

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERNEST FLAGG, as Next Friend of
JONATHAN BOND, a minor,

Plaintiff,

v

Case No.: 05-CV-74253
Hon. Gerald E. Rosen
Magistrate Judge R. Steven Whalen

CITY OF DETROIT, a municipal corporation;
DETROIT POLICE CHIEF ELLA BULLY-CUMMINGS;
DEPUTY DETROIT POLICE CHIEF CARA BEST;
JOHN DOE POLICE OFFICERS 1-20; ASST.
DEPUTY POLICE CHIEF HAROLD CURETON;
COMMANDER CRAIG SCHWARTZ; POLICE LT.
BILLY JACKSON; MAYOR KWAME M. KILPATRICK,
CHRISTINE BEATTY, jointly and severally,

Defendants.

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**DEFENDANT, CHRISTINE BEATTY'S, RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE
TO FILE THIRD AMENDED COMPLAINT**

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QUESTION PRESENTED

- I. WHETHER PLAINTIFF SHOULD BE PERMITTED, PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 15(a), TO FILE A THIRD AMENDED COMPLAINT WHERE:
- A. THIS CASE WAS ORIGINALLY FILED 2½ YEARS AGO;
 - B. PLAINTIFF HAS ALREADY BEEN PERMITTED BY THIS COURT TO TWICE AMEND HIS COMPLAINT; AND
 - C. THE PROPOSED THIRD AMENDED COMPLAINT, IF PERMITTED, WILL STILL NOT BE BROUGHT BY A PROPER PLAINTIFF.

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STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Plaintiff filed this case in November 2005. On August 31, 2006, this Court dismissed the original Complaint, but granted leave to Plaintiff to file an amended complaint.

Plaintiff filed his First Amended Complaint on September 21, 2006.

Subsequently, Plaintiff sought leave to file a Second Amended Complaint. This Court granted leave to Plaintiff to file a Second Amended Complaint, which Plaintiff did on January 14, 2008.

Now Plaintiff seeks leave to file a Third Amended Complaint. Inasmuch as this Court has already twice granted Plaintiff leave to amend his Complaint, and the proposed Third Amended Complaint still does not address the fatal flaws in Plaintiff's existing Complaint, this Court should either deny the instant Motion, or, in the alternative, declare that this is the final time it will grant leave to Plaintiff to amend his Complaint.

ARGUMENT

I. THERE IS NO BASIS TO PERMIT PLAINTIFF TO CONTINUE TO AMEND HIS COMPLAINT *AD INFINITUM*.

First, it is undisputed that Plaintiff filed this case over 2½ years ago, and has already been permitted by this Court to twice amend his Complaint. Although relatively little discovery has yet taken place, this fact hardly amounts to a license for Plaintiff to continually amend his Complaint. Indeed, even though Federal Rule of Civil Procedure 15(a) provides that “[t]he court should freely give leave [to amend] when justice so requires,” Rule 15 does not amount to a “free pass” to amend at will and/or as many times as desired. See, e.g., United States ex rel. Bernard v. Casino Magic Corp., 293 F.3d 419, 426 (8th Cir. 2002) (no abuse of discretion to deny leave to amend “two and a half years into the litigation” where amendment “would have extended the matter indefinitely.”).

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Second, Plaintiff's proposed Third Amended Complaint would still not be brought by a proper plaintiff¹. Although Plaintiff's Third Amended Complaint will purportedly add two new plaintiffs, neither of the putative new plaintiffs seek to join this matter as representatives of the estate of Ms. Greene even though the estate of Ms. Greene is the only party that has standing to bring this matter at all.

Pursuant to Michigan law, any wrongful death action must be filed by the personal representative of the estate of the deceased, on behalf of the estate. See, MCL § 600.2922. Indeed, MCL § 600.2922 provides, in pertinent part:

- (1) Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a , and although the death was caused under circumstances that constitute a felony.
- (2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased. Within 30 days after the commencement of an action, the personal representative shall serve a copy of the complaint and notice as prescribed in subsection (4) upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings. (emphasis added)

Here, neither Plaintiff, nor the putative new plaintiffs, even purport to bring this case on behalf of the estate of the deceased, Ms. Greene². Thus, like Plaintiff, the putative new plaintiffs do not have standing to assert that their constitutional rights of access to the courts have been denied

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- 1/ Defendants' motion to dismiss the Second Amended Complaint on this and other grounds is currently pending.
 - 2/ Rather, Plaintiff and putative new plaintiffs each purport to bring this case in their respective capacities as guardian for each of Ms. Greene's children.

because they simply did not have a right to file a wrongful death action in state court to begin with.

Id.

In Swekel v City of River Rouge, 119 F.3d 1259, 1264 (6th Cir. 1997), the Court held that a plaintiff in a denial-of-access case must show that “defendants’ actions foreclosed [him/her] from filing suit in state court or rendered ineffective any state court remedy [s/he] previously may have had.” Accordingly, even if Plaintiff were correct, which he is not, that Defendants’ actions rendered a wrongful death action ineffective or meaningless, Plaintiff can not demonstrate that such conduct actually foreclosed him from filing suit in state court, because he was not allowed to file suit pursuant to MCL § 600.2922 in any event. As the United States Supreme Court has held, and this Court recognized in its August 31, 2006 Opinion, “[h]owever unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court. Christopher v. Harbury, 536 U.S. 403, 415; 122 S. Ct. 2179 (2002) (emphasis supplied).

In sum, to the extent this Court permits Plaintiff to file a Third Amended Complaint, Plaintiffs should not be permitted to amend the Complaint further inasmuch as this case has already been pending for 2½ years and this Court has granted Plaintiff more than adequate opportunities to raise his claims.

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CONCLUSION

For all the foregoing reasons, this Court should deny the instant Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

_____ I hereby certify that on May 23, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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