

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

**FILED**

AUG 26 2002

MICHAEL A. GALLUZZO  
PLAINTIFF,

KENNETH J. MURPHY, Clerk  
DAYTON, OHIO

VS.

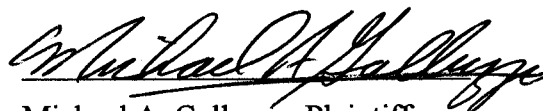
CASE NO. C-3-01-174  
Judge Thomas M. Rose  
Magistrate Judge Michael R. Merz

CHAMPAIGN COUNTY COURT  
OF COMMON PLEAS,  
DEFENDANT.

**PLAINTIFF'S OBJECTIONS to the AUGUST 19, 2002 SUBSTITUTED REPORT  
and RECOMMENDATIONS of the MAGISTRATE; ORDER TO JOIN  
NECESSARY PARTY**

Plaintiff Michael A. Galluzzo objects to the Substituted Report and Recommendation of the Magistrate to dismiss Defendant Champaign County Court of Common Pleas and hereby incorporates herein his memorandum of law supporting his objections.

Respectfully submitted,



Michael A. Galluzzo, Plaintiff  
P.O. Box 710  
St. Paris, Ohio 43072  
937-663-4505

**MEMORANDUM of LAW**

*OBJECTION RAISED:*

1. "Person" requirements of 42 USC § 1983 do not apply to 28 USC §1331; wherefore Defendant Champaign County Court of Common Pleas is a political subdivision and therefore is a proper party defendant pursuant to 28 USC § 1331.

Background

The original action was filed pursuant to 42 USC § 1983 naming various parties, but was amended shortly thereafter. Plaintiff filed his first amended complaint pursuant to 28 USC § 1331 naming Defendant Champaign County Court of Common Pleas as the sole party.

The Magistrate has recommended dismissal of Champaign County Court, asserting that Defendant is not a “properly adverse party” [Substituted Report and Recommendations @ pg. 11] for Defendant claims that “it has indeed no interest in the outcome to a general challenge to the legislation in suit.”

The Magistrate ordered joinder of either Teresa Cook (ex-spouse) and/or the State of Ohio by September 15, 2002 as properly adverse parties. Magistrate also asserts that Plaintiff’s motion to strike Defendant’s untimely request challenging their inclusion, as a proper party is not well taken. Plaintiff takes exception to the aforesaid.

Champaign County Court is a Proper Party Defendant

Plaintiff has filed collaterally to the instant Objections, a Motion for Joinder and a second amended Complaint naming both adverse parties in compliance with the ORDER of this Court. Plaintiff objects that such is not necessary and, as a matter of law that Champaign County Court of Common Pleas is a proper party Defendant.

Plaintiff also objects that the filing of such second amended Complaint naming unnecessary parties is prejudicial, especially after this Court has already certified a constitutional question to Betty Montgomery, Attorney General of the State of Ohio to be heard on the merits. Ms. Montgomery was served by Plaintiff an original complaint and also served the first amended complaint as required under federal rules of civil procedure.

[See First Amended Complaint @ para. 13; see also Certificate of Service attached to Motion for Leave to File First Amended Complaint.] She was fully apprised of the claim for unconstitutionality and up to this point has chosen not to intervene. Plaintiff also recognizes that this Court, under federal law, must notify the A.G. as well. This notification was made on August 12, 2002.

Therefore, for Plaintiff to be ordered to name the State as a necessary adverse party is a moot point where the State has maintained the option of waiver of 11<sup>th</sup> amendment immunity from the instigation of this suit, and further, such order could be construed as prejudicial, had Plaintiff done so *without* naming another “adverse party” pursuant to 28 USC § 1331.

The State of Ohio could assert 11<sup>th</sup> amendment immunity, be dismissed, and there would be no other parties to the suit, therefore requiring dismissal of the entire case and a certified constitutional question. While this scenario will not occur in this case, the assertion that Plaintiff is not prejudiced is not entirely accurate.

While Teresa Cook may have an adverse interest, she *may or may not be a necessary* party to a general constitutional challenge to the validity of Ohio’s statutory scheme where Champaign County Court of Common Pleas is an adverse party pursuant to 28 USC § 1331.

Defendant Champaign County Court of Common Pleas asserts incorrectly that it has no interest in the outcome of this matter, but under Ohio law, this Defendant retains the *parens patriae* interest of minor children, within its jurisdiction, for the state of Ohio. The legislative history of § 1331 does not preclude political subdivisions from suit where

there is federal question jurisdiction. Further there is no bar to immunity from suit to political subdivisions under the 11<sup>th</sup> amendment.<sup>1</sup>

The August 12, 2002 certificate of a constitutional question evidences that federal question jurisdiction exists, therefore Champaign County Court's argument that Defendant does not have a sufficiently adverse interest in the outcome of this case is not well taken.

And as a matter of law under 28 USC § 1331, Defendant Champaign County Court cannot be dismissed from suit. Under Ohio law, a county court of common pleas is a political subdivision.<sup>2</sup>

**“Person’ requirements of 42 USC § 1983 do not apply to 28 USC § 1331, and hence political subdivisions can be sued where jurisdiction is based on latter section.”<sup>3</sup>**

And of course, Defendant Champaign County Court of Common Pleas has already admitted proper party jurisdiction in their Answer to Plaintiff's First Amended Complaint @ Answer #1:

- 1. If the Plaintiff has otherwise raised a valid cause of action, to the extent that his claims rely on interpretations of the United States Constitution or laws of the United States, Defendant admits jurisdiction of this Court pursuant to 28 U.S.C. § 1331.**

Since this Court has certified a constitutional question, Defendant's admission is

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<sup>1</sup> *Mt. Healthy City School Dist., v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977).

<sup>2</sup> See *Sams v. State of Ohio*, 1999 WL 163542 (Ohio App. 10 Dist. 1999).

See also, *Tymcio v. State* (1977), 52 Ohio App.2d 298; *Dalton v. Bureau of Crim. Identification & Investigation* (1987), 39 Ohio App.3d 123.

<sup>3</sup> *Gray v. Union County Inter. Ed. Dist.*, 520 F.2d 803 (1975); See also *Panzarella v. Boyle*, 406 F.Supp. 787 (1975); *Williams v. Brown*, 398 F. Supp. 155 (1975).

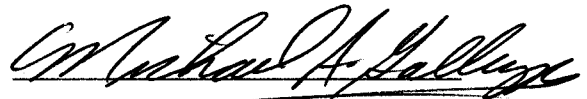
a matter of fact. Under 28 USC § 1331, Defendant is a proper party as a matter of law.

Conclusion

As a matter of law pursuant to 28 USC § 1331, Champaign County Court of Common Pleas, a political subdivision, is a proper adverse party.

Plaintiff requests that the Magistrate WITHDRAW dismissal of this proper party Defendant *or* that the Court OVERRULE the Substituted Report and Recommendations; Order to Join Necessary Party pursuant to the instant objections.

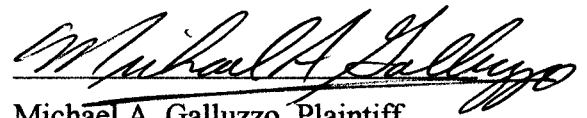
Respectfully submitted,



Michael A. Galluzzo, Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT A TRUE AND ACCURATE COPY OF THE FOREGOING WAS SERVED UPON **DEFENDANT CHAMPAIGN COUNTY COURT OF COMMON PLEAS** BY U.S. MAIL, POSTAGE PREPAID, THE 26<sup>TH</sup> DAY OF AUGUST 2002.



Michael A. Galluzzo, Plaintiff