IN THE SUPREME COURT OF OHIO

GARY L. NUNN, Appellant/Cross-Appellee -v- CHRISTOPHER J. CORNYN, Appellee/Cross-Appellant and BARBARA L. HORWITZ, et al., Appellees	:	On Appeal from the Warren County Court of Appeals, Twelfth District Case NO.: 07-2350 Court of Appeals CASE NOS.: CA2006-08-098 CA2006-08-099 CA2006-10-123

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MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE, BARBARA L. HORWITZ

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE SUBSTANTIAL CONSTITUTIONAL QUESTION

Only Appellant's Proposition of Law II is directed to Appellee, Barbara L. Horwitz. The issue involved in that proposition relates to a trial court's exercise of discretion in denying a plaintiff's leave to file a third amended complaint. This issue raises no unique or new issues of law. The standard under which the trial court considered Appellant's motion and the standard of review applied by the Court of Appeals are both well-settled.

STATEMENT OF THE CASE AND FACTS

Horwitz represented Nunn's adversary, Spring Village in a previous action in the Warren County Court of Common Pleas. That action began when Spring Village commenced an eviction action against Nunn in Warren County Court. In connection with the eviction action, Spring Village was not represented by Horwitz, but by another attorney. Christopher J. Cornyn represented Nunn in that action. An Agreed Entry of Restitution was filed on September 14, 2000. Subsequently, Cornyn filed, on behalf of Nunn, an Answer and Counterclaim against Spring Village and had the case transferred to the Warren County Court of Common Pleas. After the transfer, Horwitz represented Spring Village in connection with the defense of that counterclaim.

Nunn's counterclaim went to trial before a magistrate. The magistrate filed a decision on January 8, 2003, finding in Nunn's favor and awarding Nunn damages in the amount of $8,025.00, consisting of "diminution in the value of the apartment between July 1, 1999 to October 1, 2000 ($2,500); personal property damage ($525.00); and damages for medical expenses and pain and suffering ($5,000). This judgment was reduced by rent owed to Spring Village in the amount of $1,800, thus resulting in a judgment of $6,250.00 in favor of Nunn.

Nunn filed objections to the Magistrate's decision and on October 3, 2003, Judge James L. Flannery of the Warren County Court of Common Pleas entered a decision and entry affirming the Magistrate's decision. This decision was entered after the second evidentiary hearing before Judge Flannery described in Nunn's Complaint as the "retrial". Nunn did not appeal from Judge Flannery's decision and entry.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

Response to Proposition of Law No. II: A trial court properly denies a motion for leave to amend a complaint a fourth time where the facts supporting the alleged amendment were well known to the plaintiff before leave was sought and where, as a matter of law, the proposed amended claim failed to state a claim upon which relief could be granted.

Leave to amend a complaint is to be freely given under Rule 15(A) of the Ohio Rules of Civil Procedure. However, leave is not to be given where the amendment would be futile and where a plaintiff cannot make a *prima facie* case for the new claims or fails to present operative facts in support of the new allegations. *Wilmington Steel Products, Inc. v. Cleveland Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 573 N.E.2d 62; *Edmondson v. Steelman* (1992), 87 Ohio App.3d 455, 622 N.E.2d 661.

Nunn sought leave of Court to assert a new claim against Horwitz under a federal civil rights statute, 42 U.S.C. §1983. This proposed claim was frivolous and leave was properly denied. The claim was legally insufficient and contradicted affidavits under oath previously filed in the action by Nunn.

An action brought under 42 U.S.C. §1983 does not lie unless a defendant acted to deprive a plaintiff of a constitutional right "under color of state law." Private attorneys representing

their clients in state court litigation do not act under color of state law. The Supreme Court of Ohio held in *Kelly v. Whiting* (1985), 17 Ohio St.3d 91, 477 N.E.2d 1123 (syllabus, ¶ 2):

> 2. A privately retained attorney is not subject to suit under Section 1983, Title 42, U.S. Code, while representing his client in the state court system when proceeding pursuant to state law.

The Court's decision was in accord with numerous decisions of federal courts within the Sixth Circuit. See, e.g., *Harmon v. Hamilton Co. Court of Common Pleas*, 83 Fed.Appx.766 (6th Cir.2003) (unsuccessful plaintiff in state court litigation could not bring a §1983 action against the private attorneys for the defendants in the underlying state court litigation); *Miller v. Melnick*, 33 Fed.Appx. 807 (6th Cir.2002) (an attorney representing a party in an eviction proceeding is not a state actor for purposes of §1983); *Hahn v. Star Bank*, 190 F.3d 708 (6th Cir.1999) (a private attorney issuing subpoena in connection with a proceeding is not a state actor for purposes of §1983); *Sterling v. Trotter*, 2002 WL 3409437 (S.D. Ohio 2002) (ex-husband could not bring §1983 action against ex-wife's attorneys for their use of state courts); *Nubbeve v. Sparrow*, 808 F.Supp. 1295 (E.D. MI 1992) (former tenants could not sue former landlords under §1983 for alleged mis-use of state statute in connection with an eviction action).

The trial court also correctly denied the requested leave where the proposed Amended Complaint was based upon allegations of "fact" contradicted by Nunn in his own affidavit filed under oath in this proceeding below.

Count VI of the proposed Third Amended Complaint alleged that the Defendant lawyers, Horwitz and Cornyn, "conspired to enlist the compulsive powers of the state to seize property owned by Plaintiff Nunn by executing on that property and depriving Plaintiff of his pre deprivation rights and Procedural and Substantive Due Process Rights and further deprived him of a fair and impartial

hearing in open court." (Proposed Third Amended Complaint, ¶ 7). Nunn also complained in paragraph 8 that he was evicted without benefit of a hearing in open court.

Nunn signed and caused to be filed by his attorney in the court below, an affidavit in which Nunn swore under oath that there was no Court order permitting Horwitz or Spring Village to remove and dispose of his property, that no sheriff's deputy or officer or any bailiff of the Warren County Court "participated, attended or supervised the disposal of my personal property", and finally that Horwitz and her client "used self-help to dispose of and destroy all my personal property without a court order." Attached to Nunn's affidavit were copies of correspondence from Horwitz to Cornyn, dated well over one year after the initial filing in County Court, informing Nunn through his counsel that Spring Village would remove Nunn's property by a date certain unless Nunn made arrangements to claim and remove it. Nunn's own affidavit averred under oath that there was no state action in connection with the disposal of his property.[1]

With reference to a hearing regarding his eviction, Horwitz had nothing to do with that hearing or Nunn's eviction. She was not counsel of record at the time the writ of restitution was signed by the attorneys and the Court and at the time of Nunn's "eviction".[2] Horwitz did not become involved in this matter until after Nunn filed an Answer and Counterclaim and the matter was removed from County Court to the Court of Common Pleas. By that time, Nunn had already abandoned the premises. For the above reasons, the trial court did not abuse its discretion in denying Nunn's Motion for Leave to File Third Amended Complaint against Horwitz.

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[1] Such "facts", in any event, do not support a claim that an attorney for a private litigant acts under color of state law.

[2] The Court and counsel signed an agreed order authorizing the eviction.

Alternatively, the trial court correctly denied Nunn's request to file the Third Amended Complaint and did not abuse its discretion. As the Court of Appeals noted in its decision:

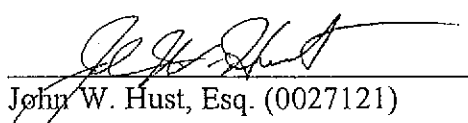
> {¶15} Likewise, the allegations found in Nunn's 42 U.S.C. 1983 claim were known to him long before he sought leave to file a third amended complaint. The essence of the claim was that Cornyn, Horwitz, and Spring Village had deprived Nunn of his due process and property rights by removing and destroying his personal property after he vacated his apartment. We note, however, that the removal and destruction of Nunn's personal properly occurred during the eviction proceeding and long before he commenced the present action. Moreover, in an earlier version of his complaint, Nunn alleged that Cornyn, Horwitz, and Spring Village were responsible for the unlawful entry into his apartment and the removal and destruction of his property. Therefore, the facts supporting Nunn's claim under 42 U.S.C. 1983 were known to him well before he sought leave to file a third amended complaint.

The trial court did not abuse its discretion in denying leave, and the Court of Appeals was correct in affirming the trial court's decision to deny Nunn leave to file a Third Amended Complaint.

CONCLUSION

Horwitz requests that this Court decline jurisdiction over the within action. This case involves well settled and properly applied principles of law relating to a party's request to file an amended pleading.

Respectfully submitted:



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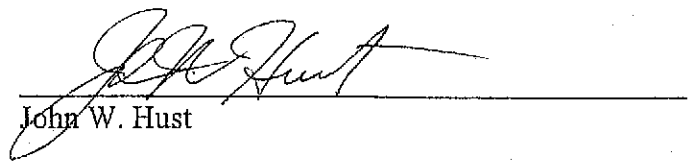
I certify that an accurate copy of the foregoing was sent by regular United States Mail, postage prepaid, to Gary L. Nunn, Appellant-Pro Se/Cross-Appellee, 201 S. Heincke, Apt. P, Miamisburg, OH 45342; Edward R. Goldman, Attorney for Appellee/Cross-Appellant, Cornyn, One West Fourth Street, Suite 900, Cincinnati, Ohio 45202-3688; Stephen M. Yeager, Attorney for Appellee, Spring Village Apartments, One West Fourth Street, Suite 1800, Cincinnati, Ohio 45202, this 15th day of January 2008.



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