

IN THE DISTRICT COURT OF BOURBON COUNTY, KANSAS

SUSAN E. WALKER )  
Bourbon County Clerk, )  
 )  
Plaintiff, )  
 )  
v. ) Case No. BB-2026-CV-000048  
 )  
JAMES CRUX )  
Bourbon County Attorney, )  
 )  
Defendants. )  
\_\_\_\_\_ )

Pursuant to K.S.A. Chapter 60

**PLAINTIFF’S RESPONSE TO THE MOTION TO INTERVENE**

COMES NOW, the Plaintiff Susan E. Walker, Bourbon County Clerk, (“Plaintiff”) by and through legal counsel, and respectfully answers the Motion to Intervene filed by proposed intervenors Kyle R. Parks, Kevin Wagner and Lyle K. Owenby (collectively, “Proposed Intervenors” or “Recall Committee”). In response and in support of her response, Plaintiff offers the following:

**Order Dismissing Defendant Recall Committee should not be set aside.**

Plaintiff repeats and reasserts her arguments set forth in her Response to Kevin Wagner’s Motion to Set Aside Order Dismissing Defendant Recall Committee and Objection to Motion to Dismiss Defendant Recall Committee (“Plaintiff’s Response”) and incorporates that filing herein by reference. There is not a sufficient legal basis for the Court to set aside its Order Dismissing Defendant Recall Committee, and the Court should DENY Kevin Wagner’s motion.

**Proposed Intervenors have no right to intervene under K.S.A. 60-224(a).**

The Plaintiff named the Recall Committee in her Verified Petition for Declaratory Judgment and Injunctive Relief (“Petition”) because her prayer therein to enjoin Recall Committee from circulating what she pled was a defective petition implicated Recall Committee’s actions and rights. Plaintiff’s Amended Verified Petition for Declaratory Judgment and Injunctive Relief (“Amended Petition”) removed Recall Committee and any claims that implicated their actions or rights. See Plaintiff’s Response. While the Petition was the operative document, Plaintiff also sought a temporary restraining order (“TRO”) to restrain Recall Committee from circulating the recall petition pending adjudication of the claims in the Petition. Plaintiff withdrew the proposed TRO. Since filing the Amended Petition and withdrawing its motions for a TRO, Plaintiff seeks no injunctive or restraining relief directly against Recall Committee. The recall petition is intact, and Recall Committee is circulating it without hindrance from the filings in this case.

Under K.S.A. 60-224(a)(2), “the court must permit anyone to intervene who... claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter substantially impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.”

**The Amended Petition does not, as a practical matter, impair or impede the Recall Committee members' ability to protect their interests.**

County Attorney is the proper party to a K.S.A. 25-4322(b) challenge.

The Amended Petition names Bourbon County Attorney James Crux

(“Defendant Crux”) as the sole defendant because the allegations of the Amended Petition concern only Defendant Crux’s independent statutory duties under the recall statutes. As County Attorney, Defendant Crux, not the Recall Committee or any of its members, is the proper party to a recall petition challenge. See *Collins v. Hoeme*, 40 Kan. App. 2d 93, 95, 189 P.3d 566, 569 (2008) (Demonstrating the person in the office of county attorney, not any other party, is the proper defendant to a recall petition contest.).

Recall Committee lacks capacity to sue or be sued, so it cannot intervene as a defendant in this case.

“In the absence of statutory authority, the [recall committee] does not have the capacity to sue or be sued.” *Collins v. Hoeme*, 40 Kan. App. 2d 93, 97–98, 189 P.3d 566, 570 (2008) citing *Corder v. Kansas Board of Healing Arts*, 256 Kan. 638, 666–67, 889 P.2d 1127 (1994). This is consistent with the fundamental principle of Kansas law that unincorporated associations are not legal entities and have no capacity to sue or be sued. See *Frey, Inc. v. City of Wichita*, 11 Kan. App. 2d 116, 121, 715 P.2d 417, 421 (1986); see also *Kansas Private Club Assn. v. Londerholm*, 196 Kan. at 3, 4, 408 P.2d 891; and 39 Am.Jur.2d, Parties § 22. The Recall of Elected Officials Act authorizes the formation of a recall committee but contains no provision authorizing a recall committee from suing or being sued. See K.S.A. 25-4301 *et. seq.*

In *Collins*, a county commissioner sued the recall committee who successfully had him recalled from office for relief including damages. The Court granted summary judgment for the recall committee based on it finding the recall committee could not sue or be sued.

The plainly stated rule is clear a recall committee formed under K.S.A. 25-4306 lacks the capacity to sue or be sued. However, the facts of *Collins* seem to suggest a recall committee may just lack the capacity to sue or be sued *for damages*. The former must be true. K.S.A. 25-4322(d) challenges are specific and narrow. A recall committee may bring a mandamus action to compel the progress of its interests illegally constrained, or a party may seek an injunction of a recall petition illegally allowed to proceed.

Recall Committee's constitutional rights to petition and seek recall of their elected officials, a recall committee's inability to sue or be sued, and an elected official's ability to enjoin recall proceedings against her is harmonized by the plain reading of the rule. That is, preventing a recall committee from suing or being sued frees them from the burdens of litigation while they work through the recall process, which maximizes their exercise of protected speech, assembly and petition rights. At the same time, it provides an elected official being recalled a reasonable opportunity to challenge the legal sufficiency by litigating the issues against the County Attorney and having a court adjudicate the legal issues. Then, if a recall committee disagrees with the Court's ruling, it may appeal to seek review. *Collins* must mean what it says: a recall committee cannot be a defendant.

Since a recall committee cannot be sued, Plaintiff improperly named the Recall Committee as defendants in the Petition. Plaintiff's err was corrected when the Amended Petition removed Recall Committee as defendants. Since the Legislature did not give recall committees the capacity to be named a defendant to a recall

petition contest, it necessarily follows the Legislature did not recognize a recall committee had any rights or interest to protect in a K.S.A. 25-4322 & 25-4331 challenge, and they would not be required, or even permissible parties to a case like the one at bar.

Recall Committee lacks capacity to sue or be sued, so it cannot intervene as a plaintiff in this case.

The *Collins* rule applies to Recall Committee's ability to intervene as a plaintiff; it may only be a party if authorized by statute. *Collins* at 97-98. The Recall of Elected Officials Act authorizes a recall committee to bring mandamus proceedings under K.S.A. 25-4322, but nothing else. Therefore, Recall Committee cannot intervene in this case as a plaintiff.

Proposed Intervenors cannot join this case as a defendant or as a plaintiff because any recall committee lacks capacity to do so. This is not a mandamus proceeding and 30 days have passed since the County Attorney made any sufficiency determination, so a mandamus proceeding under K.S.A. 25-4322(d) would be untimely. The recall process is proceeding, so no other mandamus issue is ripe. If Recall Committee wishes to participate in this case, they may only participate as amicus curiae until something hinders their recall process.

Proposed Intervenors may not intervene by right without capacity even though K.S.A. 60-224(a) is liberally construed to allow intervention by right.

K.S.A. 60-224(a) should be liberally construed in favor of proposed intervenors. See *Leslie J. Campbell Am. Legion Post No. 15, Iola v. Wade*, 210 Kan. 537, 539, 502 P.2d 773, 776 (1972), see also *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 10, 687 P.2d 603 (1984) and *Herrmann v. Board of Butler County*

*Comm'rs*, 246 Kan. 152, 155, 785 P.2d 1003 (1990).

However, if a party lacks capacity to sue or be sued, no analysis or application of law, liberal or strict, is done. For example, a deceased person cannot intervene in a case because she cannot sue or be sued. That is true no matter how well written a motion to intervene is and how liberally K.S.A. 60-224(a) could be construed.

Here, Proposed Intervenors, the Recall Committee, lacks capacity be a defendant or plaintiff because no statute grants them that capacity for this stage of the case. No matter how liberally K.S.A. 60-224(a) were construed, the Court cannot give the Recall Committee capacity the Legislature has denied them.

Adjudicating the legal sufficiency of the recall petition would not impair or impede the Recall Committee, or any of its members', ability to protect their interests.

Recall Committee's interests are wholly and adequately protected by the statutory recall process. See K.S.A. 25-4301 *et. seq.* and *Collins*, generally. the Legislature provided specific rules and procedures that governmental officials cannot change. K.S.A. 25-4301 through 4, and 4318-20. If Defendant Crux had found the reasons on either recall petition insufficient and the Recall Committee disagreed with that finding, it could have brought a mandamus proceeding. K.S.A. 25-4322(d). If Recall Committee submits signed petitions, K.S.A. 25-4326 places a duty on the election officer receiving them to timely review them and accept them in all but a few circumstances. K.S.A. 25-4328 compels a timely election on signed petitions properly filed. K.S.A. 25-4330 creates a duty on the county election officials and commissioners to certify a successful recall effort and carry out the will of the recall committee as affirmed by the voters. While the recall committee cannot bring a suit other than in

mandamus, they may appeal any final judgment.

K.S.A. 25-4301 *et. seq.* procedure protects Recall Committee, and its members, interests. Any judgment stemming from a K.S.A. 25-4331 claims on whether Defendant Crux fulfilled his duties under K.S.A. 25-4322(b), would not impair or impede the Recall Committee, or any of its members, ability to use the statutory procedure to protect those interests.

Proposed Intervenor’s “inconsistent obligations” argument is speculative and is not substantial enough to require allowing Proposed Intervenors to intervene.

Proposed Intervenor’s claim Defendant Crux could be exposed to inconsistent obligations *if* the Court enters judgment in Plaintiff’s favor and *if* they then bring a mandamus action against him and *if* the Court grants their request for a writ of mandamus. The Court has not entered judgment in Plaintiff’s favor. If it did, the judgment would be on the same recall petition procedures, facts and issues Proposed Intervenor’s could file any action in mandamus on against Defendant Crux. And, the mandamus proceedings would be in the same Court. It is very unlikely the Court would rule in favor of Plaintiff one day, and on the same facts and issues, rule in favor of Proposed Intervenors against Defendant Crux the next. Positing a conclusion three necessary ifs away and unlikely based on the circumstances is speculative at best. The Court should only act on substantive possibilities when finding a party is required under K.S.A. 60-219(a)(1)(B)(ii). Proposed Intervenors are not required parties because Defendant Crux’s risk of incurring inconsistent obligations as they propose lacks a substantive possibility.

K.S.A. 60-224(a)(2) does not grant a right to intervention when an existing party adequately represents an interest claimed by a proposed intervenor that are before the Court.

Proposed Intervenors claim a due process and fundamental interest in the constitutional and statutory recall petition process. Those broader, conceptual interests are not before the Court though.

Defendant Crux's duties under K.S.A. 25-4322(b) are specific and focused. He was required to review the recall petitions submitted by Recall Committee for legal sufficiency and notify specified parties of his determinations within five business days. The only questions before the Court, pled through K.S.A. 25-4331 in the Amended Petition, is whether Defendant Crux sufficiently performed his statutory duties and whether his determination was correct.

Defendant Crux will undoubtedly make all necessary arguments to defend against Plaintiff's claims (1) he did not properly review or provide notice on the second proposed recall petition and (2) his determination the second proposed recall petition was legally sufficient is wrong. Since Defendant Crux will fully and adequately defend against Plaintiff's claims before the Court, Proposed Intervenors do not have a right to intervene under K.S.A. 60-224(a)(2).

Plaintiff respectfully asks the Court to DENY the Motion to Intervene under K.S.A. 60-224(a) because Proposed Intervenors have no unconditional right to intervene by statute and no other right to intervene since they lack capacity to be plaintiffs or defendants.

**The Court should not permit Proposed Intervenors to intervene under K.S.A. 60-224(b) because they lack capacity to be a party to this case and have not identified their interest in the case.**

K.S.A. 60-224(b) governs permissive intervention. It states:

(b) Permissive intervention. (1) In general. On timely motion, the court may permit anyone to intervene who: (A) Is given a conditional right to intervene by a statute; or (B) has a claim or defense that shares with the main action a common question of law or fact.

Proposed Intervenors cite to no conditional right to intervene given by statute. As argued above, Proposed Intervenors as a Recall Committee cannot sue or be sued except where authorized by statute. See *Collins*. Proposed Intervenors cannot join in this case at this time as a plaintiff or defendant. Similarly, and as discussed just below, Proposed Intervenors have not named or otherwise identified the specific interest they have in this case. Since Proposed Intervenors lack capacity to join this case and have not identified the interest they have it in with any specificity, the Court should not permit them to intervene under the permissive intervention statute.

**The Court should not allow Kyle R. Parks, Kevin Wagner or Lyle K. Owenby to intervene as individuals because their interests in this case only arise as members of the Recall Committee.**

As argued above, the only questions before the Court concern Defendant Crux's statutory duties and his sufficiency determination concerning the second proposed recall petition. Defendant Crux will adequately defend against those claims. As the Recall Committee, Parks, Wagner and Owenby lack capacity to sue or be sued. As individuals, they have that capacity.

The Motion to Intervene refers to the "interest of the recall committee" not

being represented, and the “recall committee members having due process and fundamental interest in the constitutional and statutory recall petition process or, at the very least, claim to”. It is difficult to discern from the motion whether Parks, Wagner and Owenby are claiming individual interests apart from the Recall Committee or interests flowing exclusively from being members thereof.

If the latter is true, they lack capacity to be a party to this suit. If the former is true, the Court should deny them intervention by right or permission because they have not identified any specific right or interest before the Court based on the Amended Petition. Parks, Wagner and Owenby’s speech, assembly, and petition rights are not being infringed by this case. Parks, Wagner and Owenby’s interest in the recall petition being affirmed as valid is fully represented by Defendant Crux. Parks, Wagner and Owenby’s interest in sufficient petitions being filed, approved and leading to an election is not ripe because they have not (at time of filing) filed petitions with signatures upon them.

Having not identified a right or interest in this case, Parks, Wagner and Owenby are no different than any other person in the County. Therefore, the Court should deny the Motion to Intervene as to individuals Parks, Wagner and Owenby whether their interests flow wholly from them members of the Recall Committee or their interests are individual.

**Plaintiff’s Amended Petition is not a SLAPP suit.**

As discussed in Plaintiff’s Response, her Amended Petition is not a SLAPP suit. Plaintiff denies any accusation this statutorily authorized, narrow action is anything

other than a meritorious attempt for demonstrable injury.

**Notice of Date**

Proposed Intervenors began circulating their recall petition on April 27, 2026. Under K.S.A. 25-4324, they have 90 days to secure a sufficient number of signatures and file them with the election officer (here, Defendant Crux) to review. As of the time of this filing, Plaintiff has not received notice that Proposed Intervenors have filed the recall petitions with sufficient signatures. Plaintiff notes for the Court that 90 days after April 27, 2026 is July 26, 2026.

**Conclusion**

Based upon the foregoing facts, authorities and arguments, Plaintiff responds and respectfully asks the Court to allow Proposed Intervenor’s time to reply to this and Defendant Crux’s responses, thereafter set a hearing on Proposed Intervenor’s motion, and DENY Proposed Intervenor’s Motion to Intervene.

Respectfully Submitted By:

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ATTORNEY FOR THE PLAINTIFF

**CERTIFICATE OF SERVICE**

I hereby certify that on the file-stamped date above I filed a true and correct electronic copy of the above and foregoing document with the Clerk of the District Court via the Kanas Judicial Branch's e-Flex Filing System, which automatically provides electronic notification to participating parties.

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