

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS**

Calvin Hayden, Sheriff of Johnson  
County, Kansas

v.

Leonid Khayet

Case No. 23CV00560

Div. 12

**JOHNSON COUNTY BOARD OF COUNTY COMMISSIONER'S  
MOTION TO INTERVENE**

The Board of County Commissioners of the County of Johnson (“the County”), pursuant to K.S.A. 60-224(a)(2), respectfully moves this Court for leave to intervene in the above-captioned lawsuit (the “Action”) to join and name the Board of County Commissioners as Plaintiff in this Action. In support of this motion, the County States:

**I. Introduction**

Plaintiff Calvin Hayden, Sheriff of Johnson County, Kansas (“Sheriff”), filed this civil Action in his official capacity as an elected official of Johnson County, Kansas. The Sheriff seeks this Court’s order to prohibit County resident, Defendant Leonid Khayet (“Khayet”), “from calling or e-mailing Sheriff’s deputies and employees” about certain set of topics because of Khayet’s numerous telephone calls and e-mails to County employees. *See* Petition filed in 23CV560 (“Petition”), ¶¶ 27-38. The Sheriff brings this Action for the County’s public interest and seeks relief for County employees. *See* Petition, ¶¶ 5, 6, 7, 8, 38.

The County respectfully seeks to join the Sheriff as a named Plaintiff in this lawsuit. First, the County is vested with statutory authority to decide whether and when to bring a civil action by the County and any action “shall” be brought in the name of the Board of County

Commissioners. *See* K.S.A. 19-105; *Walker v. Douglas Cnty. Sheriff's Off.*, 2020 WL 5513618, at \*2 (D. Kan. Sept. 14, 2020). Second, when the County brings a civil action, the authority to bring the action is vested in the Chief County Counselor. *See* K.S.A. 19-247(c). Therefore, the County should be granted leave to intervene and join the Sheriff as Plaintiff.

Additionally, the County seeks to intervene to ensure consistency in civil actions by the County. The County is responsible for multiple departments, agencies, and offices, which renders the County best situated to pursue and prosecute civil actions in a manner that aligns with the County Charter, County Resolutions, and County Policies. Intervention by the County will ensure that the statutory framework for civil actions by the County is followed and that the interests of the Sheriff *and* the County as a whole are properly pursued and adequately protected. The County seeks to intervene to set this Action on all fours with proper procedure for a civil action brought on behalf of the County.

The Johnson County Chief County Counselor (“County Counselor”), on the County’s behalf, contacted Sheriff’s counsel to determine whether the Sheriff has any objections to the County joining the Sheriff as Plaintiff in this Action. The Sheriff’s counsel stated the Sheriff objects to the County joining as a plaintiff.

## **ARGUMENT**

The proposed intervenor is the County Board of County Commissioners, the body of elected county commissioners that has the power to perform such duties as prescribed by law. K.S.A. 19-212 (Twelfth Power). The County Board is tasked with protecting the health, safety, and welfare of the public. The County Board has exclusive powers including self-government and to adopt a budget, including the litigation budget. And, pursuant to K.S.A. 19-105, actions by or against the County are to be brought in the County Board’s name. The County Board is

vested with authority to decide whether to bring a civil action for the benefit of the County.

Therefore, the County should be permitted to intervene and work with the Sheriff in this Action.

**I. The County Is Entitled To Intervention By Right, Given Its Substantial Interest In The Action.**

Intervention under K.S.A. 60–224(a) is a matter of judicial discretion. *Mohr v. State Bank of Stanley*, 244 Kan. 555, 561, 770 P.2d 466 (1989); *McDaniel*, 235 Kan. at 107, 679 P.2d 682; *Farmers Group*, 29 Kan.App.2d at 385, 28 P.3d 413. “It is well established under Kansas law that K.S.A. 60-224(a) is to be liberally construed to favor intervention.” *Smith v. Russell*, 274 Kan. 1076, 1083, 58 P.3d 698, 703 (Kan. 2002). In *Rawlins*, the Kansas Supreme Court noted that “the right to intervene depends on the concurrence of three factors: (1) timely application; (2) a substantial interest in the subject matter; and (3) lack of adequate representation of the intervenor's interests.” *Rawlins v. Stanley*, 207 Kan. 564, 567; 486 P.2d 840, 842 (Kan. 1971). The County is so situated that disposing of this action without intervention will substantially impair or impede the County’s ability to protect the interests described herein. Here, there is sufficient concurrence of these factors to justify intervention as a matter of right. The County will be bound by any findings of facts and conclusions of law in this Action, and, although the Sheriff has valid interests, the County’s ability to protect the County’s broader interests would be impaired and impeded. The County will address these considerations out of order.

*A. The County Has A Substantial Interest In This Action*

Because the Sheriff has brought this Action in his official capacity, it is the equivalent of an Action *by* the County, and the County has an interest in this action pursuant to K.S.A. 19-105. The County, therefore, seeks to join the Sheriff as a named Plaintiff to protect its substantial interest in this Action. The Court should allow the County to intervene by right pursuant to

K.S.A. 60-224(a)(2), because the County has an interest (1) in determining whether to seek injunctive relief against one of its citizens, (2) in pursuing claims brought for the benefit of the County, and (3) ensuring the County Counselor is involved in prosecuting this civil action.

Kansas statutes lay the framework for how a civil action on behalf of the County like this one must be brought. First, K.S.A. 19-105 requires “all suits or proceedings by or against a county” to be brought in the name of the “[t]he board of county commissioners of the county of [Johnson]’.” K.S.A. 19-105 “does not prevent county officers, **where authorized by law**, from suing in their name of office for the benefit of the county.” (Emphasis added). Critically, however, the Sheriff may only bring an action in his official name *if* authorized by law.

Second, K.S.A. 19-805 dictates that a sheriff has authority to appoint, promote, demote, and dismiss deputies and assistants necessary to carry out the duties of the office. However, nothing authorizes a sheriff to bring a civil action in his official capacity for the County. *See* K.S.A. 19-105 (permitting county officers from suing in their name *only* “**where authorized by law**” (emphasis added)). The sheriff’s department is an agency of the county and is not itself capable of suing or being sued. *Wright v. Wyandotte Cnty. Sheriff’s Dep’t*, 963 F. Supp. 1029, 1034 (D. Kan. 1997). Likewise, a suit against the sheriff in his official capacity is a suit against the county. *Couser v. Gay*, 959 F.3d 1018 (10th Cir. 2020); *Bledsoe v. Bd. of Cnty. Commissioners of Cnty. of Jefferson, Kansas*, 501 F. Supp. 3d 1059, 1142 (D. Kan. 2020), *aff’d* in part, *rev’d* in part.

Moreover, Courts interpreting Kansas law have consistently treated a Sheriff’s claim as a County claim. *See, e.g., Kelley v. Wright*, 2019 WL 6700375, at \*6 (D. Kan. Dec. 9, 2019) (holding sheriff was an arm of the county and “any official-capacity claim against him is the equivalent of an action against the Atchison County Board of County Commissioners”); *Reyes v.*

*Bd. of Cty. Comm'rs of Sedgwick Cty., Kan.*, 2008 WL 2704160, at \*7-9 (D. Kan. July 3, 2008) (treating official capacity claim against sheriff as "actually a claim against Sedgwick County" and "equivalent to an action against the Board of County Commissioners"); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 475, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (summarizing Sixth Circuit's finding that sheriff was a county official with policy making authority and district court's holding that "County Board's lack of control over the Sheriff would not preclude county liability" where Ohio sheriff's acts "may fairly be said to represent the county's official policy"). "In all respects other than name, an official-capacity suit is a suit against the entity. . . [A]n official capacity suit against [the Sheriff] is equivalent to an action against the Board of County Commissioners, i.e. the County." *Reyes*, 2008 WL 2704160, at \*7. This Action is the equivalent of an action by the County, so it must be involved.

Third, K.S.A. 19-247 outlines the mandatory duties of a county counselor. K.S.A. 19-247(c) requires that the county counselor shall "commence, prosecute, or defend, all civil suits or actions in which the county is interested and represent the county generally in matters of civil law." The County must be permitted to join as Plaintiff to ensure the Johnson County counselor ("County Counselor") can be involved in the prosecution of this civil action by the County, as required by K.S.A. 19-247(c).

Together, the framework is clear: any civil action by or against the sheriff will *always* be an action in which the county is interested because any suit against the sheriff is a suit against the county; likewise, any suit by the sheriff—in his or her name of office—**must** be for the benefit of the county. Therefore, a lawsuit brought by the County on behalf of the County must be brought by and in the name of the County and the County Counselor is required to commence, prosecute, and defend civil suits in which the County is interested. Because the Sheriff has brought this

Action in his official capacity, it is the equivalent of an Action *by* the County. The County, therefore, seeks to join the Sheriff as a Plaintiff to set this Action on all fours with the statutory framework.

*B. The County Must Ensure Adequate Representation In The Action*

The County's perspective on prosecuting civil actions is broad and accounts for the multitude of departments, agencies, offices and County-wide policies. The Sheriff's lens, however, is narrowly focused on his law enforcement role. Although this role is a vital function for Johnson County residents, the Sheriff's law-enforcement lens does not account for the breadth of departments, agencies, and offices in the County, all of which factor into policy decisions and legal strategies for civil actions brought by the County on behalf of the County. Although the Sheriff seeks this injunctive relief for the benefit of County employees and for the public interest, the Sheriff is so situated that the lens through which he can view the benefit of the County and the public interest thereof is too narrowly focused on law enforcement to fully account for the County's interest as a whole. The "public interest" and "benefit of the county" considerations are much broader than the Sheriff's law enforcement functions, and the County, is in a much better position prosecute this civil Action.

Moreover, the County Counselor is statutorily required to represent the interest of the County, *see* K.S.A. 19-247(c). Together the Sheriff and the County Counselor can better pursue the public interest as it relates to this Action. Together they can ensure that both the Sheriff's interests and the county-wide policies remain central to this Action.

*C. The County's Motion Is Timely*

There is not a firm rule for evaluating whether a motion to intervene is timely. "Generally speaking, timeliness is a flexible standard that cannot be judged in a vacuum but rather is to be determined from all the circumstances." *Gannon v. State*, 302 Kan. 739, 743, 357 P.3d 873, 876

(2015) (citations omitted). Prior Kansas Supreme Court decisions are instructive and establish that the County's instant motion is timely. For example, in *Roberts v. Krupka*, 246 Kan. 433, 443, 790 P.2d 422, 429 (1990), the Supreme Court of Kansas held that "the passage of nearly 38 months between the filing of the action herein and the filing of the motion to intervene" was not untimely, reversing a district court decision to the contrary. The Supreme Court explained its decision, stating in part that "[t]he situation herein is not one where late intervention would result in additional discovery or delay of trial." *Roberts*, 246 Kan. at 444.

In *Smith v. Russell*, 274 Kan. 1076, 1084, 58 P.3d 698, 703-04 (Kan. 2002), the Supreme Court held that a motion to intervene was untimely when it was filed five months *after* a final judgment. The Supreme Court held a motion for intervention was untimely also in *Mohr v. State Bank of Stanley*, 244 Kan. 555, 770 P.2d 466 (1989). In *Mohr*, the intervenor did not seek to intervene until four years after litigation commenced and had previously vigorously opposed being brought into litigation. 244 Kan. at 562-63.

Like in the *Roberts* case, permitting the County to intervene will not result in any additional discovery or delay of trial. And, unlike in *Smith*, no final judgment has been entered. Also unlike *Mohr*, the County has never opposed being brought into this litigation. Therefore, County's Motion is timely, because Khayet has not yet answered the Petition and the Court has not yet issued findings of facts or conclusions of law.

### CONCLUSION

Here, the County has established its right to intervene because this application is timely and the County identified its substantial interest in the Action, which cannot be adequately represented through the Sheriff's narrower law enforcement lens. *See Rawlins*, 207 Kan. at 567.

WHEREFORE, for the foregoing reasons, Johnson County respectfully requests that the Court grant this Motion to intervene.

Dated: June 21, 2023

Respectfully submitted,

*/s/ Peg Trent*

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**CERTIFICATE OF SERVICE AND MAILING**

Pursuant to Supreme Court Rule 122, the undersigned certifies that a copy of the above and foregoing document has been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the email addresses provided by counsel of record in this case.

*/s/ Peg Trent*

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*An Attorney for Intervenor*