

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-01924 (DME-BNB)

KENNETH L. SMITH,

Plaintiff,

v.

HON. MICHAEL L. BENDER, et al.,

Defendants.

RESPONSE IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS

Comes now plaintiff Kenneth L. Smith ("Smith"), *in propria persona*, who states as follows:

SUMMARY OF THE ARGUMENT

The State Defendants¹ fundamentally misconstrue the nature of the case before the Court. Smith does not challenge the decision issued by the Colorado Supreme Court in *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam) *per se* but rather, disputes their legal authority to issue it.

A Colorado judge "who knows of circumstances which shall disqualify him in a case shall, on his own motion, disqualify himself." Colo. Rev. Stat. (hereinafter, "C.R.S.") § 16-6-201(2). Once a judge is obliged to recuse himself, he "immediately loses all jurisdiction in the matter

¹ Defendants Michael L. Bender, Nathan B. Coats, Gregory J. Hobbs, Jr., Rebecca Love Kourlis, Alex J. Martinez, Mary J. Mullarkey, and Nancy E. Rice are referred to herein as "the Justices," and along with John W. Suthers, and Friedrich C. Haines, "the State Defendants."

except to [transfer the case],” *People ex rel. Burke v. District Court*, 60 Colo. 1, 8, 152 P. 149 (Colo. 1915) (quotation omitted), and a judgment rendered in the face of a jurisdictional defect is void as a matter of law. *Davidson Chevrolet, Inc. v. City and County of Denver*, 330 P.2d 1116 (Colo. 1958).

The key to understanding this case is in recognizing that, in deciding the appeal in *Smith v. Mullarkey*, the Colorado Supreme Court made two distinct and legally separable decisions. The first -- the jurisdictional question, brought pursuant to C.R.S. § 13-4-110(1)(a) -- was certainly that Court’s to make. However, the Justices were defendants in the case and thus, disqualified from deciding that question by virtue of the Fourteenth Amendment. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Further, the ‘Rule of Necessity,’ *see, United States v. Will*, 449 U.S. 200, 214 (1980), could not confer jurisdiction, as other judges were specifically authorized by statute and available to decide that question. C.R.S. § 13-4-101.

As the matter had never been legally transferred from the Court of Appeals, the Justices did not and could not possibly have acquired subject-matter jurisdiction over the appeal in *Smith v. Mullarkey*. A judge who acts without jurisdiction is not entitled to judicial immunity. *See e.g., Bradley v. Fisher*, 80 U.S. 335 (1871). Everything else in this case is window dressing.

STATEMENT OF FACTS

In many respects, this may be among the simplest cases this Court will ever see. Every fact needed to establish liability is either judicially noticeable,² or otherwise constitutes an admission

² This Court may take judicial notice of court documents and matters of public record, *see e.g., Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996); *Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1994), and the existence and content of applicable constitutional or statutory provisions, *e.g., United States v. Lyon*, 397 F.2d 505, 513 (7th Cir.

against interest under Fed. R. Evid. 801(d)(2). As such, the distinction between a motion pursuant to Fed. R. Civ. P. 12(b)(1) and -(b)(6) is largely academic. (Further, as the taking of judicial notice is mandatory upon tender of an appropriate request, Fed. R. Evid. 201(d), Smith will make that request, either contemporaneous with the filing of this Response or shortly thereafter.)

A. Background

On or about November 9, 2000, Plaintiff Ken Smith filed a federal civil rights action in the United States District Court for the District of Colorado, styled *Smith v. Mullarkey*, which was never heard in that court on the stated ground of a lack of subject-matter jurisdiction. *See Smith v. Mullarkey*, 67 Fed.Appx. 535 (10th Cir. Jun. 11, 2003). On or about January 10, 2002, Smith filed a substantially identical pendent action in District Court, City and County of Denver, also styled *Smith v. Mullarkey*, also dismissed due to a putative lack of subject-matter jurisdiction. *Smith v. Mullarkey*, Case No. 02-CV-127 (Denver Dist. Ct. Apr. 9, 2004). Accordingly, Smith's federal civil rights claims have not been adjudicated on the merits in any court, despite a United States Supreme Court holding that state courts of general jurisdiction have subject-matter jurisdiction over such claims. *Clafin v. Houseman*, 93 U.S. 130 (1876). Smith then filed a timely appeal with the Colorado Court of Appeals (styled *Smith v. Mullarkey*, Case No. 04-CV-949).

Colorado law states, in pertinent part: "Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of the dist-

1968), but it does not by taking notice accept the other courts' findings of fact as true. *Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003).

riect courts” (with irrelevant exceptions). C.R.S. § 13-4-102(1). And in a decision that defies all semblance of logic or reason, a panel of learned judges of the Colorado Court of Appeals asked the Colorado Supreme Court to interpret that simple sentence. Specifically, on or about August 16, 2005, it issued an order referring the jurisdictional question to the Colorado Supreme Court, ostensibly pursuant to § 13-4-110(1)(a), which states:

When a party in interest alleges, or the court is of the opinion, that a case before the court of appeals is not properly within the jurisdiction of the court of appeals, the court of appeals shall refer the case to the supreme court. The supreme court shall decide the question of jurisdiction in a summary manner, and its determination shall be conclusive.

B. Simple Problem, Simple Solution

On the face of it, this would seem to pose a problem: The Colorado Supreme Court has a job to do, but the individual justices can't do it themselves without violating Smith's rights under the Fourteenth Amendment. But Colorado statutory law comes to the rescue: “Judges of the court of appeals may serve in any state court with full authority as provided by law, when called upon to do so by the chief justice of the supreme court.” C.R.S. § 13-4-101. It is standard procedure in states with statutory or constitutional provisions analogous to C.R.S. § 13-4-101 for conflicted supreme court justices to recuse. *See e.g., Mosk v. Superior Court of Los Angeles*, 601 P.2d 1030 (Calif. 1979) (also collecting cases from North Dakota, Washington, and Wyoming); *Sullivan v. McDonald*, 913 A.2d 403 (Conn. 2007). It would have been a simple matter for Chief Justice Mullarkey to find seven substitute judges authorized by statute to hear the jurisdictional question in the Justices' stead. This Court can even take judicial notice of the fact that she wouldn't have even have had to have left the building to find them.

C. The Rule Of PERSONAL Necessity?

The honest judge would merely step aside at this point and let his capable colleagues attend to the matter at hand -- and most of the time, judges do precisely that. *See e.g.*, Order, *United States v. Scruggs*, Case No. 07-cr-00325-LSC-HGD (N.D. Ala. Nov. 14, 2007) (the entire bench of the Northern District recused itself). But there is something about knowing that you are personally on the hook for a multi-million-dollar mistake that compromises character; the judicially noticeable fact that the Justices did not relinquish the appeal is compelling evidence of scienter.

In an apparent effort to extinguish Smith's appeal by personally retaining control over it, the Justices invoked the "Rule of Necessity," empowering a judge to hear a case when "failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." *United States v. Will*, 449 U.S. 200, 214 (1980) (internal quotation omitted). This Court can also take judicial notice of the fact that the Justices never tried to explain in their decision why the Rule applied; rather, they stated: "The court is the defendant in this action. By operation of the Rule of Necessity, Canon 3 F., if all or a majority of the court has a conflict, the court must nonetheless hear the case." *Smith v. Mullarkey*, 121 P.3d at 891 & n. 1.

Apart from the obvious fact that a hortatory judge-written canon of judicial ethics that doesn't even have the force of law can't trump the Fourteenth Amendment, there is no precedential support in the civilized world for the Justices' tendentious interpretation of it. We start, as we must, with the view of the United States Supreme Court:

The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest -- ***where no provision is made for calling another in, or where no one else can take his place*** -- it is his duty to hear and decide, however disagreeable it may be.

Will, 449 U.S. at 214 (quotation omitted; emphasis added).

As Colorado has made a statutory provision for calling non-conflicted judges in, C.R.S. § 13-4-101, and in the absence of substantive evidence to the contrary, there were at least sixteen other judges who could in fact have taken their places, the Rule of Necessity could not lawfully be applied under this fact scenario. In every other common-law jurisdiction, the Rule is strictly applied, often with severe personal consequences for wayward judges. *See e.g., West Virginia v. Dietrick*, 444 S.E.2d 47 (W.Va. 1994) (husband got warrant from magistrate wife, who failed to contact circuit judge); *Huffman v. Judicial Discipline and Disability Cmte.*, 42 S.W.3d 386 (Ark. 2001) (judge holding stock in company seeking TRO was disciplined; the other judge was “ill”).³ And when the case is even close, responsible judges invariably choose in favor of recusal:

Resolution of this appeal thus requires us to interpret and evaluate the conduct and statements of two of our current colleagues. Should the petitioners prevail in this appeal, their litigation could proceed to trial and our two colleagues could be called as material witnesses. Under these unusual circumstances, although this is a close case, we believe that in the interests of justice it is better for us to resolve all doubts in favor of recusal.

Our recusal is conditioned, however, upon there being substitute judges available to sit on this case. In the event that no substitute judge is available, the Rule of Necessity might well compel our participation in this case. ... Under the Rule of Necessity, we could not abrogate our responsibility to function as the court of last resort.

Lorenz v. New Hampshire Administrative Ofc. of the Courts, 858 A.2d 546, 2004.NH.0000133 ¶¶ 23-24 (N.H. 2004) (citations omitted). In every single case in every jurisdiction addressing this problem, **the Rule was only invoked where no substitute judge could be found.**

D. The Decision Regarding Jurisdiction Is A “Firewall.”

While common-law judicial immunity is handed out like penny candy, jurisdiction is a more

³ *See also, e.g., Dickason v. Edwards*, 10 CLR 23 (1910) (Australia); *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, 1 S.C.R. 3 (1998) (Canada).

objective affair. Jurisdiction is the “power to declare the law,” *Ex parte McCardle*, 74 U.S. 506, 514 (1869); either you have it or you don’t. It is also a question of fact properly directed to a trial court, even though the judicially noticeable facts make it into a simple decision. As the Justices’ decision on which court had jurisdiction over Smith’s appeal was void as a matter of Colorado law, jurisdiction still lies in the Court of Appeals, pending proper resolution of the Order asking the Colorado Supreme Court to decide the jurisdictional question. Accordingly, as the Justices acted without acquiring even colorable jurisdiction over the appeal, they are not in law entitled to any form of immunity whatsoever. They are thus strictly liable for their actions, and all damages resulting therefrom, even under the common-law.

With that factual and legal foundation laid, attention can be turned to the State Defendants’ Motion to Dismiss.

ARGUMENT

A. Standard Of Review

As every legally salient fact required to establish tort liability is judicially noticeable, the distinction between motions under Fed. R. Civ. P. 12(b)(1) and -(b)(6) appears largely academic. It ought to be reiterated, however, that in reviewing a summary judgment motion, this Court must presume all well-pleaded allegations in the complaint as true and construe them in the light most favorable to the plaintiff, and only then, find that it appears beyond doubt that plaintiff can prove no set of facts that would entitle him to relief. *Benfield v. McDowall*, 241 F.3d 267 (10th Cir. 2001). As *pro se* complaints are to be construed liberally, a *pro se* plaintiff whose factual allegations are close to supporting a claim should be permitted to amend his complaint, and all material facts need not be described in specific detail. *Hall v. Bellmon*, 935 F.2d 1106 (10th Cir. 1991).

B. The *Rooker-Feldman* Doctrine Cannot Apply By Definition.

As Justice Stevens recently noted, “in Justice Ginsburg's lucid opinion in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U. S. 280 (2005), the Court finally interred the so-called “Rooker-Feldman doctrine” ... a doctrine that has produced nothing but mischief for 23 years.” *Lance v. Dennis*, 546 U.S. 459, 2006.SCT.0000038, ¶ 33 (2006) (Stevens, J, dissenting on other grounds) (Versuslaw). Further, in reviewing this Circuit’s jurisprudence since *Lance* in particular, it is fair to say that the courts of this District have gotten the message in their opinions. *e.g.*, *United States v. Smith*, No. 06-cv-02039 (D.Colo. Jan. 22, 2007). More to the point, to the extent that this odious doctrine has even a spark of incipience left, and can be used to bar federal action when a plaintiff lacked a reasonable opportunity to litigate claims in state court, it violates the guarantee of due process of law and is thus unconstitutional. *See Wood v. Orange County*, 715 F.2d 1542, 1547 (11th Cir. 1983). The State Defendants seem have missed the memo, relying on case law which has in large part failed to survive *Saudi Basic*.

Conspicuously absent from the State Defendants’ analysis is the identification of a bona fide state court judgment. It couldn’t be the decision to deny Smith a law license without a hearing, as the Colorado Supreme Court acted in an administrative capacity. *Verizon Md. Inc. v. Public Serv. Comm’n of Md.*, 535 U. S. 635, 644 and n. 3 (2002) (*Rooker-Feldman* “has no application to judicial review of executive action, including determinations made by a state administrative agency”). What Smith complains about here is not a “state court decision” but rather, a statement masquerading as a state court decision, rendered by judges who had no lawful jurisdiction to hear the appeal. As no bona fide state court decision was ever entered resolving his appeal, there can be no “state court loser” *per se*. Accordingly, *Rooker-Feldman* could not possibly deprive Smith of jurisdiction in the case before this Court.

C. The State Defendants Are Not Entitled To Judicial Immunity.

1. A Judge Acting Without Jurisdiction Is Not Entitled To Judicial Immunity.

In our system of government, the people are the sovereign masters, and the government, their servant. As the Supreme Court said over a century ago (and Alabama's judicial discipline board recently said to its former Chief Justice Roy Moore, *In the Matter of Roy S. Moore*, Case No. 33 (Ala. Ct. of the Judiciary Nov. 13, 2003), *slip op.* at 9-10:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

United States v. Lee, 106 U.S. 196, 220 (1882).

Every officer of the State -- from janitors to judges -- is a servant, whose role is defined and constrained by the law of agency. When a judge knowingly acts "outside his authority and in direct violation of the spirit of the State statute," his ceases to be a judicial act. *Ex parte Virginia*, 100 U.S. 339, 349 (1879). Thus, when a judge acts without jurisdiction, as is alleged in this case with judicially noticeable record support, s/he is not ***and never has been*** entitled to judicial immunity. *See Bradley v. Fisher*, 80 U.S. 335 (1872). Moreover, even if the doctrine of judicial immunity did apply, Smith is nonetheless entitled to a declaration from this Court that the Colorado Supreme Court's decision in *Smith v. Mullarkey*, 121 P.3d at 890, is null and void.

2. Judicial Immunity Is No Longer Available Under the Common Law.

While it is Smith's position that the Justices acted without even colorable jurisdiction -- and thus, even under the broadest historical common-law reading of the judicial immunity doctrine, they are not immune -- the Court is surely aware of the fact that judicial immunity is a common-law doctrine. *See e.g., Bradley, supra*. But the common law is not and has never been static, and judicial immunity has probably reached the point where it can no longer be defended.

Judicial immunity is a medieval common-law doctrine, created by judges for the benefit of judges, predicated on a sophistry even Lewis Carroll would find impenetrable. It traces its origin to the infamous “Star Chamber” of the Tudors: In *Floyd and Barker*, 77 Eng.Rep. 1305 (1607), Coke and his colleagues of the Star Chamber declared the judges of the King's Bench immune from prosecution in competing courts for even malicious and wrongful judicial acts. Distilled to essentials, Coke’s rationale was that the King can do no wrong:

"[A]nd it was agreed, that insomuch as the Judges of the realm have the administration of justice, under the King, to all his subjects, they ought not to be drawn into question for any supposed corruption, which extends to the annihilating of a record, or of any judicial proceedings before them, or tending to the slander of the justice of the King, which will trench to the scandal of the King himself, except it be before the King himself; for they are only to make an account to God and the King, and not to answer to any suggestion in the Star-Chamber."

Pulliam v. Allen, 466 U.S. 522, 530-31 (1984) (internal citations omitted).

While that logic might resonate in dictatorships such as those in North Korea, Saudi Arabia, and the former Soviet Union, it is anachronistic in a democracy, where the government governs only by the consent of the people. Professor Abimbola Olowofoyeku of London’s Brunel University distills the problem to essentials:

You have been injured by the misconduct of a judge. We have to deny you redress. This is necessary because we have to protect your interests by protecting the judges, so that they in turn can protect your interests without fear of apprehension.

Abimbola A. Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* 197 (1993).

No rational man would ever willingly strike such a bargain, and the very notion of the rule of law necessarily precludes it. As Canada recently enacted its own bill of rights (Charter of Rights and Freedoms), the Supreme Court of Canada recently addressed the doctrine of immunity, finding it irreconcilable with the very concept of rights under law:

An absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Canadian Charter of Rights and Freedoms. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted. While the policy considerations in favour of absolute immunity have some merit, these considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim.

Nelles v. Ontario, 2 S.C.R. 170 (1989).

In *Nelles*, Canada's Supreme Court is stating the obvious: If the government, by and through its agents, deprives any citizen of rights as guaranteed under its charter, the law must provide that citizen with an effective remedy. As such, whether the irresistible tide of the common law world has overwhelmed it, *see e.g., Simpson v Attorney-General (Baigent's case)*, 3 NZLR 667 (1994); *Maharaj v Attorney-General of Trinidad & Tobago (No. 2)*, AC 385 (1979), our nation is bound by an international agreement to abolish it, *International Covenant on Civil and Political Rights*, art. 2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the United States Sept. 8, 1992), or it has attained *jus cogens* status, *id.* (the Covenant has been ratified by every country in the civilized world), the odious "the King can do no wrong" doctrine is poised to collapse under its own weight.

D. The State Defendants' Attempt To Raise a Qualified Immunity Defense Is Frivolous On Its Face.

From a procedural standpoint, perhaps the most bizarre claim made by the State Defendants is that this matter must be dismissed because they are allegedly entitled to qualified immunity. The United States Supreme Court responds, albeit in a footnote:

The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.

Imbler v. Pachtman, 424 U.S. 409, 419 & n. 13 (1976) (citations omitted).

While the State Defendants are certainly at liberty to raise the qualified immunity defense in their Answer, it is inappropriate for it to be raised here. Moreover, the State Defendants either know or should have known that such a defense is frivolous, for reasons stated in their Motion:

The Tenth Circuit uses a two-part framework to analyze the issue of qualified immunity. First, the court determines whether the plaintiff has sufficiently alleged that the defendant violated a statutory or constitutional right. If the answer is yes, the court then determines whether the right was clearly established such that a reasonable person in the defendant's position would have known that his or her conduct violated that right. *Latta v. Keryte*, 118 F.3d 693, 697-98 (10th Cir. 1997).

The key to the qualified immunity inquiry is the objective reasonableness of the official's conduct in light of the legal rules that were clearly established at the time the action was taken. *Melton v. City of Oklahoma City*, 879 F.2d 706, 727 (10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (10th Cir. 1991). Ordinarily, in order for a plaintiff to demonstrate that a law was clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains. *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).

Mot. at 9.

A quick perusal of the Complaint demonstrates that Smith alleged that the defendants violated an array of his constitutional rights, and even alleged on-point United States Supreme Court decisions -- complete with appropriate citation, for the convenience of parties and this Court -- which find the law to be as he maintains:

36. The Justices either knew or reasonably should have known relevant settled principles of Colorado and/or federal law, including but not limited to the following: [...]

e. The so-called "Rule of Necessity" only applies in situations where an actual necessity exists:

The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest -- where no provision is made for calling another in, or where no one else can take his place -- it is his duty to hear and decide, however disagreeable it may be.

Philadelphia v. Fox, 64 Pa. 169, 185 (Pa. 1870), quoted with approval in *United States v. Will*, 449 U.S. 200, 214 (1980) (emphasis added).

f. A Colorado district court is a constitutionally proper forum for the consideration of claims grounded in federal law. *Clafin v. Houseman*, 93 U.S. 130 (1876); see, *Boulder Valley Sch. Dist. R-02 v. Price*, 805 P.2d 1085 (Colo. 1991).

g. A denial of jurisdiction is not an adjudication on the merits. See, *Ex parte McCardle*, 74 U.S. 506 (1868).

h. It is “[the United States Supreme Court’s] prerogative alone to overrule one of its precedents.” *State Oil Co. v. Khan*, 522 U. S. 3, 20 (1997).

i. “Courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities.” *Valley v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353 (1920). [...]

61. At all relevant times herein, Plaintiff had a right under the due process and equal protection clauses of the federal constitution to present claims grounded in federal law for adjudication in a state court, to have those claims heard by a fair and impartial tribunal, and to due process of law and to equal protection under the law throughout the adjudicative process.

62. Acting under the color of law, the Defendants worked a denial of Plaintiff's rights, privileges, or immunities secured by the United States Constitution or by Federal law and guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, to wit, he was denied access to the courts, due process of law, and/or equal protection of the law.

Complaint [Dkt. #1] at ¶¶ 36, 61-2.

Smith also alleged the conduct violating his rights with specificity: in the case of the Justices, issuance of an opinion without statutory authority, *Id. at ¶ 33*, and in the case of Messrs. Haines and Suthers, that they failed to act when they had a duty to. *Id. at ¶¶ 45-50*. While facts will be gleaned during discovery and/or judicial notice and proven at trial, it is breathtakingly frivolous for the State Defendants to even assert this defense in a motion to dismiss.

E. The Suit Was Filed Within the Statute Of Limitations.

The State Defendants' statute of limitations defense ignores the fact that the Colorado Supreme Court had indisputable subject-matter jurisdiction over the jurisdictional question pursuant to C.R.S. § 13-4-110(1)(a). As the Colorado Supreme Court had subject-matter jurisdiction over the jurisdictional issue, to the best of anyone's knowledge, the Justices did nothing actionable on August 18. Furthermore, even if the Justices had decided the jurisdictional issue on that date -- a claim for which the State Defendants cite no evidence whatsoever! -- it would have been a legal nullity, in any event. *See Stmt. Of Facts, supra*. The actionable harm occurred on October 17, 2005, when the Justices purported to decide an appeal without any semblance of jurisdiction.

Smith isn't in this courtroom for his health. Smith is here because the wrongful conduct of public officials have caused him grievous injuries, and under any reasonably fair reading of the law, that law entitles him to fair compensation. Reputational damages alone could easily measure in the millions; if a judge can get an award of \$7 million for a local newspaper's charge that he allowed 'political considerations' to play a role in disciplining a prosecutor, Adam Liptak, A Judge at the Plaintiff's Table Tips the Scales, *New York Times* (on-line ed.), Jun. 25, 2007, a false and malicious insinuation by the highest court in a state, that becomes an indelible record that would be uncovered in every background check a prospective employer is likely to perform, that Smith is somehow "mentally unstable" -- the State Defendants have already played this card in their Motion, *Mot. at 2* -- easily justifies an award of that size on its own.

The Justices' act on October 17, 2005, undertaken without colorable jurisdiction and having had the practical effect of extinguishing an otherwise viable lawsuit, was the trigger point for a \$30,000,000 lawsuit. Smith's complaint was filed before Oct. 17, 2007; the State Defendants' statute of limitations defense must therefore by definition fail.

F. As Counsel Of Record, Defendant Friedrich Haines “Personally Participated” As a Matter Of Definition.

Next, the State Defendants advance the claim that Friedrich Haines, the attorney of record in both *Smith v. Mullarkey* cases, must be dismissed under the rationale that without personal participation by the defendant, he cannot be subject to liability under Section 1983. *Mot. at 10*. He signed every document filed with the Court and yet, he did not “personally participate?”

Mr. Haines is an Assistant Attorney General of the State of Colorado, which makes him ‘the people’s attorney.’ *People ex rel Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003). It is also worth noting at this point that he may not have had statutory authority to act as the Justices’ attorney in that matter. C.R.S. § 24-10-110(1)(a) provides:

The costs of the defense of any of its public employees, whether such defense is assumed by the public entity or handled by the legal staff of the public entity or by other counsel, in the discretion of the public entity, where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his duties and within the scope of his employment, **except where such act or omission is willful and wanton**;

C.R.S. § 24-10-110(1)(a) (emphasis added).

The state Attorney General cannot lawfully defend a state official who has acted willfully and wantonly and in doing so, has injured others. To do so is a crime under Colorado law, C.R.S. §§ 18-8-403 and -404, and, if we can still place any trust in our esteemed Department of Justice any more, mail fraud, wire fraud, and theft of government services. *See Allegations of Selective Prosecution: The Erosion of Public Confidence in Our Federal Justice System, Hearing before The House Judiciary Subcommittees on Crime, Terrorism and Homeland Security and Commercial and Administrative Law*, Oct. 23, 2007 (testimony of Richard Thornburgh) (former Republican Attorney General accused the DoJ of being a “political hit squad,” which enforces the law in an arbitrary and politically-charged manner).

For a section 1983 action to arise from an official's failure to exercise an affirmative duty, the failure must have been a substantial factor leading to the violation of a constitutionally protected liberty or property interest, *Rizzo v. Goode*, 423 U.S. 362 (1976), and he must display 'deliberate indifference.' *Turpin v. Mailet*, 619 F.2d 196 (2nd Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980). Both of the requisite elements are substantially alleged. *Complaint at ¶¶ 45-50, 65*. The claims against Mr. Haines must therefore survive as a matter of law.

The paradigmatic illustration of supervisory liability under our civil rights law is that of Sgt. Stacey Koon of the Los Angeles Police Department, supervising officer during the savage beating of Rodney King. Although he never lifted his hand or struck a blow, he was held criminally liable for his inaction. *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994). The *Koon* calculus is that knowledge plus acquiescence equals civil and criminal liability.

Smith alleged that he personally apprised Attorney General Suthers as to the particulars of this situation. *Complaint at ¶ 49*. He also alleged that Suthers had a duty to the citizens of Colorado, *Id. at ¶ 45*, and essentially was in the same position as Sgt. Koon, *Id. at ¶¶ 78-81*. The questions of what Mr. Suthers knew and when he knew it are subjects for discovery, and cannot be decided at the summary judgment stage.

F. "Consider the Source"

With the State Defendants' substantive challenges suitably dispatched, attention must now be directed to the unpleasant task of responding to the misleading and denigratory comments gratuitously inserted by counsel in her "Introduction and Statement Of Facts" section of the Motion. *Mot. at 2-3*. The problem is that she ignored the first rule of journalism (or law, for that matter): "Consider the source" (in this case, *Smith v. Mullarkey*, 121 P.3d at 890).

1. A REAL Lack Of Candor

Even if you don't learn it in law school, you figure it out very quickly thereafter: even in the best of times, the typical appellate opinion is an inherently dubious source of the facts of a case. Judges routinely 'cherry-pick' facts, deliberately eliding facts inimical to the decisions they have made to foster the illusion that their conclusions were logical and inevitable. As Karl Llewellyn observes, judges often

manhandl[e] ... the facts of the pending case, or of the precedent, so as to make it falsely appear that the case in hand falls under a rule which in fact it does not fit, or especially that it falls outside of a rule which would lead in the instant case to a conclusion the court cannot stomach.

Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) at 133.⁴

Former Chief Justice Hughes writes, "there is no better precaution against judicial mistakes than setting out accurately and adequately the material facts as well as the points to be decided," Charles E. Hughes, *The Supreme Court of the United States* 64 (1928), with the theory being that, if an opinion "won't write," it is a pretty good indication that the judge's ultimate decision is probably in error. *See* Suzanna Sherry, *Politics and Judgment*, 70 *Mo. L. Rev.* 973, 980-81 (2005).

⁴ "Opinions are overstated, rigid, seemingly inevitable. The rhetorical style is that of closure. The judge is depicted as having little choice in the matter: the decisions are strongly constrained by the legal materials." Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 *Rutgers L. J.* 1, 11 (1998) (citations omitted); *see also* Jerome Frank, *What Courts Do in Fact*, 26 *Ill. L. Rev.* 645, 653 (1931) ("Opinions, then, disclose but little of how judges come to their conclusions. The opinions are often *ex post facto*; they are censored expositions."); Martin Shapiro, *Judges As Liars*, 17 *Harv. J.L. & Pub. Pol'y.* 155, 156 (1994) (arguing that "[l]ying is the nature of the judicial activity"); Simon, *supra*, at 8-9 (summarizing the literature regarding the sense of certainty conveyed by judicial opinions and its illusory nature). Lawrence Solan concluded from an analysis of Justice Cardozo's opinions that not even a judge as forthright as Cardozo was about the indeterminacy of law and the process of decision was immune from writing decisions with a false sense of certainty. Lawrence M. Solan, *The Language Of Judges* 22-27 (1993).

When a judge desperately wants a particular party to win, he or she suddenly becomes economical with the facts. Dissenters will occasionally point this out, and in caustic terms: "Today's majority opinion is so far afield from what the court of appeals held, and what this case is all about, that it is my guess that the court of appeals' judges . . . and also the parties herein, will not recognize that we are discussing their case." *Motorists Mut. Ins. Co. v. Said*, 590 N.E.2d 1228, 1236 (Ohio 1992) (Douglas, J., dissenting). The end result is often a miscarriage of justice and in some cases, can cost an innocent man his life. See Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 *Cardozo L.R.* 1313 (1990).

It is important for this Court to recognize that the opinion the State Defendants relied on is not a disinterested appellate court's faithful exposition of the facts but rather, the tendentious opinion of parties to the case. They are *going* to deliberately mischaracterize the case. They are *going* to intentionally withhold facts inimical to their opinion. As the Colorado Supreme Court writes:

The first ideal in the administration of justice is that the judge must be free from bias and partiality. Men are so agreed on this principle that any departure therefrom shocks their sense of justice. . . . We are equally certain that when . . . a judge is prejudiced or otherwise incompetent to hear or try a cause, but nevertheless, proceeds in that regard, **the issues are not likely to be determined and the rights of the parties properly protected and enforced in a court over which he presides.**

People ex rel. Burke v. District Court, 60 Colo. 1, 4, 152 P. 149 (Colo. 1915) (emphasis added; internal citation omitted).

By way of example, counsel has advised the Court that "Plaintiff requested a formal hearing, and the Board of Law Examiners subsequently requested that Plaintiff submit to an independent medical examination (IME). Plaintiff refused to submit to the IME, which caused the hearing to be vacated." *Mot. at 2*. What counsel has conveniently failed to inform the Court is that: (a) the "request" was in fact an order (if they can punish you for non-compliance, it is not a "request,"

see Derdeyn v. University of Colorado, 863 P.2d 929 (Colo. 1993)), (b) Colorado bar admission regulations required Smith to pay the cost of the examination from his own pocket, Colo. R. Civ. P. 201.10(4), a patent violation of the federal Americans With Disabilities Act, *Dare v. State of California*, 191 F.3d 1167 (9th Cir. 1999) (\$6 surcharge for handicapped placard violates ADA), and (c) perhaps most importantly, the Inquiry Panel of the Board of Law Examiners violated their own enabling statute, thus depriving the Hearing Panel of subject-matter jurisdiction upon which to issue such an order.

As this last point is of considerable significance to this case, more elaboration is appropriate. This Court can take judicial notice (without converting this into a motion for summary judgment, *MGIC Indemnity Corp. v. Wesiman*, 803 F.2d 500, 504 (9th Cir. 1986)) of the fact that, pursuant to Colo. R. Civ. P. 201.9 (6)(a), the Inquiry Panel “**shall** set forth its findings in writing within thirty days after the panel meeting at which” their determination was made, *id.*, emphasis added. This Court can also take notice of the Board’s records showing that the Inquiry Panel made their probable cause determination on July 27, 1998, *Exhibit A*, and did not file the required written statement until October 26, 1998, *Exhibit B at 2*, outside the thirty-day window for compliance with the statute. Under Colorado law, time limitations are construed as jurisdictional where “the relevant provision would injuriously affect public interests or private rights.” *Shaball v. State Comp. Ins. Auth.*, 799 P.2d 399, 402 (Colo. App. 1990) (emphasis added; citations omitted). As an undue delay in processing Smith’s licensure application unquestionably affects his private right to practice law, the time limit is jurisdictional. Thus, the State Defendants denied Smith his constitutional right to a hearing, *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 238-39 (1957) (bar applicant is entitled to a “full, fair, trial-type hearing”), **on the basis of non-compliance with an “order” that was void as a matter of law!**

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2008, I served a copy of the foregoing upon all parties herein by depositing it in the United States Mail, postage prepaid, and addressed as follows:

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