

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

RAYMOND L. FLYNN and)
THOMAS A. SHIELDS,)

Plaintiffs,)

v.)

Docket No.
04-3136-A

DOUGLAS JOHNSTONE,)
JOHN J. LONG, DAVID J.)
RUSHFORD, SUSAN FLOOD,)
and CAROL VALCOURT,)

Defendants.)

**DEFENDANT DOUGLAS JOHNSTONE'S AND DEFENDANT
JOHN J. LONG'S RENEWED MOTIONS TO DISMISS
THE AMENDED COMPLAINT**

Now come the Defendants Douglas Johnstone, Clerk of the Town of Provincetown, Massachusetts, and John J. Long, Clerk of the City of Somerville, Massachusetts, and hereby renew their respective Motions to Dismiss the Plaintiffs' Amended Complaint for the reasons stated in the Memoranda of Law accompanying each of the Defendant's Motions.

In addition to the reasons already presented to the Court in the pleadings filed by these Defendants, as well as the pleadings previously filed by the remaining Defendant Clerks, Defendants Johnstone and Long further state that as of the date of the filing of this Renewed Motion to Dismiss, Defendants Johnstone and Long have received no opposition from Plaintiffs to their Motions to Dismiss. Defendants served their Motions to Dismiss on Plaintiffs and filed said Motions with the Clerk of the Supreme Judicial Court on June 30, 2004, prior to the transfer of this action to the Superior Court. Pursuant to Rule 9A of the Massachusetts Rules of Civil Procedure, if the Plaintiffs wished to oppose the Defendants' Motions to Dismiss, they were required to serve their opposition on the Defendants no later than twenty-one (21) days following service of the Defendants' Motions on them. Several weeks have passed since the twenty-one

day period provided in Rule 9A expired, and Plaintiffs have failed to serve any opposition on Defendants.

Instead, Plaintiffs have filed a Motion to Transfer and Consolidate their declaratory judgment action with *Johnstone v. Reilly, et al.*, Docket No. 04-2655, and *Cote-Whitacre v. Department of Public Health, et al.*, Docket No. 04-2565, consolidated actions currently pending before Judge Ball in the G session. Defendants Johnstone and Long wish to oppose the Plaintiffs' Motion to Consolidate, but do not wish to unnecessarily expend resources or place unnecessary demands on the Court's time by filing their oppositions to the Plaintiffs' Motion to Consolidate when the Plaintiffs have defaulted and failed to oppose the Defendants' Motions to Dismiss. The Attorney General has informed Judge Ball that in the interests of judicial economy, he also opposes consolidation prior to resolution of the Defendants' Motions to Dismiss. See State Defendants' Response to Motion of Raymond Flynn and Thomas Shields to Consolidate Cases, attached hereto as Exhibit A.

Given the serious jurisdictional and substantive defects in the Plaintiffs' Complaint, as detailed in the Defendants' pending Motions to Dismiss, Defendants respectfully request that this Court defer any action on the Plaintiffs' Motion to Consolidate until it has acted on the Defendants' Motions to Dismiss. It is within the Court's sound discretion to deny a motion to consolidate and to dismiss a complaint when plaintiffs lack standing to bring the action. See, e.g., *Wright v. Dougherty County*, 358 F.3d 1352 (11th Cir. 2004) ("A district court has discretion over whether two cases may be consolidated. A case may not be consolidated with another when one set of plaintiffs lack standing to assert a claim against the defendants ... By lacking standing to bring a claim the appellants also lack standing to amend the complaint to consolidate with a party who may have standing." (citations omitted)).

If the Court grants the Defendants' unopposed Motions to Dismiss, the Plaintiffs' Motion to Consolidate will be moot. If the Court declines to dismiss the Plaintiffs' Amended Complaint,

the Defendants request the time permitted pursuant to Rule 9A in which to file their oppositions to the Plaintiffs' Motion to Consolidate.

Respectfully submitted,

DOUGLAS JOHNSTONE
CLERK, TOWN OF PROVINCETOWN,

By his attorney,



Gretchen Van Ness
BBO #553632
44 School Street, Suite 510
Boston, MA 02108
(617) 723-5060

JOHN J. LONG
CLERK, CITY OF SOMERVILLE,

By his attorney,



Sarah Wunsch
BBO #548767
Staff Attorney
ACLU Foundation of Massachusetts
99 Chauncy Street, Suite 310
Boston, MA 02111
(617) 482-3170 x323

Dated: August 11, 2004

~~CERTIFICATE OF SERVICE~~

I hereby certify that on this 11th day of August, 2004, I served the foregoing document on every other party to this action by mailing a copy thereof, by First Class Mail, postage prepaid, to:

Philip D. Moran, Esq.
265 Essex Street, Suite 202
Salem, MA 01970

John G. Gannon, Esq.
City Solicitor
93 Highland Avenue
Somerville, MA 02143

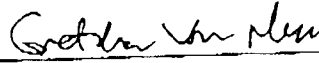
David M. Moore, Esq.
City Solicitor
City Hall, Room 301
Worcester, MA 01608

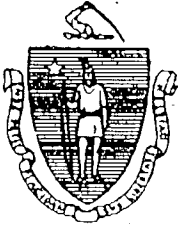
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THE COMMONWEALTH OF MASSACHUSETTS
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ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108-1598

THOMAS F. REILLY
ATTORNEY GENERAL

(617) 727-2200
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August 6, 2004

Judy Trochi, Assistant Clerk
G Session
Suffolk Superior Court
90 Devonshire Street, 12th Floor, Courtroom 3
Boston, Massachusetts 02109

Re: Douglas Johnstone, Clerk of the Town of Provincetown, et al. v. Thomas Reilly, Attorney General, et al., C.A. No. 04-2655-G

Sandra and Roberta Cote-Whitacre, et al. v. Department of Public Health, et al.,
C.A. No. 04-2656-H

Flynn v. Johnstone, No. 04-3136-A

Dear Ms. Trochi:

Enclosed for docketing and filing in the above captioned case, please find the State Defendants' Response to Motion of Raymond Flynn and Thomas Shields to Consolidate Cases.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Peter Sacks".

Peter Sacks
Assistant Attorney General
(617) 727-2200, ext. 2064

Enc.

cc: Kevin Batt, Esq.
Gretchen Van Ness, Esq.
Sarah R. Wunsch, Esq.
Michele E. Granda, Esq.
Kenneth J. Parsigian, Esq.
Philip D. Moran, Esq.
David R. Langdon, Esq.
Benjamin W. Bull, Esq.

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EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

DOUGLAS JOHNSTONE, CLERK OF THE
TOWN OF PROVINCETOWN, et al.,

Plaintiffs,

v.

THOMAS REILLY, ATTORNEY
GENERAL, et al.,

Defendants.

CIVIL ACTION
NO. 04-2655-G

SANDRA AND ROBERTA COTE-
WHITACRE, et al.,

Plaintiffs,

v.

DEPARTMENT OF PUBLIC HEALTH,
et al.,

Defendants.

CIVIL ACTION
NO. 04-2656-H

STATE DEFENDANTS' RESPONSE TO MOTION OF
RAYMOND FLYNN AND THOMAS SHIELDS TO CONSOLIDATE CASES

The state Registrar of Vital Records and Statistics and the other state defendants in the above-captioned cases respond as follows to the motion of Raymond Flynn and Thomas Shields to consolidate the case of Flynn et al. v. Johnstone et al., No. SUCV2004-3136-A, with the above-captioned cases. The consolidation motion was filed directly with the Court rather than being served according to Rule 9A. In the interests of judicial economy, the Registrar suggests

that, unless the Court is inclined to deny the consolidation motion without awaiting substantive responses thereto, the Court first rule upon the motions to dismiss that the defendants clerks have filed (and plaintiffs Flynn and Shields have opposed) in the Flynn v. Johnstone matter. If that matter survives the motions to dismiss, then the Registrar requests a brief additional time (after the ruling on the motions to dismiss) to file a more substantive response to the consolidation motion before the Court rules on that motion.

Respectfully submitted,

THOMAS F. REILLY
ATTORNEY GENERAL

Pete Sacks

Peter Sacks, BBO No. 548548
Assistant Attorney General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108-1698
(617) 727-2200, ext. 2064

Date: August 6, 2004

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail (by hand)

on 8/6/04
Pete Sacks