

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-CV-01858

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;  
the JEFFERSON COUNTY COMBINED COURT, through the  
COLORADO ATTORNEY GENERAL, JOHN SUTHERS (in his official Capacity),

Defendants

---

**REPLY IN SUPPORT OF THE FYFE DEFENDANTS’ MOTION TO DISMISS**

---

Defendants, Bill J. Fyfe and Columbine Counseling Center, P.C. (collectively referred to as “the Fyfe Defendants”), by their attorneys, Jaudon & Avery LLP, pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), submit this Reply in Support of their Motion to Dismiss.

**INTRODUCTION**

In their Motion to Dismiss, the Fyfe Defendants argued that this Court does not have subject matter jurisdiction under the *Rooker-Feldman* doctrine or should abstain from exercising

jurisdiction under the Domestic Relations Exception and the *Younger* abstention doctrine. The Fyfe Defendants further argued that they are immune from all of Plaintiff's claims under the absolute immunity doctrine. The Fyfe Defendants also argued that Plaintiff's § 1983 claim fails for lack of state action or, in the alternative, Dr. Fyfe is entitled to qualified immunity from a § 1983 claim.

In response, Plaintiff attempts to retreat from or mischaracterize his own allegations and the nature of his lawsuit. Plaintiff now states:

Plaintiff[s] claims do not concern whether Fyfe fixed the parenting time recommendation outcome of the case or whether he was biased in his investigation *vel non*. Unlike *Samora v. Fyfe*, Plaintiff has not buried a single breach of contract claim somewhere in the midst of dozens of allegations consisting of dissatisfaction over Fyfe's recommendations . . . –rather, the contract breach is one of Plaintiff's primary claims against Fyfe.

Plaintiff's Response, p. 17.<sup>1</sup> Thus, Plaintiff contends that he “is attempting to recover economic damages . . . because Fyfe breached the contract [concerning the division of his fees] . . . and for non-economic damages because the breach was willful and wanton.” Id., p. 8.

Notwithstanding Plaintiff's new characterization of his lawsuit against Dr. Fyfe, Plaintiff's claims still fail. Judge Tidball of the Jefferson County District Court appointed Dr.

---

<sup>1</sup> In one of his appendices to the First Amended Complaint, Plaintiff alleges that Dr. Fyfe “did not fulfill the obligatory tasks of a SA investigation. . . He did not (1) perform a child-parent interaction evaluation; (2) perform a personal interview with Plaintiff; (3) perform an interview with Plaintiff's spouse (the child's step-mother); (4) conduct a meaningful interview of references, witnesses or mental health care providers; or (5) provide an indication that the evidentiary documentation for which Fyfe had charged additional fees had actually been reviewed or considered.” See Appendix A attached to First Amended Complaint, p. 4. In fact, Plaintiff has attached an expert report criticizing Dr. Fyfe's evaluation and investigation. Plaintiff apparently is no longer making these claims. If so, all of his claims relating to Dr. Fyfe's investigation, report, or recommendation should be dismissed and all such allegations and the expert report should be stricken.

Fyfe to serve as a Special Advocate for the child pursuant to Colo. Rev. Stat. § 14-10-116. The statute provides that the Special Advocate will “assist the court in any domestic relations proceeding,” that the Special Advocate “shall investigate, report, and make recommendations” to the court, and that the court shall enter orders concerning the Special Advocate’s fees. Pursuant to her statutory authority, Judge Tidball ordered Plaintiff to pay Dr. Fyfe for the additional work that Plaintiff unnecessarily created.

Unhappy with Judge Tidball’s decision, Plaintiff now seeks to collaterally attack her decision by suing the Fyfe Defendants. Plaintiff’s claims are directly related to Dr. Fyfe’s services as a court-appointed Special Advocate and directly related to Judge Tidball’s Orders awarding fees for those services. Regardless of how Plaintiff now characterizes his lawsuit, Plaintiff is attempting to collaterally attack the state court’s judgment compensating Dr. Fyfe for the services he performed as a court-appointed Special Advocate. For the reasons more fully discussed below, this Court should dismiss all of Plaintiff’s claims against the Fyfe Defendants.

### **ARGUMENT**

#### **I. THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION TO HEAR THIS CASE OR SHOULD ABSTAIN FROM EXERCISING JURISDICTION OVER THE CASE.**

Plaintiff begins by claiming that the Fyfe Defendants’ arguments that this Court does not have subject matter jurisdiction or should abstain from exercising jurisdiction are mutually exclusive. Plaintiff’s Response, pp. 4-5. Plaintiff misunderstands the Fyfe Defendants’ argument. The argument was presented as alternative grounds for dismissal. If the Court concludes that it does not have jurisdiction over the case, then the case is over. If the Court concludes that it does have jurisdiction, then it may still abstain from exercising jurisdiction

under the Domestic Relations Exception or *Younger* abstention doctrine.

**A. *Rooker-Feldman* Doctrine.**

Plaintiff contends that the *Rooker-Feldman* doctrine was narrowed by the United States Supreme Court in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 125 S.Ct. 1517 (1995). Plaintiff then argues that *Rooker-Feldman* does not apply to this case because Plaintiff did not have an opportunity to fully and fairly litigate the fee dispute, and because his claims in this federal lawsuit would have existed regardless of the state court's judgment. Plaintiff's Response, pp. 5-10. Plaintiff's arguments do not survive close examination.

The *Rooker-Feldman* doctrine precludes a federal district court from exercising jurisdiction over a case where the court is being asked, in essence, to review a state court judgment. Facio v. Jones, 929 F.2d 541, 543 (10<sup>th</sup> Cir. 1991). Following the decision in Exxon, the United States District Court in Colorado (sitting in a panel of three judges consisting of two Tenth Circuit Judges Ebel and Porfilio and a Senior District Court Judge Weinshienk) had an opportunity to address the *Rooker-Feldman* doctrine. Lance v. Davidson, 379 F.Supp.2d 1117 (D. Colo. 2005). In light of the Exxon decision, Judge Ebel, writing for the Court, declared that "at least three requirements must be met in order to deprive this court of jurisdiction under *Rooker-Feldman*":

First, the party against whom the doctrine is invoked must have actually been a party to the prior state-court judgment or have been in privity with such a party. See DeGrady, 512 U.S. at 1006; Kenman Eng'g, 314 F.3d at 481. Second, the claim raised in the federal suit must have been actually raised or inextricably intertwined with the state-court judgment. Rooker, 263 U.S. at 416; Feldman, 460 U.S. at 483 n. 16. Finally, the federal claim must not be parallel to the state-court claim. Exxon Mobil Corp., 125 S.Ct. at 1521-22.

Id. at 1124. In further explaining the third element recognized in Exxon, Judge Ebel wrote:

Rooker-Feldman does not apply to claims brought parallel to the state-court action. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 161 L.Ed.2d 454, 125 S.Ct. 1517-1521-22 (2005). That is, only if the federal claim was filed after the state-court judgment will Rooker-Feldman deprive us of jurisdiction.

Id.

All three elements, which will be addressed in reverse order, are satisfied. First, the claims Plaintiff raises in the federal court do not parallel the state-court claims because Plaintiff filed his federal lawsuit on September 23, 2005, after the state court entered its judgments. Plaintiff alleged that Judge Tidball ruled on the fee dispute on May 4, 2004 and again on January 31, 2005. See Appendix F to First Amended Complaint, p. 4, ¶26, p. 5, ¶33. Plaintiff further alleged that his motion to disqualify Dr. Fyfe was denied numerous times in 2004. Id., p. 4, ¶27. In fact, Plaintiff states that the state court judgments concerning the fee dispute and the motion to disqualify are currently on appeal. Plaintiff's Response, p. 13; Kenman Eng'g v. City of Union, 314 F.3d 468, 474 (10<sup>th</sup> Cir. 2002) (holding that *Rooker-Feldman* applies to the state-court judgment even though the judgment is on appeal). Because Plaintiff filed the federal lawsuit long after Judge Tidball ruled on the fee dispute and the motion to disqualify, the third element is clearly satisfied.

Second, Plaintiff's claims raised in this federal suit were actually decided by the state court or are inextricably intertwined with the state court judgment. In Kenman Eng'g, the Tenth Circuit held that the *Rooker-Feldman* doctrine divests federal courts from exercising jurisdiction over not only claims actually decided by the state court but issues inextricably intertwined with such claims. In that case, Plaintiff, as here, argued that the *Rooker-Feldman* doctrine did not apply because they sought monetary damages and did not seek declaratory or injunctive relief to enjoin the state decision. Id. at 477. Rejecting this argument, the Tenth Circuit held that the

“plaintiffs' requested relief—monetary damages—would necessarily undo the Oklahoma state court's judgment.” Id. In providing examples of ways in which a federal court might “upset” or “undo” the state-court judgment, the Tenth Circuit stated:

We need not consider the myriad ways a federal court might "upset" a state-court judgment, but two obvious examples are vacating the state-court judgment, *see, e.g., Facio v. Jones*, 929 F.2d 541 (10<sup>th</sup> Cir. 1991), and **awarding damages for losses incurred as a result of complying with the state-court judgment**, *see, e.g., Ritter v. Ross*, 992 F.2d 750 (7<sup>th</sup> Cir. 1993).

Kenman Eng'g, 314 F.3d at 476 n. 6 (emphasis added).

An unpublished Tenth Circuit opinion further illustrates the inextricably intertwined test. In Dickerson v. Bates, 2004 U.S. App. LEXIS 13988 (10<sup>th</sup> Cir. July 7, 2004) (attached hereto), Mr. Dickerson alleged that the defendants violated the Racketeer Influenced and Corrupt Organizations Act and defrauded him in obtaining and collecting various judgments entered against him in a landlord-tenant dispute in Kansas state court. Id. at \*\*2. The Tenth Circuit held that “[a]lthough a state court has not actually decided Mr. Dickerson's federal claims,” “Mr. Dickerson clearly seeks redress for losses resulting from the state judgments against him”—i.e., reimbursement “for losses resulting from the garnishment of funds, posting of a bond, and payment of damages, all of which resulted from the state court decisions.” Id. at \*\*4. The Tenth Circuit further explained:

In an attempt to avoid the *Rooker-Feldman* doctrine, Mr. Dickerson argues that the defendants, rather than the state court judgments, caused his injuries because the defendants defrauded him and engaged in criminal acts in obtaining and enforcing the judgments. Although he asks us to believe otherwise, he is, in fact, asking a federal district court to undo state court judgments and restore him to the position he was in before these judgments. See Kenman, 314 F.3d at 477 (holding that the *Rooker-Feldman* doctrine barred a suit by plaintiffs seeking monetary relief that would restore them to the position they were in before the state-court judgments). We, therefore, agree with the District Court that his “attempt to reframe the issues is unavailing.”

Id. at \*\*5.

Such is the case here. In explaining why the Rooker-Feldman doctrine does not apply, Plaintiff states that he “is attempting to recover economic damages (monies lost or already paid) because Fyfe breached the contract (a subject that the State trial court did not reach) and for non-economic damages because the breach was willful and wanton.” Plaintiff’s Response, p. 8. However, Judge Tidball actually decided the fee dispute pursuant to Colo. Rev. Stat. § 14-10-116(3) (2004). See Exhibit D, Colo. Rev. Stat. § 14-10-116(3) (2004).<sup>2</sup> On May 4, 2004, Judge Tidball entered the following Order:

Respondent shall be responsible for past Special Advocate fees, specifically the outstanding \$845, and any future fees billed by the Special Advocate that are directly attributable to the Special Advocate’s time spent reviewing documents submitted by Mr. Harrington.

See Appendix F to First Amended Complaint, p. 4, ¶26. Judge Tidball again ordered Plaintiff to pay Dr. Fyfe’s fees on January 31, 2005:

The Court has received a letter from the Special Advocate dated January 20, 2005 stating that Respondent has failed to pay the Special Advocate \$1,267.50. Willful failure by any party to pay . . . may be punishable by fine or imprisonment as a contempt of Court. . . IT IS THEREFORE ORDERED that Respondent show cause . . . why the motions should not be imposed.

Id., p. 5, ¶33. In fact, Plaintiff admits that he has appealed Judge Tidball’s Orders. Plaintiff’s Response, p. 13. This Court does not have the authority to sit as an appellate court to invalidate, either directly or indirectly, the issues considered and decided by Judge Tidball, especially when the matter is currently on appeal in the state court. Kenman Eng’g, 314 F.3d at 477 (*Rooker-*

---

<sup>2</sup> The exhibits referenced herein are attached to the Fyfe Defendants’ Motion to Dismiss. The appendices mentioned herein are attached to the First Amended Complaint.

*Feldman* prevents a lower federal court from conducting “what in substance would be appellate review of [a] state judgment . . . based on a losing party's claim that the state judgment itself violates the loser's federal rights”). Because the relief Plaintiff seeks in this federal lawsuit would necessarily undo Judge Tidball's Orders awarding fees to Dr. Fyfe, the second element is satisfied here.

Third, Plaintiff, the party against whom the doctrine is invoked, was a party to the state domestic relations proceeding. Plaintiff does not dispute this fact. However, Plaintiff argues that he did not have an opportunity to fairly and fully litigate the fee dispute in the state court. Plaintiff's Response, pp. 6, 9. In Kenman Eng'g, the Tenth Circuit explained that “it is not the absence of an opportunity to litigate that precludes operation of the *Rooker-Feldman* doctrine.” Id., 314 F.3d at 478 n. 9. Rather, the Tenth Circuit emphasized:

[W]e have previously applied the *Rooker-Feldman* doctrine despite the fact that the federal-court plaintiff had no opportunity to litigate her claims in the state-court proceeding. See Facio, 929 F.2d at 542-44; Anderson, 793 F.2d at 263. *Rooker-Feldman* bars any suit that seeks to disrupt or "undo" a prior state-court judgment, regardless of whether the state-court proceeding afforded the federal-court plaintiff a full and fair opportunity to litigate her claims. Facio, 929 F.2d at 544; Anderson, 793 F.2d at 264.

Id. at 478. For all of these reasons, the *Rooker-Feldman* doctrine divests this Court of jurisdiction over Plaintiff's lawsuit against the Fyfe Defendants.

#### **B. Domestic Relations Exception.**

Plaintiff argues that the Domestic Relations Exception to diversity jurisdiction does not apply because there is no ongoing state proceeding. Plaintiff further claims the domestic relations exception divests a federal court of jurisdiction to hear issues such as divorce, alimony and child decrees, but it does not “encompass contract claims having domestic relations

overtones.” Plaintiff’s Response, p. 11. Plaintiff’s arguments are without legal basis.

First, the state domestic relations court possesses continuing jurisdiction over its orders and decrees, and this jurisdiction continues not only with respect to the validity of those orders and decrees, but also with respect to modifying and supervising the orders and decrees. Short v. Short, 730 F. Supp. 1037, 1040 (D. Colo. 1990) (“The state court possess continuing jurisdiction over its decrees. It has the requisite expertise to oversee and modify its rulings when appropriate.”); Casida v. Casida, 580 F. Supp. 857, 859 (D. Colo. 1984) (“the state court possesses continuing jurisdiction to supervise and modify its decrees and orders in a divorce proceeding”). In Casida, the United States District Court in Colorado found that the state court proceeding was ongoing even though the plaintiff “was appealing concurrently in the Colorado Court of Appeals various orders of the state court.” Id., 580 F.Supp. at 859. By the same token, this Court does not have jurisdiction because the state court has continuing jurisdiction over its orders and decrees.

Second, the domestic relations exception applies even when the claims arise from “tortious conduct or out of contract.” Short, 730 F. Supp. at 1040. “In such cases, abstention is still appropriate if the determination of the issues at hand would involve this Court inextricably in matters properly committed to the jurisdiction of the state court.” Id. Thus, “a federal court may well decline jurisdiction if the tortious conduct is part of an ongoing series of disputes centering around the marital relationship.” Id. (quoting Kilduff v. Kilduff, 473 F. Supp. 873, 874 (S.D. N.Y. 1979)). The District Court in Short explained:

Plaintiffs’ complaint seeks money damages for the alleged abuse. However, the characterization of the suit as one for recovery of damages incurred as a result of tortious conduct does not save it from the well-established and principled domestic dispute abstention doctrine. “Stripped of its verbiage, this is no more-

and no less-than a domestic relations case.” [citation omitted] The present suit is inextricably bound to the state court proceeding. As such, abstention is proper here.

Id. at 1040.

Here, this Court should abstain from exercising jurisdiction over this lawsuit because the Special Advocate’s fees are a matter committed to the jurisdiction of the state court. Colo. Rev. Stat. § 14-10-116(1) gives the state court exclusive jurisdiction to appoint Special Advocates “to assist the court in any domestic relations proceeding. . . .” The statute then authorizes the state court with jurisdiction over the domestic relations case to enter orders concerning the Special Advocate’s fees. See Exhibit D, Colo. Rev. Stat. § 14-10-116(3) (2004). Plaintiff’s contention is that Dr. Fyfe improperly charged for his services as a Special Advocate when he was appointed by Judge Tidball to investigate, report, and make recommendations concerning the parenting issues. Because the issue of whether Dr. Fyfe properly charged for his services is a matter delegated to the state court, this Court should abstain from exercising jurisdiction over this case.

**C. *Younger* Abstention Doctrine.**

Plaintiff contends that the *Younger* abstention doctrine does not apply because there is no ongoing state judicial proceeding, because the state proceeding does not implicate any important state interest, and because he did not have an opportunity to fairly and fully litigate the fee dispute and the motion to disqualify. Plaintiff’s Response, pp. 12-14. Each of these arguments is without legal basis.

First, there is an ongoing state proceeding for the purpose of *Younger* abstention doctrine because, as admitted by Plaintiff, the state court judgments are on appeal. Plaintiff’s Response,

p. 13. In determining whether the state action is ongoing, the United District Court in Kansas stated that “It is well settled that for the purposes of *Younger* abstention a proceeding is considered pending until all appellate court remedies have been exhausted.” Oltremari by McDaniel v. Kansas Social & Rehabilitative Service, 871 F. Supp. 1331, 1356 (D. Kan. 1994).

Second, the state proceeding implicates an important state interest. In analyzing whether the state custody proceedings implicate an important state interest, the United District Court in Kansas held:

States have a strong interest in such matters. “Family relations are a traditional area of state concern.” “States have a compelling interest in cases involving determinations of parental rights and custody.” “State courts have a paramount if not exclusive interest in child custody cases.”

Id. at 1357 (citations omitted)). Although Plaintiff attempts to separate Dr. Fyfe’s fees from the parenting issues decided in the state court, those fees were for Dr. Fyfe’s investigation, report, and recommendations concerning the parenting issues. Because the issue concerning Dr. Fyfe’s fees is inextricably intertwined with the parenting issues, the state has a compelling interest on such matters.

Third, Plaintiff is wrong in claiming that he did not have a full and fair opportunity to litigate the fee dispute and the motion to disqualify in the state court. Plaintiff states that he filed numerous motions to disqualify Dr. Fyfe alleging bias and unethical conduct. See Appendix F to First Amended Complaint, p. 4, ¶27. He also filed numerous motions claiming that Dr. Fyfe improperly charged for his services. Id. However, the trial court denied those motions. Id., p. 4, ¶26, p. 5, ¶33. Plaintiff is simply upset because the trial court did not grant him an evidentiary hearing and because the trial court ruled against him. The “opportunity to litigate” requirement does not encompass an evidentiary hearing. Because all three factors under the *Younger* doctrine

are satisfied, this Court should abstain from exercising jurisdiction.

**II. ALL OF PLAINTIFF'S CLAIMS AGAINST DR. FYFE AND COLUMBINE COUNSELING CENTER FAIL AS A MATTER OF LAW BECAUSE THEY ARE ENTITLED TO ABSOLUTE IMMUNITY.**

Plaintiff argues that Dr. Fyfe is not entitled to absolute immunity because his activities were outside the scope of his court appointment. Plaintiff contends that his "claims do not concern whether Fyfe fixed the parenting time recommendation outcome of this case or whether he was 'biased' in his investigation" even though his First Amended Complaint says otherwise. Instead, Plaintiff asserts that his claims are primarily for breach of contract relating to the services Dr. Fyfe charged as a Special Advocate. Plaintiff's Response, pp. 8, 17. Plaintiff's argument is not supported by case law.

To begin, Plaintiff suggests that his conclusory allegation that Dr. Fyfe's conduct fell outside the scope his court appointment defeats the Fyfe Defendants' motion to dismiss. Plaintiff's Response, p. 17. That is not so. Under Fed.R.Civ.P. 12(b)(6), the court accepts as true all well-pleaded facts, Maier v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10<sup>th</sup> Cir.1998), and all reasonable inferences from those facts are viewed in favor of plaintiff. Swanson v. Bixler, 750 F.2d 810, 813 (10<sup>th</sup> Cir. 1984). However, a court is not bound by conclusory allegations, unwarranted inferences, or legal conclusions. Hackford v. Babbitt, 14 F.3d 1457, 1465 (10<sup>th</sup> Cir. 1994).

Plaintiff also suggests that state law claims such as a breach of contract claim are not subject to the absolute immunity doctrine. Plaintiff's Response, p. 17. Again that is not correct. Absolute immunity not only bars civil rights claims under federal statutes, but also bars state law claims. Snell v. Tunnell, 920 F.2d 673, 686 (10<sup>th</sup> Cir. 1990) (recognizing the defense of

absolute immunity from civil rights suits); Short v. Short, 730 F.Supp. 1037, 1038-39 (D. Colo. 1990) (granting a guardian *ad litem* absolute immunity from state law tort claims where she investigates, makes recommendations to a court, or enters reports); Dalton v. Miller, 984 P.2d 666, 668-69 (Colo. App. 1999) (absolute immunity protects a psychologist from state tort law claims based on his videotape deposition and written report submitted during the course of litigation); Elmore v. Van Horn, 844 P.2d 1078, 1085-86 (Wyo. 1992) (counselor hired by a parent to evaluate child for potential abuse immune from state tort law claims based on an affidavit prepared for custody hearing); Winchester v. Little, 996 S.W.2d 818, 825-26 (Tenn. App. 1999) (absolute immunity barred both 42 U.S.C. § 1983 and state law claims).

Plaintiff further suggests that the absolute immunity doctrine should not apply because Dr. Fyfe allegedly had an improper motive to extort fees when he carried out his activities as a Special Advocate. Plaintiff's Response, p. 14. Once a court determines that challenged conduct involves a function covered by absolute immunity, the actor is shielded from liability for damages regardless of his or her motive or intent. Clevinger v. Saxner, 474 U.S. 193, 199-200 (1985). "[In] the realm of absolute immunity, . . . evaluation of motive and reasonableness is forbidden. . . ." Robinson v. Via, 821 F.2d 913, 920 (2d Cir. 1987); see also Dory v. Ryan, 25 F.3d 81, 83 (2d Cir. 1994) (the absolute character of absolute immunity is that it "protects a prosecutor from § 1983 liability for virtually all acts, regardless of motivation, associated with his function as an advocate"). Thus, absolute immunity applies even though the allegation is that the defendant's conduct was malicious or the testimony was knowingly false. See Briscoe v. Lahue, 460 U.S. at 331-32 (stating that under the doctrine of witness immunity, "plaintiff could not recover even if the witness knew the statements were false and made them with malice");

Collins v. Walden, 613 F. Supp. 1306, 1314 (N.D. Ga. 1985) (“The immunity applies even though the testimony might have been knowingly false and malicious.”).

Furthermore, Plaintiff’s attempt to distinguish Hughes v. Long, 242 F.3d 121 (3d. Cir. 2001) is unpersuasive. Plaintiff’s Response, p. 17. In that case, the court appointed Long, a social worker, to conduct a full custody evaluation, consisting of reporting the results of the psychological evaluations to the court and making any recommendations appropriate to a child custody determination. Id. at 124. Although the court appointed Long to perform the evaluation, Long entered into a private contract with the parents whereby each agreed to pay fifty percent of her fees. Id. The plaintiff asserted the same claims advanced against Dr. Fyfe—i.e., violation of section 1983, breach of contract, fraud, conspiracy, and so on. Id. In extending absolute immunity against federal civil rights and state law claims, the Third Circuit distinguished between a private expert hired by a party and an advisor appointed by the court. Id. at 130. While privately retained experts “enter into a private contract with a party and typically receive compensation for their testimony,” a court-appointed advisor like Long serves a different purpose even though she, too, had a contract with both parents for her compensation. Id. Emphasizing that a court-appointed witness serves as an advisor to the court rather than to any one party, the Third Circuit held that Long was absolutely immune from the plaintiff’s breach of contract, fraud, conspiracy, and other similar claims. Id.

By the same token, this Court should extend absolute immunity to the Fyfe Defendants. Judge Tidball appointed Dr. Fyfe to serve as a Special Advocate pursuant to Colo. Rev. Stat. § 14-10-116. The key components of this statute are that (1) the Special Advocate is appointed by the Court, (2) the Special Advocate reports to the Court, (3) the Special Advocate is to make

independent and informed recommendations to the Court, and (4) the Special Advocate's fees are set by the Court. See Exhibit D. Plaintiff now alleges that his claims are primarily for a breach of contract in connection with the fees Dr. Fyfe charged. However, Plaintiff ignores the fact that those charges are for Dr. Fyfe's services he performed within the scope of his court appointment—i.e., for his investigation, report, and recommendation concerning the parenting issues. Plaintiff also ignores the fact that Colo. Rev. Stat. § 14-10-116 specifically authorizes Judge Tidball to enter orders regarding Dr. Fyfe's fees and that Judge Tidball was the one who ultimately ordered Plaintiff to pay Dr. Fyfe's fees. See Exhibit D. Because Dr. Fyfe is entitled to immunity for his activities as a Special Advocate, **including the fees he charged for his services in performing the Special Advocate duties**, this Court should dismiss this lawsuit against him and his professional corporation.<sup>3</sup>

### **III. PLAINTIFF'S SECTION 1983 CLAIM FAILS AS A MATTER OF LAW FOR LACK OF STATE ACTION AND LACK OF CONSPIRACY WITH STATE ACTOR.**

In arguing that Dr. Fyfe was a state actor under § 1983, Plaintiff contends that Meeker v. Kercher, 782 F.2d 153, (10<sup>th</sup> Cir. 1986) should be overruled or distinguished from this case. Plaintiff's Response, pp. 19-25. Plaintiff further asserts that he alleged sufficient facts to establish a conspiracy between Dr. Fyfe and Judge Tidball because the judge ruled in Dr. Fyfe's favor on the fee dispute and because Dr. Fyfe cited to the judge's courtroom practices on his website. Id., pp. 26-27. Each argument is without factual or legal basis.

The plaintiff bears the burden of establishing that a private defendant was a state actor or

---

<sup>3</sup> Plaintiff's claims against Columbine Counseling Center appear to be based on the theory of *respondeat superior*. Given that Dr. Fyfe is immune from liability, Colorado Counseling Center is likewise entitled to immunity for Dr. Fyfe's conduct.

acting under the color of state law. Jojola v. Chavez, 55 F.3d 488, 492 (10<sup>th</sup> Cir. 1995). The Tenth Circuit law is that guardians *ad litem* are not state actors subject to liability under § 1983. Meeker, 782 F.2d at 155; Schaffrath v. Thomas, 993 F. Supp. 842, 846 (D. Utah 1998), aff'd, 189 F.3d 478 (10<sup>th</sup> Cir. 1999); see also Anderson v. Glismann, 577 F. Supp. 1506, 1509 (D. Colo. 1984) (holding that a psychologist who was appointed by the trial court to conduct a custody evaluation was not a state actor under §1983). In Meeker, the Tenth Circuit held:

It is the requirement that the guardian *ad litem* must exercise independent, professional judgment that is crucial to the determination of whether a guardian *ad litem* acts under color of state law and is therefore a person liable under § 1983. We hold that a guardian *ad litem* is not acting under color of state law for purposes of § 1983.

782 F.2d at 153. In fact, both Judge Matsch and Judge Daniel recently held that a Special Advocate appointed under Colo. Rev. Stat. § 14-10-116 is not a state actor. Those two decisions were attached to the Fyfe Defendants' Motion to Dismiss for this Court's review.

There is no functional difference between a Special Advocate and a guardian *ad litem* for the purpose of determining "state action" under section 1983.<sup>4</sup> Both of them are appointed by the court to serve in the best interest of the child. Both of them serve as an investigator and gather information about the parents and children and report back to the court recommending which parent should receive custody. See Hughes v. Long, 242 F.3d at 127 ("A guardian *ad litem* is a person appointed the court in custody proceeding to serve as an investigator and gather information about the parents and children and report back to the court recommending which

---

<sup>4</sup> In 1997, the Colorado General Assembly repealed and re-enacted the statute governing guardians *ad litem* and divided the role of a guardian *ad litem* into two job categories. See Exhibit E, "Division of the GAL Role in Domestic Relations Cases," 27 Colo. Law. 45 (April 1998). The statute replaced the guardian *ad litem* position with the positions of a Special Advocate and a Representative of the Child. See Exhibit D, Colo. Rev. Stat. § 14-10-116(2).

parent should receive custody.”); see also Exhibit D, C.R.S. § 14-10-116. Both the Special Advocate and guardian *ad litem* must exercise independent professional judgment. See Exhibit D, Colo. Rev. Stat. § 14-10-116(2)(b) (“The special advocate shall make independent and informed recommendations to the court.”). Given that the Tenth Circuit already held that a guardian *ad litem* is not a state actor, Dr. Fyfe, who was appointed as a Special Advocate, was not a state actor. Therefore, Plaintiff cannot establish “state action” necessary to establish his § 1983 claim.

Furthermore, Plaintiff’s § 1983 conspiracy claim fails because he has alleged insufficient facts to support the conspiracy. When a plaintiff in a § 1983 action attempts to assert the necessary state action by implicating a state official in a conspiracy with a private defendant, the Complaint must specifically present facts showing (1) an agreement between the private and state actors; and (2) concerted action between the private and state actors. E.g., Scott v. Hern, 216 F.3d 897, 907 (10<sup>th</sup> Cir. 2000); Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 510 (10<sup>th</sup> Cir. 1998). Conclusory allegations without supporting facts are insufficient. Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10<sup>th</sup> Cir. 1983); see also Crabtree ex rel. Crabtree v. Muchmore, 904 F.2d 1475, 1481 (10<sup>th</sup> Cir. 1990) (“Allegations of conspiracy must provide some factual basis to support the existence of the elements of a conspiracy: agreement and concerted action.”); Hammond v. Bales, 843 F.2d 1320, 1323 (10<sup>th</sup> Cir. 1988) (attempts to establish requisite state action through implication of state actors in conspiracy must be supported by specific factual allegations). The requirement for specific factual allegations is even stricter when the state official allegedly involved in the conspiracy is immune from suit. McBride, 708 F.2d at 512.

Here, Plaintiff asserts nothing more than conclusory allegations of a conspiracy. Plaintiff claims that a conspiracy was sufficiently stated in the First Amended Complaint by the allegation that Judge Tidball ruled in favor of Dr. Fyfe on the fee dispute and the allegation that Dr. Fyfe allegedly promoted Judge Tidball's courtroom practices in his online articles. Plaintiff's Response, pp. 26-27. However, those two allegations do not establish an agreement or a concerted action between Dr. Fyfe and Judge Tidball to violate Plaintiff's constitutional right. White v. Denny's Inc., 918 F. Supp. 1418, 1429 (D. Colo. 1996) (a plaintiff cannot establish a conspiracy without producing evidence of a meeting of the minds, *i.e.*, "a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences."). In fact, Plaintiff has not connected the alleged conspiracy to any constitutional violation. If Plaintiff means to suggest that Dr. Fyfe and Judge Tidball made him pay for fees that he should not have paid,<sup>5</sup> the claim does not rise to the level of a constitutional violation. As Plaintiff repeatedly stated in his Response, this is merely a contract claim. Plaintiff needs to present more than conclusory allegations to support a conspiracy claim under § 1983.

**IV. PLAINTIFF'S SECTION 1983 CLAIM FAILS AS A MATTER OF LAW BECAUSE DR. FYFE IS ENTITLED TO QUALIFIED IMMUNITY.**

Dr. Fyfe has argued that he is entitled to qualified immunity as an alternative argument, *i.e.*, if this Court were to conclude that Plaintiff established "state action." In arguing that Dr. Fyfe is not entitled to qualified immunity, however, Plaintiff provides a recitation of applicable law that is not correct. Plaintiff's Response, pp. 27-28. There is no case law, as Plaintiff

---

<sup>5</sup> To date, Plaintiff has never paid any of the outstanding fees ordered by Judge Tidball.

suggests, stating that “When an official acts outside the scope of his authority, he acts individually and not in his official capacity and therefore, he cannot claim protection of qualified immunity.” Plaintiff’s citations to City of Lakewood v. Brace, 919 P.2d 231, 241 n. 14 (Colo. 1996) and Trimble v. City and County of Denver, 697 P.2d 716, 729 (Colo. 1985) are erroneous. Plaintiff’s Response, p. 27. There, the Colorado Supreme Court was discussing whether the common law doctrine of official immunity shields an official from state law claims when the official is acting outside the scope of his employment.

Instead, qualified immunity shields government officials performing discretionary functions from individual liability under 42 U.S.C. § 1983 unless their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” Baptiste v. J.C. Penney Co., 147 F.3d 1252, 1255 (10<sup>th</sup> Cir. 1998). Once a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff to satisfy a "heavy two-part" test. Gross v. Pirtle, 245 F.3d 1151, 1156 (10<sup>th</sup> Cir. 2001). The plaintiff must first establish "that the defendant's actions violated a [federal] constitutional or statutory right." Id. If the plaintiff establishes a violation of a federal constitutional or statutory right, he or she must then demonstrate that the right at issue was clearly established at the time of the defendant's unlawful conduct. Id. Whether the defendant is entitled to qualified immunity is a question of law. Derda v. City of Brighton, Colo., 53 F.3d 1162, 1164 (10<sup>th</sup> Cir. 1995).

Here, Plaintiff cannot establish that Dr. Fyfe’s actions as alleged in the First Amended Complaint violated a clearly established constitutional right. In support of his § 1983 claim, Plaintiff asserts that he has a constitutional right to file a grievance and a civil lawsuit. See First Amended Complaint, p. 83, ¶394. However, Plaintiff now states that Dr. Fyfe merely “attempted

to strong arm” him from filing suit or withdrawing the grievance,<sup>6</sup> but that Dr. Fyfe’s actions did not actually stop him from pursuing those remedies. Nevertheless, Plaintiff contends that the threat alone or an act of retaliation is sufficient to establish a constitutional violation. Plaintiff’s Response, p. 28. That is simply untrue. Plaintiff must establish that Dr. Fyfe actually violated his constitutional right. See Brace, 919 P.2d at 242 (“If Brace resigned and was not terminated, his constitutional claims based on a retaliation theory would drop out from under him.”). Because, by Plaintiff’s own admission, Dr. Fyfe did not actually deny Plaintiff access to the courts or the grievance process,<sup>7</sup> Dr. Fyfe is entitled to qualified immunity from § 1983 claim.

### **CONCLUSION**

For the foregoing reasons, Dr. Fyfe and Columbine Counseling Center request that this Court dismiss all of Plaintiff’s claims against them with prejudice.

Respectfully submitted this 14<sup>th</sup> day of December, 2005.

s/ David H. Yun

David H. Yun

Jaudon & Avery LLP

1660 Wynkoop Street, Suite 1010

Denver, CO 80202

Phone: 303.832.1122

Fax: 303.832.1348

Email: [dyun@jalegal.com](mailto:dyun@jalegal.com)

Attorneys for Defendants Bill J. Fyfe and Columbine Counseling Center, P.C.

---

<sup>6</sup> Dr. Fyfe denies that he attempted to strong arm Plaintiff from filing a grievance or this civil lawsuit.

<sup>7</sup> Plaintiff’s grievance was thrown out on its merits by the state board of psychologists.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2005, I electronically filed the foregoing **REPLY IN SUPPORT OF THE FYFE DEFENDANTS' MOTION TO DISMISS** with the Clerk of the United States District Court for the District of Colorado using the CM/ECF system which will send notification of such filing to the following:

Sean Harrington, *pro se*  
197m Boston Post Road, West  
Marlborough, Mass. 01752  
Fax: 508-630-9004  
[esoxlucios@msn.com](mailto:esoxlucios@msn.com)

Brett N. Huff, Esq.  
[bhuff@wsteele.com](mailto:bhuff@wsteele.com)

Randolph S. Dement, Esq.  
[rdement@dementlaw.com](mailto:rdement@dementlaw.com)

Christine Wilkinson, Esq.  
[ck.wilkinson@state.co.us](mailto:ck.wilkinson@state.co.us)

s/ Olivia Erkhart

---