IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2004-CA-00759-COA

JACK HAYES AND GEORGE S. WHITTEN, SR. — **APPELLANTS**

v.

LEFLORE COUNTY BOARD OF SUPERVISORS — **APPELLEE**

IRVING, J., DISSENTING FROM DENIAL OF MOTION FOR REHEARING:

¶1. In its opinion, the majority finds that the motion to intervene — filed almost five years after the predicate lawsuit was filed — was a timely filed motion to intervene. I cannot agree that such is or ought to be the law; therefore, I respectfully dissent from the denial of the County's motion for rehearing.

¶2. I should also point out at the beginning that the Open Meetings Act does not bestow upon a citizen the right to intervene in an existing lawsuit brought under the act. It gives every citizen the right to go into court and enforce the provisions of the act, but that is a totally different question from being given the right to intervene, at any time, in an existing Open Meetings Act lawsuit, as the majority seems to think. Clearly, the majority has misapprehended the reach of the Open Meetings Act.

¶3. The majority concludes that Hayes and Whitten's motion filed on March 21, 2003, was sufficiently timely to warrant their being granted the right to intervene in a lawsuit that began on April 17, 1998. In reaching its conclusion, the majority focuses on one fact and one assumed fact. The one fact is that the motion to intervene was filed before the lawsuit was dismissed. The

assumed fact is that Hayes and Whitten apparently learned of Wolfe's intention to settle the case the month prior to their filing their motion to intervene. Hayes and Whitten did not say in their motion to intervene when they learned of Wolfe's intention to settle the lawsuit, and there is plenty circumstantial evidence that they knew well before February 2003. After all, the parties had been attempting since July 30, 1998, to settle the lawsuit. According to the motion to intervene, Whitten is a member of the Taxpayers for Good Government which operates The Taxpayers Channel. The Taxpayers Channel, according to the motion to intervene, "weekly broadcasts by cable the complete, un-edited coverage of the meetings of local public bodies such as the board of supervisors. . . ." In fact, it is the Taxpayers Channel's videotape of the November 14, 1995 meeting of the Board that Hayes and Whitten rely on as proof that the November 14, 1995 minutes are inaccurate.

¶4. While it is true that Hayes and Whitten's motion to intervene was pending when the trial court dismissed the action, that fact, given the totality of the facts and circumstances of this case is inconsequential. Focusing, as does the majority, on the fact that the motion to intervene was filed before the lawsuit was actually dismissed ignores the significant fact, for purpose of timeliness, that, at the time Hayes and Whitten sought to intervene, the lawsuit had been ongoing for almost five years and that, during all of this time, Hayes and Whitten had been monitoring the litigation via The Taxpayers Channel which was videotaping every meeting of the Board.

¶5. The majority apparently reasons that because Wolfe initially was attempting to protect the interest which Hayes and Whitten now seek to protect, Hayes and Whitten did not know and could not know that they had an interest to protect. This is flawed reasoning which, taken to its logical extension, compels the conclusion that Hayes and Whitten had no interest to protect as long as Wolfe was in the lawsuit. If that were the case, the further extension of this reasoning would be that Hayes and Whitten only became citizens of Leflore County when Wolfe dropped his lawsuit.

Surely, as citizens of Leflore County Hayes and Whitten, have an interest in seeing that the minutes of the Board accurately reflect the deliberations of the Board. That is the cornerstone of their contention. Therefore, if Hayes and Whitten were citizens of Leflore County prior to Wolfe's terminating his involvement in the lawsuit, they, as citizens, had an interest in the case prior to Wolfe's terminating his involvement. That a specific person is already a party to the litigation is not a factor to be considered on the question of whether another, who possesses an interest in the litigation, should be allowed to intervene. The first relevant inquiry is the length of time the would-be intervenor knew or should have known of his interest before applying to intervene. *Guar. Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 382 (Miss. 1987).

¶6. As already stated, apparently the majority reasons that Hayes and Whitten did not know and could not have known before February 2003 of the interest they sought to protect, that is, an accurate recording of the minutes of the Board of Supervisors of Leflore County. The only information needed by Hayes and Whitten to protect this interest was information that any set of minutes of the Board was inaccurate. In this case, that would be the minutes of the November 14, 1995 Board meeting. Clearly, the evidence is overwhelming that Hayes and Whitten knew or reasonably should have known well before February or March 2003 that the minutes of the November 14, 1995 meeting of the Board were inaccurate. The Taxpayer Channel, owned and operated by The Taxpayers for Good Government of which Whitten is a member, videotaped the meeting. When Wolfe first made the accusation in 1998 regarding the inaccuracy of the November 14, 1995 minutes of the Board, it was based on his recollection of the meeting, the accuracy of that recollection being verified by The Taxpayer Channel's videotape of the meeting.

¶7. The second inquiry on the question of timeliness of a motion to intervene is the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would be intervenor's

failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case. It is readily apparent that Leflore County will be greatly prejudiced. It has been trying to resolve since 1998 the litigation and economic consequences stemming from the alleged inaccuracies in its November 14, 1998 minutes. Seven years of litigation is more than enough to resolve a matter which occurred ten years ago.

¶8. The next inquiry is the extent of the prejudice that the would be intervenor may suffer if his petition for leave to intervene is denied. I can think of none unless Hayes and Whitten would be barred by the statute of limitation from bringing a separate action. Even if that is the case, that eventuality is no justification for granting intervention. That a would be intervenor may have lost his right to initiate a separate action because of a statute of limitation bar, in my judgment, is not the type of prejudice contemplated here. Otherwise, intervention would oftentimes be utilized as a savings tool to get around the legislatively mandated time periods for initiating lawsuits.

¶9. The final inquiry is the existence of unusual circumstances militating either for or against a determination that the application is timely. There are many circumstances militating against a determination that the application is timely. Clearly Hayes and Whitten had knowledge, from the very beginning of this litigation, of the interest that they now belatedly seek to protect. The fact that the case had already been settled prior to their attempt at intervention militates strongly against a determination that their motion was timely.

¶10. I conclude by briefly returning to the matter of what Hayes and Whitten sought to accomplish by intervening. In the prayer of the "Petition by Intervention for Injunctive Relief" which was attached to Hayes and Whitten's motion to intervene, they stated:

> Petitioners by intervention pray for the same relief requested by Phillip Wolfe in paragraph (1) of the Prayer for Relief in his Second Amended Application for Injunctive Relief, namely, a judgment of this Chancery Court finding and declaring the purported Board Order at Minute Book 147, pages 520 – 523, dated November

> 14, 1995, to be a violation of Miss. Code §25-41-11 requiring the minutes of the Board to be an accurate recording of final actions taken at a meeting; Petitioners pray the Court to enforce the Open Meetings Act and issue either (a) an injunction commanding the Board of Supervisors of Leflore County to purge from its Minutes (Book 147) those certain pages (520 — 523) falsely purporting to be an Order of the Board, thereby conforming its Minutes to the actions taken and not taken by the Board of Supervisors, or (b) a decree that strikes said Order from the Minutes.
>
> Petitioners disclaim any interest in or need for the notice found in the lis pendens index filed by an original party to this action. While Petitioners possess a definite interest in public property belonging to the citizens of Leflore County, as well as in transactions disposing of said property, they do not seek herein to cancel a deed or recover possession of property. This action is brought to correct the minutes of the Leflore County Board of Supervisors.

¶11. In paragraph one of the prayer of Wolfe's "Second Amended Application for Injunctive Relief," he sought "an order correcting the minutes thereby bringing them into conformity with the accuracy requirements of the Open Meetings Act, *by declaring the supposed Order null and void*." (emphasis added).

¶12. The record reflects that the Board has taken no action in reliance on the November 14, 1995 minutes other than executing a deed of conveyance to the 10.04 acre tract of land.[1] However, in subsequent meetings, the Board voted to reconvey the land which was the subject of the November 14, 1995 minutes. Apparently, this occurred in a meeting on either July 30, 2001, or on November 5, 2001, or in the meetings which occurred on both dates. The minutes of neither meeting are included in the record.[2] The accuracy of the minutes involving the reconveyance is not challenged

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[1] It appears that the corrected conveyance was for 10.11 acres.

[2] In Hayes and Whitten's motion to intervene, they state that "[t]he minutes of July 30, 2001, accurately show that Wolfe voted "nay" against attempting to amend the 1995 minutes to reflect that the Board was free of any obligation to provide a rail spur, easement, and tax exemption." Also, a copy of a certified copy of a resolution which appears to have been a part of November 5, 2001 minutes is included in the Board's brief in the appendix. That resolution states in pertinent part:

> Whereas it appears Goldkist has submitted a request for ad valorem tax exemption as well as an easement for underground pipe; and

by Hayes and Whitten, and they specially disclaim any interest in seeking to cancel the deed of conveyance. The County no longer has an obligation to build the rail spur or grant an easement over other existing land owned by the County. Further, the County no longer is obligated to grant Gold Kist a tax exemption certificate. The record reflects that Gold Kist has released the County from these obligations which the County undertook in the disputed board meeting on November 14, 1995. Therefore, it seems to me that there is no interest to protect.

¶13. For these reasons I dissent from the denial of the motion for rehearing.

> Whereas it appears that Goldkist is willing to resolve the matter provided this Board sufficiently amends the minutes or adopts new minutes to reflect that the property now possessed by Goldkist is in fact the property attempted to be conveyed to Goldkist by the November 14, 1995 meeting; and
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> Whereas the Board seeks to rectify any misunderstanding that may have occurred at the November 14, 1995 meeting.
>
> Be it resolved that the minutes of the meeting of November 14, 1995, which cast a cloud on the title of the property to Goldkist, be and are hereby amended nunc pro tunc to convey to Goldkist that property described as follows:
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> * * *
>
> Be it further resolved and Goldkist acknowledges that the County is under no obligation to build a rail supr to the property herein above described as owned by Goldkist, any requests for ad valorem tax exemption is withdrawn, and Goldkist seeks no easement for an underground pipe.