

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-CV-1858-EWN-MJW

SEAN HARRINGTON,

Plaintiff,

v.

MADELINE WILSON AND THE :”LAW OFFICE OF MADELINE WILSON”,
CHRISTY RYAN,
BILL J. FYFE AND COLUMBINE COUNSELING CENTER, P.C.
LAURA ARCILISE in her personal capacity,
LOUISE CULBERSON-SMITH in her personal capacity,
JOHN GLEASON in his personal capacity and his official capacity (as Attorney Regulation
Counsel),
WENDELL PRYOR in his official capacity as Director of the Colorado Civil Rights
Division & Colorado Civil Rights Commission,
ROBERT EVANS in his official capacity as ADA Coordinator and Court Administrator for
the First Judicial District,
JEFFERSON COUNTY COMBINED COURT, through the Colorado Attorney General,
JOHN SUTHERS, (in his official capacity).

Defendants.

STATE DEFENDANTS’ *CORRECTED* MOTION TO DISMISS

Laura Arcilise, Louise Culberson-Smith, John Gleason, Wendell Pryor, Robert Evans,
Jefferson County Combined Court and Colorado Attorney General John Suthers, (hereinafter
collectively referred to as the “State Defendants”), by and through their attorney, Assistant
Attorney General Christine K. Wilkinson, hereby move to dismiss the claims against them
pursuant to Fed. R. Civ. P. 8, 12(b) and 12(b)(6). As grounds therefore, the State Defendants
submit the following:

INTRODUCTION

This case stems from a contentious divorce and custody proceeding in Colorado state court. Plaintiff has sued the State Defendants because, in essence, they did not adequately sanction his ex-wife's attorney, prevented him from filing certain documents, did not investigate his claim that the Jefferson County Courts were discriminating against him because he is mentally ill, and generally conspired against him in the state court proceedings. All of the claims against the State Defendants must be dismissed, for the reasons explained below.

CLAIMS AGAINST THE STATE DEFENDANTS

- (1) Fourth claim for relief against Arcilise for Civil Conspiracy to Deny Access to the Courts;
- (2) Fifth claim for relief against Arcilise for Extreme and Outrageous Conduct;
- (3) Eleventh claim for relief against Arcilise under 42 U.S.C. §1983 alleging violations of his rights to free speech, equal protection and due process;
- (4) Twelfth claim for relief against Arcilise under 42 U.S.C. §1985(3);
- (5) Thirteenth claim for relief against Culberson-Smith and Gleason under 42 U.S.C. §1983 alleging violations of the First Amendment and 42 U.S.C. §1985(3);
- (6) Fourteenth claim for relief against Gleason for violations of C.R.C.P. 251.1 et al.;
- (7) Sixteenth claim for relief against Pryor for violations of C.R.S. §24-34-205 and 24-34-601;
- (8) Seventeenth claim for relief against Arcilise, Culberson Smith and Gleason for violating 42 U.S.C. §1986;
- (9) Eighteenth claim for relief against all State Defendants for violating the Americans with Disabilities Act;

(10) Nineteenth claim for relief against all State Defendants for violations of the Rehabilitation Act; and

(11) Twentieth claim for relief against all State Defendants for violating C.R.S. §24-34-601.

ARGUMENT

I. Standard of Review

A motion to dismiss under Rule 12(b)(1) challenges a court's subject matter jurisdiction over the action, which may exist despite the sufficiency of the allegations in the complaint. *See KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936). Under a Rule 12(b)(1) challenge, the court may consider matters outside the pleadings that challenge the averments upon which the court's jurisdiction depends. *Axtell v. United States*, 860 F. Supp. 795, 797 (D.Wyo. 1994). The burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266 (6th Cir.1990); *Professional Investors Life Ins. Co. v. Roussel*, 445 F. Supp. 687, 691 (D.Kan.1978).

Under Fed. R. Civ. P. 12(b)(6), the court may dismiss for failure to state a claim upon which relief can be granted when it appears beyond a doubt that plaintiff can prove no set of facts in support of his theory of recovery that would entitle him to relief, *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), or when an issue of law is dispositive, *see Neitzke v. Williams*, 490 U.S. 319, 326 (1989). Allegations that are not supported by facts may not be offered or considered. The court must accept as true all well-pleaded facts, as distinguished from conclusory allegations. *Fry Bros. Corp. v. Department of Housing and Urban Development*, 614 F.2d 732, 733 (10th Cir. 1980); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir.1998). The court, however, is not to assume that the Plaintiff “can prove facts that [he] has

not alleged or that the [D]efendants have violated the state laws in ways that have not been alleged.” *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

II. The Rooker Feldman Doctrine Bars Plaintiff’s Claims

As the United States Supreme Court recently held, the Rooker-Feldman doctrine bars “cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corporation v. Saudi Basic Industries Corporation*, 125 S. Ct. 1517, 1521-1522 (2005). In other words, the doctrine precludes “a party losing in state court ... from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party’s claim that the state judgment itself violates the loser’s federal rights.” *Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994); *see also Anderson*, 793 F.2d at 263. Under the doctrine, a federal district court cannot review matters actually decided by a state court, or provide relief that is “inextricably intertwined” with the state court decision. *See Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103, 1108 (10th Cir. 2000). “This rule applies even though, as here, the challenge is anchored to alleged deprivations of federally protected due process and equal protection rights.” *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Doe v. Pringle*, 550 F.2d 596, 599 (10th Cir. 1976); *see also Anderson* at 263 (where a constitutional issue could have been reviewed on direct appeal by the state appellate courts, a litigant may not seek to reverse or modify the state court judgment by bringing a constitutional claim under 42 U.S.C. §1983).

A claim is “inextricably intertwined” if the federal claims succeed only to the extent that the state court wrongly decided the issues before it,” *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995), or if the federal claim requires the federal district court to “go beyond mere review of the state rule *as promulgated*, to an examination of the rule *as applied* by the state court.” *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1432-33 (10th Cir. 1984) (italics in original). “In other words, Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its ruling.” *Charchenko* at 983.

In this case, Plaintiff’s claim against the State of Colorado and Judge Tidball seeks review of divorce/custody proceedings in Jefferson District Court. Plaintiffs are clearly state-court losers who are complaining of injuries caused by a state-court judgment, rendered before this proceeding commenced, and who are inviting review and rejection of the state-court judgment. Yet, Plaintiffs’ sole avenue for review on such a claim is by appeal in the Colorado appellate courts, through the highest court of the Colorado, and, from there, for review on certiorari in the United States Supreme Court. *Feldman*, 460 U.S. at 486; *Facio v. Jones*, 929 F.2d 541, 543-44 (10th Cir. 1991); *Anderson v. Colorado*, 793 F.2d 262, 264 (10th Cir. 1986); *Razatos*, 746 F.2d at 1432-33. Thus, Plaintiffs’ claim in this action is barred pursuant to the *Rooker-Feldman* doctrine and should be dismissed with prejudice for lack of subject matter jurisdiction.

III. The Younger Abstention Doctrine Bars Plaintiff’s Claims

In this case, Plaintiff is expressly attempting to interfere with ongoing Colorado State court proceedings by seeking equitable remedies including injunctions and declaratory

judgments regarding constitutional issues in those proceedings. This is the very interference in pending state court proceedings that the *Younger* abstention doctrine is intended to prevent. When a state forum provides an adequate avenue of relief, federal courts should not interfere by granting the sort of relief that Plaintiffs are requesting. *See Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1267 (10th Cir. 2002). *Younger* requires that a federal court refrain from hearing an action over which it has jurisdiction “when [the] federal proceedings would (1) interfere with an ongoing state judicial proceeding (2) that implicates important state interests and (3) affords an adequate opportunity to raise the federal claims.” *Joseph A.* at 1267, quoting *J.B. v. Valdez*, 186 F.3d 1280, 1291 (10th Cir. 1999). Once a court finds that the required conditions are present, abstention is mandatory. *See Joseph A.* at 1267; *see, e.g., Amanatullah v. Colorado Bd. of Med. Examiners*, 187 F.3d 1160, 1163 (10th Cir. 1999) (“*Younger* abstention is non-discretionary; it must be invoked once the three conditions are met, absent extraordinary circumstances.”).

This case meets all three of the *Valdez* criteria. There is an ongoing state judicial proceeding with which this federal lawsuit would interfere that implicates an important state interest regarding child custody in the State of Colorado. This Court should therefore abstain from hearing the claim raised in this action.

IV. The Eleventh Amendment Bars the Assertion of Subject Matter Jurisdiction Over Plaintiff’s Claims

Plaintiff seeks monetary damages from the State Defendants.

The Eleventh Amendment to the United States Constitution bars claims brought in federal court against states, state agencies *and their officials* when sued in their official capacity for *damages* and/or retroactive relief. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

Congress did not intend 42 U.S.C. §1983 to abrogate Eleventh Amendment immunity or override state immunity. *Quern v. Jordan*, 440 U.S. 332, 337, 340-45 (1979).

The State of Colorado has not waived its Eleventh Amendment immunity. *See Griess v. Colorado*, 841 F.2d 1042, 1044-45 (10th Cir. 1988). Consequently, this Court has no power to exercise jurisdiction over Defendants John Gleason, Wendell Pryor, Robert Evans, Jefferson County Combined Court or Attorney General John Suthers, all of whom are sued in their official capacities, regarding Plaintiff's claims for damages. Therefore, the Court must dismiss the claims against them for lack of subject matter jurisdiction.

V. The State Defendants Are Immune from Plaintiff's Claims Under the Doctrine of Absolute Judicial Immunity.

Few doctrines are more solidly established in common law than the absolute immunity of judges from liability for damages for acts committed within their judicial discretion. *Pierson v. Ray*, 386 U.S. 547, 553-554, 87 S. Ct. 1213, 1217 (1967). The doctrine of judicial immunity bars a suit for damages against a judge unless the judge's conduct was taken without any colorable claim of jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356-357, 98 S. Ct. 1099 (1978). A judge does not lose the cloak of judicial immunity even when he or she acts maliciously or in error so long as the action was not taken in the complete absence of all jurisdiction. *Mireless v. Waco*, 502 U.S. 9, 112 S. Ct. 286 (1991).

Absolute judicial immunity extends to court personnel who perform "quasi-judicial" functions. *Whitesel v. Sengenberger*, 222 F. 3d 861, 867 (10th Cir. 2000). Absolute immunity "free[s] the *judicial process* from the harassment and intimidation associated with litigation." *Burns v. Reed*, 500 U.S. 478, 494, 111 S. Ct. 1934 (1991) (emphasis added). Thus, absolute

judicial immunity has been extended to non-judicial officers who perform judicial acts to aid a judge, or where non-judicial officers perform duties having “an integral relationship with the judicial process.” *Whitesel, supra*, 222 F. 3d at 867. The Tenth Circuit has recognized that court clerks may be protected by absolute judicial immunity where the clerk is performing discretionary judicial acts, or ministerial acts at the direction of a judge. *Whitesel, supra*, 222 F. 3d at 869

Here, Plaintiff complains that the State Defendants should be assessed monetary damages because of Arcilise’s treatment of him during the pendency of the domestic case before Judge Jane Tidball. Arcilise is Judge Tidball’s clerk. Thus, Arcilise is entitled to judicial immunity for conduct that occurred while she was acting as the judge’s clerk. *Smith v. Erickson*, 884 F.2d at 1111 (concluding clerk's duties in filing documents was an integral part of the judicial process, so the clerk's delayed filing of the complaint and lies about its whereabouts, was protected by judicial immunity); *Mullis v. United States Bankr. Ct.*, 828 F.2d 1385, 1390 (9th Cir.1987) (determining bankruptcy clerks enjoyed absolute quasi-judicial immunity for refusing to accept an amended complaint, as their actions related to an integral part of the judicial process); *Eades v. Sterlinske*, 810 F.2d 723, 726 (7th Cir.1987) (holding judge's clerk, who prepared a false certificate and altered the docket, was exercising discretion and performing duties integrally related to the judicial process, which afforded her the defense of absolute immunity). Accordingly, all of Plaintiff’s claims against Arcilise must be dismissed.

Furthermore,

VI. Arcilise, Culberson-Smith and Gleason Are Entitled to Qualified Immunity

Defendants Arcilise, Culberson-Smith and Gleason, sued in their individual capacities under §1983, §1985(3) and §1986, are entitled to qualified immunity.

“Government officials performing discretionary functions enjoy qualified immunity from civil damage suits if their conduct did not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Warner v. Grand County*, 57 F.3d 962, 963-64 (10th Cir. 1995); *See also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Furthermore, “[q]ualified immunity is an ‘entitlement not to stand trial or face the other burdens of litigation.’” *Saucier v. Katz*, 533 U.S. 194, 200 (2001). “The privilege is ‘an *immunity from suit* rather than a mere defense to liability . . . “ *Id.* “Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.” *Id.*

A Court required to rule upon the qualified immunity issue must consider two questions. First, taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? Second, if a violation could be made out on a favorable view of the parties’ submissions, the next, sequential step is to ask whether the right was clearly established. *Id.* at 201.

Here, Plaintiff alleges that his rights to due process, equal protection, free speech and access to the courts have been violated as to State Defendants Arcilise, Culberson-Smith and Gleason. Yet, failure to sanction an attorney against whom Plaintiff has a complaint and failure to assist Plaintiff with his filings in Court do not implicate a constitutional right. Accordingly,

Arcilise, Culberson-Smith and Gleason are entitled to qualified immunity on the eleventh and thirteenth claims for relief.

VII. The Twelfth and Thirteenth Claims for Relief Alleging Violations of 42 U.S.C. 1985(3) Must Be Dismissed for Failure to State a Claim

A conspiracy claim under 42 U.S.C. § 1985 is intended to ameliorate a conspiracy to deprive a plaintiff of a constitutional or federally protected right under color of state law. *Dixon v. City of Lawton, Okla.*, 898 F.2d 1443, 1449 n. 6 (10th Cir. 1990). Thus, a plaintiff must prove an agreement as well as an actual deprivation of a right “secured by the Constitution and laws.” *Id.*; *Villanueva v. McInnis*, 723 F.2d 414, 418-19 (5th Cir. 1984). Moreover, the plaintiff “must allege specific facts showing an agreement and concerted action among the defendants.” *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 533 (10th Cir.1998); *O’Hayre v. Board of Education for Jefferson County*, 109 F. Supp.2d 1284, 1291 (D.Colo. 2000). “Mere agreement to do something that happens to aid in the commission of a tort, without more, does not constitute civil conspiracy. ...[P]laintiff cannot succeed on [his] claims for civil conspiracy without showing that each defendant agreed to do something in furtherance of the conspiracy, knowing of its improper purpose.” *Powell Products, Inc. v. Marks*, 948 F. Supp. 1469, 1480 (D.Colo. 1996).

Plaintiff’s claims averring a conspiracy are fatally deficient. Beyond its facial assertion of the fact of a “conspiracy,” Plaintiff’s complaint is devoid of any factual allegations which, taken to be true, would support the inference that an agreement existed among the State Defendants to deprive Plaintiff of his rights. *Espinoza v. O’Dell*, 633 P.2d 455, 468 (Colo. 1981). Plaintiff provides no specific facts showing an agreement by or collaboration between or among

the State Defendants to undertake an act with improper purpose or unconstitutional goal. In addition, Plaintiff has not demonstrated an actual deprivation of his constitutional rights. Therefore, Plaintiff's claims alleging conspiracy among the State Defendants should be dismissed for failure to state a claim.

VIII. State Defendants Are Entitled to Absolute Prosecutorial Immunity.

Prosecutors are absolutely immune from suit under 42 U.S.C. § 1983 concerning activities intimately associated with the judicial process such as initiating and pursuing criminal prosecutions. It is also well established that absolute immunity extends to state attorneys and agency officials who perform functions analogous to those of a prosecutor in initiating and pursuing civil and administrative enforcement proceedings. *Richard E. Pfeiffer, M.D. v. Hartford Fire Insurance Co, et al.* 929 F. 2d 1484, (Colo. App. 1991). *Butz v. Economou*, 438 U.S. 478, 509, 515-17, 98 S. Ct. 2894 (1978).

Plaintiff complains of the purported failure of State Defendants Gleason and Culberson-Smith to appropriately sanction his ex-wife's attorney. Gleason is the Attorney Regulation Counsel and Culberson-Smith was the attorney from that office who allegedly received Plaintiff's complaint regarding his ex-wife's attorney. In essence, Plaintiff asserts that they did not adequately prosecute his ex-wife's attorney for perceived ethical failings. As such, these Defendants are entitled to absolute prosecutorial immunity.

IX. The Fourteenth Claim for Relief Must Be Dismissed Because There Is No Private Right of Action for Violation of the Colorado Rules of Attorney Discipline.

Plaintiff alleges claims for violating the Colorado Rules of Procedure regarding attorney discipline against the Attorney Regulation Counsel, defendant Gleason. This stems from

Plaintiff's unhappiness with the ARC's purported failure to sufficiently sanction his ex-wife's attorney.

Specifically, Plaintiff alleges violations of C.R.C.P. 251.1, 251.9, 251.11 and 251.12. There is, however, no private right of action for a violations of these rules. Accordingly, this claim must be dismissed.

X. Plaintiff Has Failed to Allege a Cognizable Claim Against Suthers or the Jefferson County Combined Court and the Claims Against Them Must Be Dismissed.

Although Plaintiff identifies John Suthers as a defendant in his complaint, Plaintiff fails to make any averments at all in the body of complaint regarding Suthers or the Jefferson County Combined Court. Accordingly, any claims against them must be dismissed.

Fed. R. Civ. P. 8(a)(2) states that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint need not express all facts that support the claim, but need only serve notice of the claim asserted. The chief function of a complaint is to give notice to the defendant of the transaction or occurrence that is the subject of the plaintiff's claims. *Fluid Technology, Inc. v. CVJ Axles, Inc.*, 964 P.2d 614 (Colo. App. 1998).

Upon review of the complaint, it is apparent that Plaintiff has not included any allegations that pertain to or can be attributed to Suthers or the Court. Accordingly, Plaintiff's Complaint does not comply with Rule 8 and must be dismissed.

XI. Plaintiff's §1985(3) Claims Must Be Dismissed For Failure to State a Claim

To state a claim under section 1985(3), a complaint must allege:
(1) a conspiracy of two or more person; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons equal protection of the laws, or of equal privileges and

immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *Deubert v. Gulf Federal Savings Bank*, 820 F.2d 754, 757 (5th Cir.1987). Essential to the claim, however, is that the conspiracy be motivated by racial animus. *See Green v. State Bar of Texas*, 27 F.3d 1083, 1088 n. 8 (5th Cir.1994); *Rayborn v. Mississippi State Bd. of Dental Examiners*, 776 F.2d 530, 532 (5th Cir.1985). In other words, a conspiracy motivated by religious animus or animus against mentally ill persons cannot stand under §1985(3). *See, e.g., Word of Faith World Outreach Center Church, Inc. v. Sawyer*, 90 F.3d 118 (5th Cir. 1996).

Here, Plaintiff asserts in the twelfth claim that Arcilise conspired against him based on his religion. *See* Amended Complaint, ¶¶240-250. In the thirteenth claim, Plaintiff asserts that it is his mental illness that has prompted Culberson-Smith and Gleason to violate §1985(3). *Id.*, ¶¶251-261. As a result, Plaintiff has failed to state a claim under §1985(3), as he does not allege that the purported conspiracy was motivated by his race. Thus, these claims must be dismissed for failure to state a claim.

Respectfully submitted this 1st day of December, 2005.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within *Corrected* Motion to Dismiss upon all parties herein by E-Filing and/or depositing same in the United States mail, first-class postage prepaid, this 1ST day of December 2005 addressed as follows:

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