

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 17, 2012**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2913**

**Cir. Ct. No. 2011FO808**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**COUNTY OF ADAMS,**

**PLAINTIFF-RESPONDENT,**

**V.**

**VERONICA MCCARTHY,**

**DEFENDANT,**

**FRANK GAURA,**

**PROPOSED-INTERVENOR-APPELLANT.**

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APPEAL from an order of the circuit court for Adams County:  
PAUL S. CURRAN, Judge. *Affirmed.*

¶1 SHERMAN, J.<sup>1</sup> Frank Gaura, pro se, appeals an order of the circuit court denying his motion to intervene in an action brought by Adams County against his sister, Veronica McCarthy, for failure to timely comply with the septic tank inspection, pumping, and reporting requirements of Adams County Municipal Ordinance No. 11-2009. I affirm.

### BACKGROUND

¶2 Adams County cited McCarthy for violation of Adams County Private Onsite Wastewater Treatment Systems Ordinance No. 11-2009, section 6.00, which requires the inspection and/or pumping of a landowner's private waste treatment system, and the reporting of that inspection and/or pumping to the Adams County Planning and Zoning Department, by July 31 of the year inspection and/or pumping is required. *See* section 6-5.01. An individual who fails to timely comply with his or her obligations under section 6 is subject to a civil forfeiture. McCarthy's septic tank was required to be inspected and/or pumped by July 31, 2011, and notice of that inspection and/or pumping was to be given to the Adams County Planning and Zoning Department by that date as well. McCarthy's notice to the Adams County Planning and Zoning Department indicated that inspection and/or pumping of her septic system took place on August 9, 2011, and was file-stamped August 11.

¶3 McCarthy appeared pro se and entered a plea of not guilty. Thereafter, Gaura filed a motion with the circuit court to intervene in the present action by right under WIS. STAT. § 803.09(1) and, alternatively, by permission

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

under § 803.09(2). Gaura asserted that he resides with McCarthy and, as a cohabitant, is directly affected by the proceeding against McCarthy. Gaura further asserted that he is an interested party because he served as McCarthy's agent with respect to performance of McCarthy's septic tank inspection and reporting obligations. The circuit court determined that Gaura was not entitled to intervene as a matter of right under WIS. STAT. § 803.09(1), or by permission under § 803.09(2), and therefore denied Gaura's motion to intervene. Gaura appeals.

## DISCUSSION

¶4 Gaura contends the circuit court erred in denying his motion to intervene in the present action. Gaura claims that he is entitled to intervene as a matter of law under WIS. STAT. § 803.09(1), or is entitled to permissive intervention under § 803.09(2).

### *A. Intervention as a Matter of Right*

¶5 WISCONSIN STAT. § 803.09(1), which governs intervention as a matter of right, provides:

[U]pon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

¶6 To claim a right of intervention under WIS. STAT. § 803.09(1), the movant must meet each of the following four criteria:

- (A) that the movant's motion to intervene is timely;
- (B) that the movant claims an interest sufficient related to the subject of the action;

(C) that disposition of the action may as a practical matter impair or impede the movant’s ability to protect that interest; and

(D) that the existing parties do not adequately represent the movant’s interest.

*Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1 (footnotes omitted). In analyzing whether a movant has met the four criteria, courts do not apply a precise formula, but rather employ a “holistic, flexible, and highly fact-specific” analysis in which the facts and circumstances underlying the intervention rule are reviewed. *Id.*, ¶40. On appeal, this court’s review of a circuit court’s decision to allow or not allow intervention under WIS. STAT. § 803.09(1) is de novo. *Id.*, ¶41.

¶7 I conclude, upon my independent review, that Gaura has not established the second of the four criteria—that he has an interest in the present action sufficiently related to the subject of the action.

¶8 The supreme court has explained:

[A] claimed interest does not support intervention if it is only remotely related to the subject of the action. There must be some sense in which the interest is “of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment.” A movant may intervene as of right when the movant needs “to protect a right that would not otherwise be protected in the litigation.”

*Id.*, ¶45 (citations omitted).

¶9 Gaura has not established that his interest in the present action is in any sense “of such direct and immediate character that [he] will either gain or lose by the direct operation of the judgment,” or that he “needs ‘to protect a right that would not otherwise be protected in the litigation.’” *See id.* Gaura claims that he

has an interest in the action because he is McCarthy's agent due to his payment of the septic inspection and/or pumping service. However, Gaura's claim is unsubstantiated and the mere payment of a service does not alone establish an agency relationship. *See* WIS JI—CIVIL 4000.<sup>2</sup> Gaura has also not made a showing that he would in any other way be affected by the present action. There is no evidence that Gaura would gain or lose anything by virtue of a judgment against McCarthy in the action, or that his inclusion in this action was necessary to protect a right that would not otherwise be protected.

¶10 Because Gaura has not established the second of the four necessary criteria that must be established for intervention as of right under WIS. STAT. § 803.09(1), I conclude that the circuit court did not err in denying Gaura's right to intervene under that statute.<sup>3</sup>

#### *B. Permissive Intervention*

¶11 WISCONSIN STAT. § 803.09(2) provides in relevant part:

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<sup>2</sup> WISCONSIN JI—CIVIL 4000 provides in relevant part:

An agency is based on an agreement between the parties which embodies three factual elements:

(1) the conduct of the principal showing that the agent is to act for him or her;

(2) the conduct of the agent showing that he or she accepts the undertaking;

(3) the understanding of the parties that the principal is to control the undertaking.

<sup>3</sup> Because I conclude that Gaura did not satisfy one of the four necessary criteria for intervention under WIS. STAT. § 803.09(1), I do not address whether he satisfied any of the other criteria. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

[U]pon timely motion anyone may be permitted to intervene in an action when a movant'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.

¶12 The decision of whether a movant may be permitted to intervene in an action when the movant's claim or defense and the main action have a question of law or fact in common lies within the discretion of the circuit court. *Helgeland*, 307 Wis. 2d 1, ¶120. An appellate court will not disturb a circuit court's discretionary decision so long as the record reflects the circuit court's reasoned application of the appropriate legal standard to the relevant facts in the case, and the decisionmaker has reached a conclusion that reasonable decisionmaker could reach. *See Flottmeyer v. Circuit Court of Monroe County*, 2007 WI App 36, ¶17, 300 Wis. 2d 447, 730 N.W.2d 421.

¶13 In denying Gaura's right to intervene under WIS. STAT. § 803.09(2), the court stated:

[Section 803.09(2)] provides that [Gaura] may move to intervene in an action when Mr. Gaura's claim or defense and the main action have a question of law or fact in common. Mr. Gaura has no claim nor defense. He is not—nobody is asking for any—nobody is making any claim against him for him to defend.

... I can understand his position may be as a witness. I mean, that I will leave up to the parties to determine who it is they call as witnesses. He may be a witness, but that doesn't make him a party. So the motion to intervene is denied.

¶14 Gaura argues that the circuit court should have permitted him to intervene under WIS. STAT. § 803.09(2) because “there [would be] no prejudice against the original parties, and [his] claims or defenses and the main question

have a question of law or fact in common.” While it may be true that the original parties to the action would not be prejudiced by his inclusion in the action, Gaura has not shown that he has any claim or defense that has a question of law or fact in common with the present action.

¶15 Because the circuit court applied the appropriate law to the relevant facts, and, in concluding that Gaura did not have a claim or defense with a question of law or fact in common with the main action, reached a conclusion a reasonable decisionmaker could reach, I conclude that the circuit court did not erroneously exercise its discretion when it denied Gaura’s motion for permissive intervention under WIS. STAT. § 803.09(2).

### CONCLUSION

¶16 For the reasons discussed above, I affirm.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

