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## Hairr v. First Judicial Dist. Ct., 132 Nev. Adv. Op. 16 (Mar. 10, 2016)

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CIVIL PROCEDURE: INTERVENTION AS A MATTER OF RIGHT AND PERMISSIVE  
INTERVENTION UNDER NRCP RULE 24

**Summary**

The Supreme Court denied petitioners' application for a writ of mandamus for abuse of the district court's discretion. If granted, this writ would have compelled the district court to grant the petitioners' application to intervene under Rule 24 of the Nevada Rule of Civil Procedure as defendants in a constitutional challenge to a program that awards grants to children who are educated by entities other than public schools. The State is presumed to adequately represent the interests of those who support the bill. Since they did not demonstrate a conflict of interest with the State's position or present an argument that the State would not make, the petitioners failed to overcome this presumption and may not intervene as a matter of right. The petitioners have also not provided any supportable reason for reversing the district court's discretionary decision not to grant permissive intervention. Since the Court treats this decision with deference and since the district court invited the petitioners to submit amicus briefs in lieu of intervention, the Court perceives no abuse of discretion to warrant granting a writ of mandamus.

**Background**

Senate Bill 302 creates a program that awards grants to children who receive educational instruction from an entity other than a public school.<sup>2</sup> Several parents challenged the constitutionality of the program on behalf of themselves and their minor children who attend public school. They filed suit against State Treasurer Dan Schwartz. Petitioners sought to intervene in the suit as defendants as a matter of right under Nevada Rule of Civil Procedure 24(a) or, alternatively, to intervene through permissive intervention under 24(b).<sup>3</sup> The petitioners wished to focus the court's attention on the parents and children who benefitted from the law.

Concerning intervention as a matter of right, the petitioners argued that their interests were narrower on a theoretical level than those of the State and the petitioners might therefore make different arguments, although the petitioners did not specify what those different arguments might be. The petitioners asserted in particular that they had a liberty interest in their children's educational upbringing. The plaintiffs challenged the petitioners' entry into the suit and the district court denied the motion to intervene as a matter of right for failure to assert an independent legal interest in the action. The district court also exercised its discretion not to grant permissive discretion based on the potential for cost and delay without benefit to the court in deciding the issues. Petitioners also failed to provide a pleading in support of their motion setting forth the claim or defense for which intervention is sought as required by NRCP 24(c).<sup>4</sup> The

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<sup>1</sup> By Douglas H. Smith

<sup>2</sup> S.B. 302 (Nev. 2015).

<sup>3</sup> NEV. R. CIV. P. 24(a)-(b) (2016).

<sup>4</sup> NEV. R. CIV. P. 24(c) (2016).

district court found that the petitioners had instead filed several documents without a legal basis for doing so as they were not parties to the litigation

Petitioners then filed for a writ of mandamus from the Supreme Court to compel intervention, arguing that the district court failed to recognize the distinct nature of its liberty interest in educational upbringing in denying intervention as a matter of right. Petitioners also asserted that the district court's refusal to grant permissive intervention because of an alleged Rule 24(c) violation was in error and that the district court did not sufficiently consider under Rule 24(b)(2) whether intervention would cause undue delay or prejudice in adjudicating the existing parties' lawsuit.

## **Discussion**

Since the petitioners are not parties to the action, requesting a writ of mandamus is an appropriate means of asking the Court to review the order denying intervention.<sup>5</sup> Petitioners carry the burden of showing that relief via a writ of mandamus is warranted.<sup>6</sup>

### *Intervention of Right*

Under Rule 24(a) and Supreme Court precedent, a right to intervene exists when an applicant shows that (1) she has a sufficient interest in the litigation's subject matter, (2) she could be impaired in her ability to protect that interest if she does not intervene, (3) existing parties do not adequately represent her interest, and (4) her application is timely.<sup>7</sup> A presumption of adequate representation arises when applicants and existing parties have the same ultimate objective. When the existing party with that same objective is a state official, applicants for intervention must make "a very compelling showing" to overcome the presumption favoring adequate representation. Here, the existing party and the petitioners have the same objective of demonstrating that S.B. 302 is constitutional. The petitioners failed to demonstrate how protecting their asserted liberty interest would result in making any different defenses to decide that issue. Thus they failed to show an interest distinct from or adverse to that of the State. The presumption of adequate representation holds and the petitioners have failed to demonstrate that a writ of mandamus should compel the district court to allow intervention as a matter of right.

### *Permissive Intervention*

The district court's decision to deny permissive intervention was based on the potential for increased cost and delay without benefit to the proceedings. The Court treats the district court's decisions concerning permissive intervention with great deference. The important question upon review of such decisions is whether the district court clearly abused its discretion.<sup>8</sup> Although the petitioners argue that the district court merely mentioned generalized concerns regarding Rule 24(b)(2), this is the kind of fact-based judgment to which the district court's discretion extends. There is no clear abuse of discretion in such generalized treatment of Rule

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<sup>5</sup> *Am. Home Assurance Co. v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1234, 147 P.3d 1120, 1124 (2006).

<sup>6</sup> *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

<sup>7</sup> NEV. R. CIV. P. 24(a); *Am. Home Assurance Co.*, 122 Nev. at 1238.

<sup>8</sup> *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 471 (5th Cir. 1984).

24(b)(2). The district court's invitation to petitioners to submit amicus briefs reinforces this conclusion.

**Conclusion**

Absent a right to intervene and a demonstrated clear abuse of discretion by the district court, the petitioners' application for a writ of mandamus is denied.