement. Because the district court denied the motion without explanation, we find it necessary to remand for additional findings.

FACTUAL AND PROCEDURAL HISTORY

In February 1991, John J. Herrigan and James Burke filed a federal lawsuit against William J. Thompson, Thomas E. Rawlings, and Cellwave, Inc., alleging that defendants engaged in securities fraud, breach of fiduciary duty, and [*3] RICO violations. Thompson retained A. Russell Smith and the law firm of Sharp & Lankford to defend him in the lawsuit, and entered into a fee agreement with Smith and the law firm in March 1991. The fee agreement provided:

1. Attorneys shall receive, as their fees for representing William J. Thompson in the two lawsuits, twenty-five percent (25%)

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of the gross dividends, earnings, income, and/or receipts which he, his wife, heirs, assigns, or any others claiming through him, may receive at any time from any interest that he may have, or shares that he, his wife, heirs, assigns, or any others claiming through him, may have in Cellwave, Inc. and all its assets, its affiliates, subsidiaries and successors.

2. Attorneys shall also receive as fees, twenty-five percent (25%) of any recovery which William J. Thompson may obtain from any counter-claims or cross-claims which may be brought on his behalf against any party in the two lawsuits.

In July 1991, the parties to the lawsuit entered into a settlement agreement, with a mutual release of all claims, which provided that Thompson would relinquish all of his shares and interest in Cellwave, Inc., in exchange for plaintiffs [*4] paying him a percentage of the proceeds from the sale of the company's cellular radio broadcast licenses in Michigan and Ohio.

In October 1995, the district court ordered plaintiffs to make a payment of \$ 10,626,714.61 to Thompson. A month later, Thompson paid Sharp & Lankford \$ 1.3 million, 12.5 percent of the total sum it had received from plaintiffs, pursuant to the attorney fee agreement. In January 1996, the plaintiffs paid Thompson an additional \$ 2,554,697.31, of which he has not paid Sharp & Lankford any amount.

On March 5, 1996, Sharp & Lankford terminated its relationship with Paul Castellitto, the only lawyer in the firm who had worked on the Thompson case. Three days later, Sharp & Lankford informed Thompson that they, rather than Castellitto, would be representing him in the future. The firm subsequently requested that Thompson pay them \$ 319,337.16 -- 12.5 percent of the \$ 2,554,697.31 that Thompson had received from plaintiffs in January. Thompson did not make this payment and, on March 18, he discharged Sharp & Lankford and purported to terminate the contingent attorney fee agreement with the law firm. Thompson then filed suit against Sharp & Lankford in the Court [*5] of Common Pleas of Summit County, Ohio, seeking damages for breach of contract and requesting a declaratory judgment both that Thompson is not required to pay the law firm under the fee agreement until final disposition of the settlement agreement enforcement proceedings and also declaring that the firm's basis for a fee recovery is in *quantum meruit*. In the lawsuit, Thompson also requested an order requiring Sharp & Lankford and Castellitto to settle between themselves their rights, if any, to the \$ 319,337.16

payment for the legal services which Castellitto provided to Thompson before the firm was discharged.

At the end of April 1996, Sharp & Lankford moved to intervene in the ongoing federal lawsuit between Thompson and the plaintiffs as a matter of right, pursuant to *Fed. R. Civ. P. 24(a)(2)*. The district court denied the motion with only a marginal entry, and Sharp & Lankford now timely appeals the district court's decision.

ANALYSIS

This court has held that [HN1] a "district court's denial of a party's motion to intervene as a matter of right is reviewed *de novo*." *Purnell v. City of Akron*, 925 F.2d 941, 945 (6th Cir. 1991). In determining whether intervention [*6] should be allowed, we "must accept as true the non-conclusory allegations of the motion." *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983).

[HN2] An applicant for intervention under *Fed. R. Civ. P. 24(a)(2)* must show that (1) the applicant has timely applied to intervene; (2) the applicant has a substantial legal interest in the pending litigation; (3) the applicant's ability to protect that interest is impaired; and (4) the parties before the court do not adequately represent that interest. *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir. 1993). The parties do not dispute that Sharp & Lankford's application to intervene was timely filed.

Sharp & Lankford satisfies the second element of the test for intervention as a matter of right by establishing that the law firm may be entitled to a percentage of any recovery received by its former client, Thompson, in the underlying lawsuit. Thompson argues that the discharged firm does not have a protectable interest in the lawsuit because, under Ohio law, [HN3] an attorney who has been discharged by his or her client is entitled to recover only the reasonable value of services rendered prior to the [*7] discharge on the basis of *quantum meruit*. See *Fox & Assocs. Co. v. Purdon*, 44 Ohio St. 3d 69, 541 N.E.2d 448, 450 (Ohio 1989). However, as the Ohio Supreme Court pointed out in *Fox*, "an attorney who substantially performs under the contract may be entitled to the full price of the contract in the event of discharge 'on the courthouse steps,' or just prior to settlement." *Id.* In the present case, Thompson's discharge of Sharp & Lankford occurred after the settlement agreement between Thompson and the plaintiffs, and after the law firm performed a considerable amount of post-judgment work to enforce the settlement. Consequently, under Ohio law the law firm may be entitled to "the full price of the contract."

Horrigan and the other plaintiffs in the underlying federal lawsuit against Thompson oppose Sharp &

Lankford's motion to intervene and argue that the law firm does not have a protectable interest in the suit because Thompson's claims (of which Sharp & Lankford's claim to attorneys fees is derivative) are meritless. The district court has not yet made any determination regarding the merits of the underlying dispute, and Thompson has not had an opportunity to argue the merits of his [*8] position before this court. Hence, it would be premature for us to deny Sharp & Lankford's motion to intervene on the basis that the underlying action is meritless.

It is the third factor of the intervention test that gives us the greatest pause. To satisfy the third factor, Sharp & Lankford must demonstrate that the law firm's ability to protect its interests would be substantially impaired or impeded were it not allowed to intervene. This question "must be put in practical terms rather than in legal terms." 7C Wright, Miller & Kane, Federal Practice and Procedure § 1908, p. 301 (2d ed. 1986). In other words, [HN4] intervention should be allowed when a party might be practically disadvantaged by the disposition of the action, not just when a party will be legally bound as a matter of *res judicata*. *Id.*

The law firm seeks to intervene in this action to protect and enforce its interest in a percentage of any recovery that Thompson receives from the settlement agreement the firm helped forge. Thompson argues that this issue can be litigated in the action he brought in state court alleging, among other things, that Sharp & Lankford breached its contract with him. However, requiring [*9] Sharp & Lankford to defend its interest in state court when a federal judge who has presided over this case for many years is already familiar with the relevant facts and legal issues appears, from our vantage point, to create a practical impediment to the firm's ability to protect its interests. It is on this issue that a finding from the district court would be the most helpful.

The fourth and final prong of the test for intervention as a matter of right asks whether the parties before the court adequately represent the interests of the would-be intervenor. With regard to this prong of the test, the Supreme Court of the United States has observed that [HN5] "the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10, 30 L. Ed. 2d 686, 92 S. Ct. 630 (1972). This court has noted that a party's opposition to the motion to intervene is evidence that the party does not adequately represent the intervenor. See *Purnell*, 925 F.2d at 950; see also *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989) ("In the case of a former attorney

seeking intervention in order to secure rights under a contingent fee agreement, neither [*10] of the existing parties is concerned with protecting the [attorney's] interest.") (citing *Gaines v Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir. 1970)). In the present case, Sharp & Lankford's interest is to enforce its fee agreement with Thompson and to recover its share of any proceeds that Thompson recovers in this federal lawsuit. Clearly neither the plaintiffs nor Thompson adequately represent this interest.

We have previously held that [HN6] "although attorneys' fee arrangements are contracts under state law, the federal court's interest in fully and fairly resolving the controversies before it requires courts to exercise supplemental jurisdiction over fee disputes that are related to the main action." *Kalyawongsa v. Moffett*, 105 F.3d 283, 287 (6th Cir. 1997). Hence, in addition to the four factors derived from the federal rule itself, "judicial economy is a relevant consideration in deciding a motion for . . . intervention." *Venegas*, 867 F.2d at 531 (citations omitted). As this court has recently noted, "resolution of related fee disputes is often required to provide a full and fair resolution of the litigation. Unlike a state court judge hearing a separate contract [*11] action, a federal judge who has presided over the case is already familiar with the relevant facts and legal issues. Considerations of judicial economy are at stake." *Kalyawongsa*, 105 F.3d at 287. In the instant case, the district judge is familiar with both the litigation that has ensued over the past six to seven years and also with the relationships among the parties. Hence, It may well be in the interest of judicial economy for the district court to determine this question on the record.

CONCLUSION

For the reasons set out above, we **REMAND** this case to the district court for a determination on the motion to intervene, in the event that the merits of the issue concerning attorneys fees have not been concluded in the state court action. In remanding, we also emphasize that this court has repeatedly stated that marginal entry orders are disfavored. See, e.g., *FDIC v. Bates*, 42 F.3d 369, 373 (6th Cir. 1994); *United States v. Woods*, 885 F.2d 352, 353-54 (6th Cir. 1989). They are deficient because they fail to comply with *Fed. R. Civ. P.* 58, which requires judgments to be set forth on a separate document, 885 F.2d at 353, and they hinder appellate review, [*12] by forcing the parties and the reviewing court to guess as to the district court's reasoning. *Id.* At 354.