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FILED
KENNETH J. MURPHY
CLERK
01 SEP 17 PM 2:47
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION DAYTON

**IN THE UNITED STATES DISTRICT COURT
IN THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION-DAYTON**

MICHAEL A. GALLUZZO
PLAINTIFF,

VS.

CASE NO. C301-174
Judge Walter H. Rice

CHAMPAIGN-COUNTY COURT
OF COMMON PLEAS,
DEFENDANT.

**PLAINTIFF MICHAEL A. GALLUZZO'S MOTION FOR
LEAVE TO SUPPLEMENT MOTION CONTRA TO
DISMISS INCORPORATED INSTANTER**
and
**PLAINTIFF'S REQUEST FOR ORAL HEARING ON
FACTS INTRODUCED OUTSIDE THE PLEADINGS
PURSUANT TO DEFENDANT'S PLEADINGS TO DISMISS**

Plaintiff Michael A. Galluzzo respectfully requests leave, for good cause shown, to supplement his Motion Contra To Dismiss where Defendant Champaign County Court of Common Pleas has introduced facts outside the pleadings pursuant to their Motion to Dismiss and their subsequent Reply. As Plaintiff is not an attorney and is self-represented in this matter, the court should be liberal in its application of procedural rules allowing for Plaintiff to include all relevant and persuasive arguments against dismissal in order to properly reach the merits of this case, and where Defendant has abused the rules of procedure to abort a meritorious decision of Plaintiff's causes of action.

FILED
KENNETH J. MURPHY
CLERK
01 SEP 18 AM 11:33
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION DAYTON

GRANTED
SEP 18 2001
Michael B. Aterz
U.S. Magistrate Judge

as to Supplement

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IN THE UNITED STATES DISTRICT COURT
IN THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION-DAYTON

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SEP 17 2001
BERNARD J. MURPHY, Clerk
DAYTON, OHIO

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PLAINTIFF,

VS.

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Judge Walter H. Rice

CHAMPAIGN COUNTY COURT
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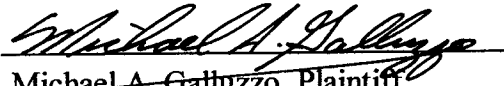
Plaintiff Michael A. Galluzzo respectfully requests leave, for good cause shown, to supplement his Motion Contra To Dismiss where Defendant Champaign County Court of Common Pleas has introduced facts outside the pleadings pursuant to their Motion to Dismiss and their subsequent Reply. As Plaintiff is not an attorney and is self-represented in this matter, the court should be liberal in its application of procedural rules allowing for Plaintiff to include all relevant and persuasive arguments against dismissal in order to properly reach the merits of this case, and where Defendant has abused the rules of procedure to abort a meritorious decision of Plaintiff's causes of action.

Plaintiff further requests an oral hearing pursuant to Defendant's violation of introducing facts outside the pleadings, hereby requesting that this Court convert Defendant's Motion To Dismiss to a Motion For Summary Judgment.

Furthermore, Plaintiff requests that this Court not limit discovery to matters solely pertaining to the existence of a pending action for the final decree was journalized on June 29, 1994, and where Defendant is attempting to incorporate post-decree proceedings denying the finality of the state court's decision by totally ignoring the seven (7) year deprivation of Plaintiff's federal right to custody of his children.

This request incorporates *instanter* the merits of Plaintiff's argument. The following Memorandum In Support herein supplements Plaintiff's motion opposing dismissal.

Respectfully submitted,



Michael A. Galluzzo, Plaintiff

P.O. Box 710

St. Paris, Ohio 43072

937-663-4505

MEMORANDUM IN SUPPORT

Plaintiff informs this Court that while the underlying case was decreed June 29, 1994, and wherein the final decree Defendant Champaign County Court of Common Pleas *terminated* Plaintiff's **legal** custody of his children without a finding of unfitness, inapposite of the Second District Appellate Court's decision in *Esch v. Esch*, 2001 Ohio App. LEXIS 679, February 23, 2001 (unreported). Squarely on point with the Sixth Circuit's decision in *Hooks v. Hooks*, 771 F.2d 935 (6th Cir. 1985), and where the facts in *Hooks* did not even reach a termination issue, *any* deprivation of custody requires the procedures of due process. A federal question arose upon the deprivation of Plaintiff Galluzzo's *termination* of his **legal** custody right, where Plaintiff is fit and where the "best interests" standard is not the proper standard pursuant to the Second Appellate Court's conclusive decision in *Esch* and its' progeny.

Defendant Champaign County Court of Common Pleas resorts to asserting that the final decree is not actually a final order; that Plaintiff has a continuing case; and that there is an ability to continue to raise issues. But should Plaintiff ignore the deprivation of custody (legal and physical) in his final court order, then he would be inviting the Defendant to find him in contempt and subject him to penalties including jail. The Champaign County Court of Common Pleas has already demonstrated that it uses its enforcement capabilities to jail litigants. [See April 27, 2001 Report and Recommendations filed in this Court.]

Defendant wants the final decree to be enforceable, a decree that occurred without due process, but on the other hand wants this court to assert that the matter is still pending

enabling it to dismiss the case pursuant to abstention. This Court must determine that a federal question exists, where then it must decide to abstain or reach the merits.

Hooks, id. states that *any* deprivation of custody requires the procedures of due process.

Precedent requires that this Court determine whether *Hooks* is applicable. Since a deprivation did occur, the Court must assert jurisdiction. The Court must determine then whether to abstain and dismiss. The crucial fact is *when* the deprivation took place. That deprivation occurred pursuant to the final decree on June 29, 1994.

But...wait, the Defendant now asserts that there is not really a final order as some issues are still pending. Obviously, the Second Appellate Court has already determined that this matter was concluded and that all issues subsequent are post-decree matters. Either way, a deprivation occurred and that deprivation required Champaign County to follow the procedures of due process. [See *Hooks, id.*] This Court should note that the issues pending (at trial level and on appeal) are post-decree issues of child support and contempt.

Defendant wants this Court to also recognize that a post-decree Motion for a Modification of Custody is pending. Defendant has already admitted that Plaintiff has not retained custody of his children for he was designated the non-custodial parent, and at the same time pursuant to their Answer to the First Amended Complaint, Defendant has asserted that no determination of fitness was made. This Court should recognize that a modification requires:

R.C. 3109.04 (E)(1)(a): “The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds...that the modification will serve the best interests of the child.”

Where is the language that requires the state court to make a finding of parental suitability? The language does not exist, for the statute, by omission, is unconstitutional on its face.

Again, Defendant Champaign County Court of Common Pleas attempts to override the Second Appellate Court's clear language in *Esch* that a determination of parental fitness is the required standard in determining whether the court can deny custody; and where a parent is not deemed to be unsuitable, the application of the best interests standard is unconstitutional.

Plaintiff points out once again that he has generally challenged the constitutionality of the *entire* statute, for every clause in R.C. 3109.04 contains the applicable best interests of the child standard which is used for parent and non-parent alike. There is no remedy under any set of circumstances in any Ohio court where the same statute is applicable upon appeal. The flagrant unconstitutionality of the best interests of the child standard exists in every clause of R.C. 3109.04, therefore in a cursory review of the statute, one can only conclude that Plaintiff's assertion does comply with this exception to *Younger* pursuant to *Huffman v. Pursue*, 402 U.S., 592 (1975).

Defendant asserts that Plaintiff is required to exhaust state remedies. Plaintiff Galluzzo asserts that this Court is required to give full faith and credit to final state court decisions. Defendant argues that post decree motions mean that the case is not fully decreed. Which is it?

A final journal entry is a final order. The court speaks through its' orders. The fact that Plaintiff retains standing is solely for the purposes of the interest that the state has in the child's welfare. Then, and only where the child's welfare (physical, emotional,

or materially) is jeopardized does the state court have the jurisdiction to intervene. And of course this Court is fully aware that any case can be reopened upon a successful Civil Rule 60(B) motion.

Finally, Defendant is concerned with introducing facts outside the pleadings, but he has done precisely that. **All post-decree filings and matters attached to Defendant's Motion to Dismiss and Reply are outside of the pleadings and cannot be introduced into this matter.** While the Court has now read and seen all attached exhibits, a motion to strike would be futile. Therefore, Plaintiff, for good cause, has had to resort to requesting leave *instanter* to defend facts that are *totally outside* of the pleadings. Defendant's introduction of such facts does not comport with rules governing a Motion to Dismiss.

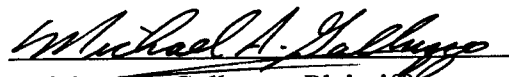
As such, this Court is required to convert Defendant Champaign County Court of Common Pleas Motion to Dismiss to a Motion for Summary Judgment under Federal Civil Rules and provide Plaintiff notice to do so.

Further, Defendant counsel has introduced such facts in an underhanded fashion and with such intent as to unfairly prejudice Plaintiff's meritorious case, while at the same time taking advantage of this litigant who lacks any legal training, for Defendant counsel has asserted his: "fear of turning this motion into a summary judgment motion..." He would not "fear" this had he not resorted to introducing such evidence, and as such, supporting the introduction of such evidence by citing certain Federal Rules of Evidence.

But, the fact remains, no matter what evidentiary rules he cites, Defendant counsel has improperly introduced facts outside the pleadings in an attempt to unfairly prejudice this Court's decision, and within such attempt, Defendant counsel has attempted to limit discovery to facts to support his contention that a pending action exists.

Wherefore, Plaintiff Michael A. Galluzzo respectfully moves this Court for an oral hearing on this matter; to strike the facts introduced outside the pleadings; and to convert the Defendant's Motion to Dismiss into a Motion for Summary Judgement.

Respectfully submitted,



Michael A. Galluzzo, Plaintiff

P.O. Box 710

St. Paris, Ohio 43072

937-663-4505

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND ACCURATE COPY OF THE FOREGOING WAS SERVED UPON DEFENDANT or DEFENDANT's COUNSEL by U.S. mail, postage prepaid, THE 17TH DAY OF SEPTEMBER 2001.


Michael A. Galluzzo, Plaintiff