

[Cite as *In re Protest of Initiative Petitions Proposing the Ohio Sales Tax Reduction Act, 2004-Ohio-4157.*]

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
LOGAN COUNTY**

**IN RE: PROTEST OF INITIATIVE  
PETITIONS PROPOSING THE  
“OHIO SALES TAX REDUCTION ACT”**

**CASE NUMBER 8-04-06**

**OPINION**

**(J. KENNETH BLACKWELL,  
OHIO SECRETARY OF STATE,  
APPELLANT)**

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**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas  
Court.**

**JUDGMENT: Judgment reversed and cause remanded.**

**DATE OF JUDGMENT ENTRY: August 9, 2004.**

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**SCUPP, J.**

{¶1} Appellant, J. Kenneth Blackwell, Ohio Secretary of State, appeals the decision of the Logan County Court of Common Pleas, denying the appellant's motion to intervene as a party in an initiative petition protest action. Although originally placed on the accelerated calendar, we have elected, pursuant to Local Rule 12(5), to issue a full opinion in lieu of a judgment entry. After considering the issue presented, we reverse the judgment of the trial court and remand the case for further proceedings.

{¶2} The power of the people to propose laws by initiative, expressed by Article II of the Ohio Constitution, is codified in R.C. 3519.01 et seq. A petition

must comply with these statutory requirements to be valid. If a petition purports to meet all the necessary requirements, it is sent to the Ohio Secretary of State to be separated according to the county where it was circulated. The divided petitions are known as “part-petitions” and, pursuant to R.C. 3519.15, are then sent to the respective county boards of elections for the purpose of determining the sufficiency and validity of each part-petition.

{¶3} On January 22, 2004, Brian Rothenberg (hereinafter “Protester”), filed a protest with the Logan County Board of Elections, alleging that certain part-petitions proposing the Petitioner-named “Ohio Sales Tax Reduction Act” did not meet the statutory requirements. The Logan County Board of Elections thereafter brought an action in the Logan County Court of Common Pleas to determine the validity of the petitions.

{¶4} On February 10, 2004, appellant filed a motion for an order to intervene in the action and for an order to change venue to Franklin County. Protester filed a motion in opposition to the appellant’s intervention and a motion hearing was held February 20, 2004.

{¶5} At the hearing, the trial court determined that the appellant’s intervention was permissive, not as of right, and that the intervention would “unduly delay the decision and would prejudice the rights of the protester.”

Therefore, the trial court denied the appellant's motion to intervene and to transfer the case to Franklin County.

{¶6} It is from this decision that appellant appeals and sets forth one assignment of error for our review.

### ASSIGNMENT OF ERROR NO. I

**The Trial Court erred in denying Appellant's motion to intervene and to change venue, because Appellant Secretary of State had the right to intervene and to have the matter transferred under R.C. 3501.05 and Civil Rules 24(A)(1) and (2), and since denial of intervention was an abuse of discretion.**

{¶7} The appellant argues that intervention in the petition protest action is governed by statute; that R.C. 3501.05, which delineates the duties of the Secretary of State, authorizes his intervention as of right; and that the trial court erred in denying the intervention. Appellant further argues that intervention as of right should have been permitted pursuant to Civ.R. 24(A)(2) even in the absence of R.C. 3501.05.

{¶8} Our review of a trial court's interpretation of a statute is conducted under a de novo standard of review since statutory interpretation is a matter of law. *State v. Wemer* (1996), 112 Ohio App.3d 100, 103. Therefore, we review the decision without deference to the trial court's interpretation. *Id.*

{¶9} The language of the specific paragraph of R.C. 3501.05 which is at issue in this case purports to grant the Secretary of State the authority to intervene

in court actions involving certain types of controversies over Ohio's election laws.

The section provides in pertinent part:

**In any action involving the laws in Title XXXV of the Revised Code wherein the interpretation of those laws is in issue in such a manner that the result of the action will affect the lawful duties of the secretary of state or of any board of elections, *the secretary of state may, on the secretary of state's motion, be made a party.***  
Emphasis supplied.

{¶10} The appellant contends that the phrase, “\* \* \* [T]he secretary of state may, on the secretary of state's motion, be made a party” gives to the secretary of state the discretionary authority whether or not to move to intervene. But, that once the Secretary of State exercises this discretion and makes the motion to intervene, the intervention becomes of right and the trial court does not have the authority to deny the motion.

{¶11} On the other hand, Protestor contends that, although the Secretary of State has the discretion to decide whether to seek intervention through motion, the trial court is given the discretion to decide whether or not to grant the motion and allow the intervention sought. In Protester's view, the Secretary of State has the right to ask for intervention but has no automatic right to obtain it.

{¶12} In reviewing R.C. 3501.05, we find that the plain meaning of the statutory text grants the Secretary the right to intervene under the statute if the Secretary chooses to do so. The statute's use of the word “may,” when considered

in context, refers to the discretion of the Secretary of State and not the discretion of the court.

{¶13} Support for this reading of the statute is found in the manner in which the word “may” is used in the two preceding paragraphs. One states, “\* \* \* the secretary of state *may* administer oaths, issue subpoenas \* \* \*.” The other provides, “\* \* \* the secretary of state *may*, through the attorney general, bring an action in the name of the state \* \* \*.” Each instance of the use of the word “may” clearly grants to the Secretary of State the authority, at the Secretary of State’s discretion, to do the act or acts set out in the paragraph. The text stipulates that, for the act to be performed, the Secretary of State need only decide to do it, and it is to be done.

{¶14} Correspondingly, the contested wording plainly continues the phraseology used in the preceding paragraphs: “\* \* \* the secretary of state *may*, on the secretary of state’s motion, be made a party.” It grants intervention upon the secretary of state’s decision to intervene, which decision is manifested by the filing of a motion in the court.

{¶15} Accordingly, we hold that whether or not to intervene in an action involving Revised Code Title XXXV is discretionary on the part of the secretary. However, once the secretary files his motion to intervene in such action, as the

secretary of state has done in this case, the trial court may not deny the intervention.

{¶16} The court action, of course, must be one involving the interpretation of R.C. Title 35 “\* \* \* wherein the interpretation \* \* \* will affect the lawful duties of \* \* \*” the Secretary or of an elections board. R.C. 3501.05. However, it is not contested that the present action will affect such lawful duties.

{¶17} The Secretary has also filed a motion with the trial court to change the venue to Franklin County, where other actions involving the petitions of the same initiative effort have been transferred. There is no dispute that once the Secretary of State becomes a party, the Secretary of State has the power to have the venue changed. The statute in this regard provides:

**The secretary of state may apply to any court that is hearing a case in which the secretary of state is a party, for a change of venue as a substantive right, and the change of venue shall be allowed, and the case removed to the court of common pleas of an adjoining county named in the application or, if there are cases pending in more than one jurisdiction that involve the same or similar issues, the court of common pleas of Franklin county.** Emphasis added.

{¶18} The trial court erred in denying the appellant’s motion to intervene pursuant to R.C. 3501.05. In holding that the appellant has a statutory right to intervene, it becomes unnecessary to decide appellant’s additional argument that the Secretary’s motion to intervene should also have been granted as of right pursuant to Civ.R. 24(A)(2).

{¶19} Having found error prejudicial to appellant herein, in the particulars assigned and argued, we reverse the judgment of the trial court and remand the matter for further proceedings consistent with this opinion.

Judgment reversed  
and cause remanded.

BRYANT, J., concurs.

ROGERS, J., concurs separately.

ROGERS, J., concurring separately.

{¶20} While I concur with the lead opinion's statements of the general law concerning statutory interpretation and its disposition of appellant's assignment of error, I write separately to emphasize that I do not concur with its interpretation of R.C. 3501.05.

{¶21} The majority has interpreted R.C. 3501.05 to mean that the Secretary of State can intervene as of right in any case "involving the laws in Title XXXV of the Revised Code wherein the interpretation of those laws is in issue in such a manner that the result of the action will affect the lawful duties of the secretary of state or of any board of elections." R.C. 3501.05(W). The majority cites to several preceding paragraphs that use the word "may" to grant discretion to the Secretary in exercising his powers. Thus, they argue, the word "may" in this paragraph grants discretion to the Secretary. They then conclude that once the

Secretary chooses to exercise such discretion, he can intervene in such a case as of right.

{¶22} I read the sentence differently. Because it says that the Secretary may be made a party, on the motion of the Secretary, I believe the statute grants the Secretary the discretion to move to intervene, while the discretion to grant leave to intervene remains with the court in which the action is pending.

{¶23} This interpretation is strengthened when one notes that in the paragraph following the one in question the statute explicitly states that upon the Secretary's motion a "change of venue *shall* be allowed" in any case where the Secretary is a party. *Id.* (Emphasis added.) If the legislature had intended to grant the Secretary such an explicit right in regards to intervention it could have done so. However, the statute clearly states only that the Secretary *may* be permitted to intervene in certain cases, not that the Secretary *shall* be allowed to intervene.

{¶24} Accordingly, I would find that the plain meaning of the words the legislature chose to use denotes that the Secretary can not intervene as of right in such cases. Therefore, the Secretary was required to bring the motion to intervene pursuant to Civ.R. 24(B), and it must be determined whether the trial court abused its discretion in not allowing intervention under this rule.

{¶25} "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.” Civ.R. 24(B). Permissive intervention under this statute is to be granted liberally. *State v. Superamerica Group v. Licking Cty. Bd. of Elections* (1997), 80 Ohio St.3d 182, 184.

{¶26} A reviewing court will consider the trial court’s decision pursuant to Civ.R. 24(B) under an abuse of discretion standard. *State ex rel. Montgomery v. City of Columbus*, 10th Dist. No. 02AP-963, 2003-Ohio-2658, at ¶14, citing *Young v. Equitec Real Estate Investors Fund* (1995), 100 Ohio App.3d 136, 138; *Widder & Widder v. Kutnick* (1996), 113 Ohio App.3d 616, 624. An abuse of discretion will only be found where the decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶27} In the case sub judice, the trial court found that allowing the Secretary to intervene “would necessarily unduly delay the decision and would prejudice the rights of the protestor, Rothenberg.” (Judgment Entry Page 2.) I would find that the record does not support such a finding on the part of the trial court.

{¶28} The current appeal is part of a large number of appeals being filed across the state in numerous other jurisdictions by Protestor. In every other case the Secretary has been allowed to intervene and has used its statutory right to change venue to Franklin County. Therefore, it appears that intervention in this

case would not cause Protestor any undue delay. Indeed, it would result in all of Protestor's cases being heard in the same venue and probably would mean a faster final outcome for Protestor.

{¶29} Furthermore, the record is totally devoid of any evidence concerning what prejudice Protestor would suffer upon the Secretary's intervention. Without any sort of evidence to support the trial court's findings, especially in light of the mandate that permissive interventions are to be liberally granted, I would find that the trial court abused its discretion in not allowing the Secretary to intervene.

{¶30} Accordingly, I would hold that while the Secretary can not intervene as of right in this case the trial court abused its discretion in not allowing the intervention. For that reason I would sustain the Secretary's assignment of error and reverse the decision of the trial court.