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IN THE
COURT OF APPEALS OF INDIANA

CARDIAC PACEMAKERS, INC.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A04-0704-CV-240
	)	
RYAN TERRY and LINDA MASON,	)	
	)	
Appellees-Respondents.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn Moberly, Judge
Cause No. 49D06-0210-PL-1727

September 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Cardiac Pacemakers, Inc., ("CPI") appeals the trial court's denial of its motion to intervene in a product liability suit. CPI raises the sole issue of whether the trial court abused its discretion in denying the motion. Concluding that the trial court acted within its discretion, we affirm.

Facts and Procedural History

Guidant Corporation is an Indiana corporation that manufactures and markets various medical devices, including cardiac defibrillators and pacemakers. CPI is a Minnesota corporation and a wholly-owned subsidiary of Guidant. In May 2003, plaintiff Linda Mason had a defibrillator/pacemaker implanted. In October 2005, plaintiff Ryan Terry had a defibrillator/pacemaker implanted. Apparently, these devices were manufactured by CPI, but were labeled solely as a product of Guidant. Mason and Terry claim "they were affirmatively led to believe they were dealing with Guidant, not CPI." Appellee's Brief at 19. In June 2005, the Food and Drug Administration classified certain medical devices manufactured by CPI as recalls. Guidant has since recalled various models of defibrillators and pacemakers.

As a result of the defects in the medical devices, and amidst allegations that Guidant knew of these defects prior to the recalls, plaintiffs have filed hundreds of lawsuits alleging injury caused by these devices. On November 7, 2005, the federal Judicial Panel on Multidistrict Litigation transferred many of these cases to the United States District Court for the District of Minnesota for consolidated pre-trial proceedings. See In re Guidant Corp. Implantable Defibrillators Products Liability Litigation, 398 F.Supp.2d 1371 (J.P.M.L. 2005).

On June 21, 2006, Terry and Mason filed their suit against Guidant, and sought to certify a class. On October 12, 2006, CPI filed a motion seeking leave to intervene in this action, alleging that Terry and Mason had "prevented this case from coming under the MDL Court's authority by intentionally omitting CPI as a named defendant," thereby preventing CPI from removing the case to federal court. Appellant's Appendix at 30. On October 31, 2006, Terry and Mason filed their motion in opposition. On December 1, 2006, the trial court held a hearing on CPI's motion. On January 2, 2007, the trial court issued the following order denying CPI's motion:

> CPI seeks to create minimal diversity by intervening in this lawsuit and thereby remove the case to federal court and presumably join the pending MDL. No class has yet been certified in the pending federal litigation.
> The defendant argues that the Plaintiff has intentionally not added CPI as a party defendant to this action so that Plaintiffs may maintain their action in state court and that this choice of forums is inappropriate. It is difficult to reconcile why it would be appropriate to create minimal diversity to enable the defendant to obtain federal jurisdiction, yet inappropriate for the Plantiffs to do the opposite. However, the defendant does not concede that class certification is appropriate at either the state or federal level, so there is no apparent advantage to federal MDL and it quite likely would cause significant delay in the resolution of the case.
> CPI argues that it is in possession of many documents that will be the subject of discovery. Access to those documents does not require that CPI be made a party to this case.
> The desire to resolve disputes between citizens of Indiana in our local courts outweighs the benefit of federal jurisdiction of this lawsuit at this time. Hoosiers rightfully expect that when they have a dispute with another Hoosier, that they will not have to travel to Minnesota, or any other state, to have their day in court.

Appellant's Appendix at 11-12. CPI now appeals.

Discussion and Decision

Indiana Trial Rule 24(b) provides:

> Upon timely filing of his motion anyone may be permitted to intervene in an action . . . when an applicant'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.

The language of Trial Rule 24 is similar to that of its counterpart in the federal system,[1] and to that in other state court systems. See Bryant v. Lake County Trust Co., 166 Ind. App. 92, 100, 334 N.E.2d 730, 735 (1975). We may look to case law in these jurisdictions when determining issues under Trial Rule 24. Id. However, although federal law and the law of other states is persuasive authority, we are not bound by other courts' decisions when applying an Indiana rule. City of New Haven v. Chem. Waste Mgmt. of Ind., L.L.C., 685 N.E.2d 97, 101 (Ind. Ct. App. 1997), trans. dismissed.

We review a trial court's ruling on a motion to intervene for an abuse of discretion. United of Omaha v. Hieber, 653 N.E.2d 83, 88 (Ind. Ct. App. 1995), trans. denied. We will conclude the trial court abused its discretion only when its decision is "clearly against the logic and effect of the facts and circumstances before the court or reasonable and probable inference to be drawn therefrom." Developmental Disabilities Residential Facilities Council v. Metro. Dev. Comm'n, 455 N.E.2d 960, 965 (Ind. Ct. App. 1983). Federal courts have noted that district courts are afforded wide discretion in regard to permissive intervention, and that reviewing courts pay significant deference to a district court's decision. See South Dakota ex rel Barnett v. U.S. Dep't of Interior, 317 F.3d 783, 787 (8th Cir. 2003) ("Reversal

[1] Federal Rule of Civil Procedure 24(b) states in relevant part:
Upon timely application anyone may be permitted to intervene in an action . . . when an applicant'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.

of a decision denying permissive intervention is extremely rare, bordering on nonexistent."); United States v. Pitney Bowes, Inc., 25 F.3d 66, 73 (2d Cir. 1994) ("Reversal of a district court's denial of permissive intervention is a very rare bird indeed, so seldom seen as to be considered unique."); Bush v. Viterna, 740 F.2d 350, 359 (5th Cir. 1984) ("This court has never reversed a denial of permissive intervention under Rule 24(b) solely for an abuse of discretion."). Even if the requirements of Rule 24(b) are met, the trial court retains discretion to deny intervention. See Cont'l Cas. Co. v. ZHA, Inc., 154 F.R.D. 281, 283 (M.D. Fla. 1994). Also, the discretion afforded to trial judges under this rule "contemplates that judges may properly reach different decisions in generally similar circumstances." Brewer v. Republic Steel Corp., 513 F.2d 1222, 1225 (6th Cir. 1975).

Still, despite the broad discretion afforded to a trial court, its decision to deny permissive intervention is subject to our review. See Spangler v. Pasadena City Bd. of Ed., 552 F.2d 1326, 1329 (9th Cir. 1977). Although the trial court is required to consider the delay and prejudice caused to the original parties, the trial court may properly consider other factors, including, but not limited to:

> the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case . . . whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Id.

Here, the trial court's order indicates that it denied CPI's motion primarily to protect Terry and Mason's right to proceed in state court and to avoid unnecessary delay. The trial court also noted that CPI's participation in the lawsuit was not necessary and that CPI was a wholly owned subsidiary of Guidant.

CPI argues that "[t]he trial court did not determine that CPI failed to satisfy any of Trial Rule 24(B)'s requirements and therefore abused its discretion in denying intervention." Appellant's Br. at 6. However, as noted above, even if an intervening party meets the rule's requirements, a trial court retains discretion to deny a motion for permissive intervention. See Cont'l Cas. Co., 154 F.R.D. at 283. Therefore, the mere fact that CPI has satisfied the requirements for permissive intervention does not indicate that the trial court abused its discretion in denying CPI's motion.

CPI also argues that the trial court "improperly focused on whether removal would be proper after intervention," appellant's br. at 6, and "failed to show how CPI's intervention itself would cause delay or prejudice," appellant's reply br. at 6. The thrust of CPI's argument is that the trial court was precluded from considering what CPI would do after intervention was granted, and was limited to considering the effects of intervention itself. See id. at 6-7 ("[T]he trial court should have illustrated . . . how adding CPI as a party to the Indiana state case would cause undue delay or prejudice. The effects of removal are for the federal court, not the trial court, to address." (emphasis in original)). We disagree.

Consideration of whether intervention will unduly delay litigation inherently involves consideration of what the intervening party plans to do once involved in the lawsuit. See ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1323 (11th Cir. 1990) (concluding that

intervention would cause undue delay as the party seeking intervention "seeks to inject numerous issues into the case"); Wooten v. Moore, 42 F.R.D. 236, 241 (E.D.N.C. 1967) (examining Government's likely course of action upon grant of motion to intervene). Indeed, were a trial court not permitted to consider what an intervening party would do after becoming a party to the suit, we have difficulty imagining a situation where a trial court could conclude that intervention would cause delay. That is, the mere act of joining a party causes no delay (outside of the time taken to deal with the motion). On the other hand, the party's actions following intervention may cause delay and are properly considered by a trial court.

CPI has cited no authority for its argument that the trial court's consideration of the effects of removal was improper. We have likewise been unable to find any authority supporting this position. It is clear that a trial court considering a motion of intervention may consider a wide variety of factors. See Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1248 (6th Cir. 1997) (noting that the trial court balances undue delay, prejudice to the parties, and "any other relevant factors"); Pierson v. United States, 71 F.R.D. 75, 81 (D. Del. 1976) (trial court's ruling on motion for permissive intervention "must include an appraisal of any potential delay or prejudice to the original parties that might result from permitting the intervenor's claim to be heard"). Although we have found no federal or Indiana case addressing the potential for removal caused by a third party's intervention, the Louisiana Court of Appeals has assessed an analogous situation.

In Heaton v. Monogram Credit Card Bank of Ga., 818 So.2d 240 (La. Ct. App. 2002), the FDIC sought leave to intervene in a suit filed by credit card customers against the issuing

bank. Under Louisiana statute, a party may intervene if such intervention "will not retard the progress of the principal action." La. Code Civ. Pro. art. 1033. The trial court denied the FDIC's motion to intervene based in part on the fact that the intervention would allow the existing defendant to remove the case to federal court, thereby prejudicing the plaintiffs. Heaton, 818 So.2d at 244. The court of appeals affirmed the trial court's denial of the motion for intervention, concluding that the trial court's finding that intervention would delay the proceeding by allowing removal to federal court was reasonable. Id. at 245.

Although the Louisiana statute at issue in Heaton differs slightly from our Trial Rule 24(B), we find the case persuasive authority for allowing a trial court to consider potential removal to federal court when determining whether intervention will delay the proceedings or prejudice the original parties. Based on Heaton and the general discretion of a trial court to consider a wide variety of factors, we conclude that the trial court did not act improperly in considering the effect of CPI's intent to remove the case to federal court the resulting delay and prejudice to Terry and Mason. Cf. Zimmerman v. Bell, 101 F.R.D. 329, 332 (D. Md. 1984) (granting motion to intervene where party's "intervention will not result in the destruction of federal jurisdiction over this case, or in any other prejudice to the existing parties").

Also, the trial court's order recognizes that CPI is a wholly-owned subsidiary of Guidant. Although the trial court did not explicitly find that CPI's interests were therefore adequately represented, its order implies as much. The adequacy of representation is a permissible factor for the trial court to consider. Spangler, 552 F.2d at 1329; see Brock v. McGee Bros. Co., Inc., 111 F.R.D. 484, 487 (W.D.N.C. 1986) (considering fact that original

party adequately protected the rights of the party seeking to intervene). The Eighth Circuit has upheld a district court's denial of permissive intervention that was based primarily on the fact that the rights of the party seeking intervention were adequately represented. Barnett, 317 F.3d at 787; see also Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280-81 (5th Cir. 1996), cert. denied, 519 U.S. 965 (affirming trial court's denial of motion for permissive intervention where trial court's denial was based solely on ground that proposed intervenor's interests were already protected); Hoots v. Pennsylvania, 672 F.2d 1133, 1136 (3d Cir. 1982) (where "the interests of the applicant in every manner match those of an existing party and the party's representation is deemed adequate, the district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that any resulting delay would be 'undue'").

Although the trial court certainly could have granted CPI's motion to intervene, we conclude the trial court also acted within its discretion in denying the motion. See Barnett, 317 F.3d at 787 ("[A]lthough the [potential intervenor] has cited authority that probably would have persuaded us to grant the motion . . . we cannot say that the district court clearly abused its discretion in this case by not granting the motion."). We note that CPI is not precluded from contributing to this case by seeking leave to file a brief as amicus curiae. See Mille Lacs Band of Chippewa Indians v. Minnesota, 152 F.R.D. 587, 591 (D. Minn. 1993) ("Where the applicant for intervention presents no new questions, a third party can contribute most expeditiously by a brief amicus curiae and not by intervention." (quoting British Airways Bd. v. Port Authority, 71 F.R.D. 583, 585 (S.D.N.Y. 1976), aff'd, 556 F.2d 554 (2d Cir. 1976))).

Conclusion

We conclude that the trial court did not abuse its discretion by denying CPI's motion to intervene.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.