

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

FILED

AUG 26 2002

KENNETH J. MURPHY, Clerk
DAYTON, OHIO

MICHAEL A. GALLUZZO
PLAINTIFF,

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 MOTION FOR JOINDER
PURSUANT TO THE AUGUST 19, 2002 ORDER
TO JOIN NECESSARY PARTY

On August 12, 2002, Federal Magistrate Judge Michael R. Merz certified a constitutional question to Betty Montgomery, Attorney General for the State of Ohio to be decided on the merits of the constitutionality of Ohio's statutory scheme¹.

On August 19, 2002, the Magistrate Judge recommended that the State of Ohio and/or Teresa Cook be named by September 15, 2002 as necessary adverse parties to defend the merits of the certified constitutional question. The Magistrate Judge recommended that Defendant Champaign County Court of Common Pleas be dismissed asserting that Defendant was not an adverse party, therefore not necessary.²

Collateral with the filing of the instant Motion for Joinder, Plaintiff has filed Objection(s) to the Substituted Report And Recommendation.

Plaintiff is filing this Motion pursuant to direct court order. Plaintiff objects to the fact that the Court asserts that Defendant Champaign County Court of Common Pleas is *not* a necessary adverse party to this action. Pursuant to 28 U.S.C. § 1331, a political subdivision, *i.e.*, Champaign County Court of Common Pleas, is a proper party to a

¹ O.Civ. R. 75(N) {formerly (M)} and R.C. 3109.04

federal question action. Likewise, Defendant Champaign County Court is not immune from suit under the Eleventh Amendment.

On the other hand, the State of Ohio is not a necessary party unless the State chooses to intervene, which choice of waiver the State maintains. The Attorney General was notified in October 2001 of a constitutional challenge to Ohio law pursuant to Plaintiff's service of the original action *and* the subsequent first amended complaint to her office.

Whereby the State has absolute immunity from suit under the Eleventh Amendment, the federal court cannot require the State of Ohio to defend this action. And unless the Attorney General waives the State's immunity from suit and voluntarily chooses to intervene to defend the merits of the certified constitutional challenge to Ohio's statutory scheme...naming the State as an adverse party is gratuitous. Such order to join the State could be construed as prejudicial to Plaintiff had the Court dismissed Defendant Champaign County Court and had the State declined intervention³ leaving no sufficiently adverse parties, and therefore, grounds for dismissal.

Teresa Cook may *or may not* be a necessary adverse party. But, the federal court has determined that she should be joined. Plaintiff is merely responding to the Court's direct order to join her.

Plaintiff does object to joining Teresa Cook as a necessary adverse party where the Defendant Champaign County Court has already admitted that they are a proper

² Substituted Report And Recommendations; Order To Join Necessary Party filed August 19, 2002.


³ Eleventh Amendment Immunity from Suit. See Plaintiff's Objection(s) to Substituted Report And Recommendation filed collaterally with the instant Motion for Joinder.

party,⁴ and in fact, under 28 USC § 1331, the county common pleas court is a political subdivision subject to suit under this section of the United States Code. A *proper* necessary adverse party already exists, therefore, Plaintiff does not believe that Teresa Cook is in *any* way “necessary” to this action.

Whereas this Court has previously certified a constitutional question to be determined on the merits, Plaintiff requests of the Court whether a Second Amended Complaint must be filed pursuant to the instant Motion for Joinder, and in the alternative, upon the Court’s granting of said motion. Plaintiff requests leave of court to file should the Magistrate Judge determine that a Second Amended Complaint is required.


WHEREFORE, under objection, Plaintiff Michael Galluzzo moves this Court pursuant to its own order to join the State of Ohio and Teresa Cook as necessary adverse parties. Plaintiff further requests that Defendant Champaign County Court of Common Pleas remain a proper party defendant.

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; BETTY MONTGOMERY, ATTORNEY GENERAL OF OHIO, 30 East Broad Street, Columbus, Ohio 43215; and TERESA A. COOK (fka Galluzzo)** BY U.S. MAIL, POSTAGE PREPAID, THE 26TH DAY OF AUGUST 2002.


Michael A. Galluzzo, Plaintiff

⁴ See Answer # 1 of Defendant Champaign County Court of Common Pleas to Plaintiff’s First Amended Complaint.