

Appeal Number 05-14239-JJ

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

DENNY C. CORMIER,
Plaintiff/appellant, pro se

v.

NANCY B. CORMIER
Defendant/appellee.

On Appeal from the United States District Court
For the Middle District of Georgia
Case Number 6:05-CV-26(WLS)

APPELLANT'S MOTION FOR RECONSIDERATION

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Cormier v. Cormier.
Case Number 05-14239-JJ

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Thurbert E. Baker, Attorney General's office (Georgia)

Laura W. Hyman, Attorney General's Office (Georgia)

John J. Jones Attorney General's Office (Georgia)

Dwight May Attorney for Appellee

Nancy B. Cormier Defendant/ Appellee

Denny C. Cormier Plaintiff/Appellant

Honorable W. Louis Sands United States District Judge

Honorable William Harken Colquitt County Georgia Judge

All Interested Parties in *Greenberg v. Zingale* 11th Cir. Case No. 05-10187-F

All Interested Parties in *Cormier v. Green* 11th Cir. Case No. 04-16220-AA

All Interested Parties in *Martyak v. Martyak* 11th Cir. Case No. 05-13843-

FF

All Interested Parties in *Stanley v. Stanley* Case No. 05-0281-CV-W-GAF In
the United States District Court for the Western District Missouri,
Western Division

All Interested Parties in *Mills v. Mills* Case No. 2:04-23286-DCN-GCK In
The District Court of the United States For the District of South
Carolina, Charleston Division

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STATEMENT OF APPELLANT, *pro se*

I express a belief, based on reasoned and studied judgment, that the panel's premature sua sponte dismissal decision, as a matter of law was error, having been entered without benefit of a jurisdictional brief or the Appellant's Initial Brief; the remand order was entered without authority because the Appellant was not noticed and was denied an opportunity to be heard; the panel was denied the opportunity to be informed of the applicability of the reservation of federal claims pursuant *England v Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299, 1303 (11th Cir. 1992) and *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976); the panel's premature sua sponte dismissal for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1447 (c) (d) misperceives the grounds for dismissal in the district court order because the district court order here remanded for "collateral estoppel" and "res judicata" and not for lack of subject matter jurisdiction; is contrary to *Quackenbush v. Allstate Ins. Co.* 517 U.S. 706 (1996). A distinction with a difference.

I also believe, based on a reasonable and studied judgment, that this appeal involves one or more questions of exceptional importance: whether a procedurally defective remand order entered without authority is reviewable;

whether a district court remand for “collateral estoppel” of a prior district court order that remanded for lack of original jurisdiction is the same as remand for lack of subject matter jurisdiction under § 1447 (c); premature sua sponte appellate dismissal without opportunity to be informed through jurisdictional brief or Appellant’s Initial Brief, timely filed, of the proper application of the *England*, *Jennings* and *Fields* reservations to the claims herein; the right of an Appellant to appeal when properly reserving federal claims to return to federal court deny him access to federal court; and whether the liberty interest, associational interest, privacy and property interests of Georgians' are impermissibly infringed by the state's Dissolution of Marriage alimony provisions.

**STATEMENT OF COURSE OF PROCEEDINGS AND STATEMENT
OF FACTS NECESSARY TO ARGUMENT ON THE ISSUE**

The Appellant, as the result of three federal district courts and this appellate court, directing him to return to state court, is now forever an alimony payor who is forced to make alimony payments by judgment of a Georgia state court. He was directed by the federal courts to return to state court with his federal and state law claims and to make his challenge of the constitutionality of Georgia alimony statutes there. He did just that with proper reservation of his federal claims pursuant to *England*, *Jennings* and

Fields. (See attached Federal District Court Order Case No. 6:04-CV-19 (HL) and Case No. 6:04-CV-30 (WLS)) Now he is foreclosed from review of his reserved federal claims by the district court order and foreclosed from appellate review of the district court order.

The Appellant sought to challenge Georgia's alimony scheme, O.C.G.A. §§ 19-6-(1-35), as unconstitutional on three grounds: a facial and an as applied challenge to the statutes on due process grounds, i.e. Right of Privacy, an equal protection challenge, and a challenge that such alimony payments violate the Thirteenth Amendment (ban on involuntary servitude).

Appellant seeks rehearing consideration on the jurisdictional issue of whether this Court's panel's premature sua sponte dismissal pursuant to 28 U.S.C. §1447 (d) misinterpreted the district court order to be a remand for lack of subject matter jurisdiction entitled to preclusion of review here under §1447 (c) or as the chosen wording of the order is in fact a remand based upon collateral estoppel; whether the remand order challenged was procedurally defective, entered without authority , i.e. ultra vires and therefore reviewable as outside the scope of 28 U.S.C. § 1447.

This Court's panel sua sponte dismissal predicated upon 28 U.S.C. §1447 (d) was rendered within the time frame allotted for the Appellant to submit his Initial Brief and Record Excerpts. An Appellant's Initial Brief is

due before September 16, 2005. (11th Cir. R. 31-1 (a)). The Clerk of this Court has interpreted the panel's dismissal order as precluding the filing of the timely submitted Appellant's Initial Brief. This "catch 22" denies the panel the opportunity to be advised of the Appellant's jurisdictional argument.

In addition to the misinterpretation of the district court order the panel was unaware of the application of *England, Jennings* and *Fields* when it entered its sua sponte dismissal for lack of jurisdiction. A reconsideration will permit this court to accurately interpret the nature of the district court remand order, determine if the remand order was entered with authority and accept the Appellant's Initial Brief to be advised of the application of *England Jennings* and *Fields* to the claims at issue.

Conversely, without reconsideration of the panel's jurisdictional dismissal the Appellant is denied the opportunity to inform this court of the reasons it has jurisdiction over this appeal as well as the reasons for the district court error.

The application of *England, Jennings* and *Fields* reservations to the claims of this case must be considered by this court before it accepts the sua sponte district court's order of collateral estoppel jurisdictional bar as well as its own premature sua sponte § 1447 (d) jurisdictional bar.

STATEMENT OF THE ISSUE(S) TO MERIT REHEARING

Whether the Panel Erred by prematurely sua sponte dismissing pursuant to 28 U.S.C. § 1447 (d) without requesting a jurisdictional brief to distinguish between a remand for collateral estoppel and a remand for lack of subject matter jurisdiction; whether the district court remand order was entered with authority or was outside the scope of § 1447, and whether the panel erred by entering its order before reviewing the timely filed Appellant's Initial Brief which would advise them of the application of *England, Jennings and Fields* to the claims of this case as to make 28 U.S.C. §1447(d) inapplicable?

ARGUMENT AND AUTHORITIES

I. If the Panel was concerned about the validity of jurisdiction over this appeal it should have requested a jurisdictional brief from the Appellant rather than dismiss.

The Court has previously requested jurisdictional briefs from Appellants when an appeal is requested that may be foreclosed by 28 U.S.C. § 1447 (d). It did not do that here but rather sua sponte dismissed pursuant to 28 U.S.C. § 1447 (d) even before the closing date for Appellant's Initial

Brief filing. Because a premature sua sponte dismissal, as in this case, denies an Appellant the opportunity to inform the court of factors which may afford it jurisdiction of an appeal that at first blush may appear to be foreclosed by 28 U. S.C. § 1447 (d) reconsideration is proper.

The Appellant must be given the opportunity to make his appellate jurisdictional argument.

II. **A district court sua sponte remand order without notice and an opportunity to be heard exceeds its remand authority under § 1447 and should be considered reviewable.** (See history of §1447 in *Liberty Mutual v. Ward Trucking Corp.*, 48 F.3d 742, 749 (3d Cir. 1995), Becker dissenting)

The district court's remand order was entered sua sponte and without notice to the Appellant or an opportunity to be heard. Such a remand order is entered without authorization. (See district court docket sheet and Appellant's Initial Brief, Proceedings Below)

Liberty Mutual 48 F. 3d , Becker, Circuit Judge, dissenting, gives a detailed history of 28 U.S.C. § 1447 which the Appellant relies upon for this point of argument says inter alia,

“...I cannot conceive that either the district court's admittedly broad remand power under section 1447(c) or the delay avoidance policy of section 1447(d) renders a district court's ex parte determination that it lacks subject matter jurisdiction, made without notice or opportunity to be heard, inviolate and

unreviewable. This is especially so in a case such as this where the district court is remanding for the second time.”

As in *Liberty Mutual* 48 F.3d the district court’s remand was entered without notice and Appellant denied the opportunity to be heard. This too was a second remand by the same district court judge.

Justice Becker goes on to cite rulings for the premise that a district court, when it appears jurisdiction is at issue, must provide the effected party notice and the opportunity to be heard otherwise the remand order is without authority, i.e. ultra vires. Justice Becker presents a detailed history of 28 U.S.C. § 1447 which supports review of this remand order, (internal citations omitted)

“As a general matter, the district court is required to give parties notice and an opportunity to be heard before remanding a removed case. See Local 336, American Federation of Musicians, AFL-CIO v. Bonatz, 475 F.2d 433, 437 (3d Cir. 1973) (‘Even on [issues of jurisdictional fact] the record must clearly establish that after jurisdiction was challenged the plaintiff had an opportunity to present facts by affidavit or by deposition, or in an evidentiary hearing, in support of his jurisdictional contention.’) (emphasis supplied); Prakash v. American Univ., 727 F.2d 1174, 1179-80 (D.C. Cir. 1984) (‘When subject matter jurisdiction is questioned, the court must, of course, satisfy itself of its authority to hear the case, and in so doing, it may resolve factual disputes. The court has considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction, and normally it may rely upon either written or oral evidence. The court must, however, afford the nonmoving party `an ample opportunity to secure and present evidence relevant to the existence of jurisdiction.’) (quoting Gordon v. National Youth Work

Alliance, 675 F.2d 356, 363 (D.C. Cir. 1982) (Spotswood W. Robinson, III, C.J., concurring)).” [Emphasis in original]

“While the district court's consideration of the jurisdictional issue sua sponte was proper, the court did not afford the parties the opportunity to brief or present evidence on this issue. We find this lack of opportunity to be heard improper. The court below should have allowed [the plaintiff] sufficient time to present evidence or otherwise respond on the issue of jurisdiction before it determined that none existed.” [Emphasis in original]

“But the district court's failure to give Liberty Mutual notice and opportunity to be heard precluded this from constituting a “remand order issued under § 1447(c).”

“Rather, since the district court's authority to remand a removed case extends to all situations where it finds a lack of subject matter jurisdiction after allowing the parties notice and an opportunity to be heard, the courts of appeals would review only those decisions where the district court fails to listen to the parties before remanding. If the court receives argument from each side before acting yet still remands for lack of subject matter jurisdiction, review would generally be unavailable, regardless of how erroneous the court may have been in its jurisdictional determination.: [Emphasis in original]

“I agree that Thermtron and Gravitt teach that “when a district court exercises its power to remand under section 1447(c), section 1447(d) allows a district court to err.” Id. However, it does not as a matter of logic “necessarily follow[] that section 1447(d) also allows a district court to be procedurally unfair.” Id. The majority's deduction would be sound only if procedural unfairness were merely one more form of error. But that cannot be, for to so hold would undermine the legitimacy of our procedural system. Procedural fairness is the predicate of legitimacy. And since (concomitantly) section 1447(c) does not authorize judges to remand without hearing from the parties, a

district court does not exercise "its power to remand under section 1447(c)" when it remands as the district court did here, for it possesses no such power. Such conduct would not then be an "error" permitted to stand by section 1447(d) any more than would be the remand at issue in Thermtron, which was entered for docket control reasons; both actions are ultra vires."

"Nothing in the subsequent evolution of section 1447(c) from section five of the Judiciary Act of 1875 forward demonstrates an intent to abrogate the salutary restriction described above, i.e., that the (original) statutory power of the federal trial courts to remand for lack of jurisdiction required that remand orders be entered only after giving the affected parties notice and an opportunity to be heard."

"Nothing in the subsequent evolution of section 1447(c) from section five of the Judiciary Act of 1875 forward demonstrates an intent to abrogate the salutary restriction described above, i.e., that the (original) statutory power of the federal trial courts to remand for lack of jurisdiction required that remand orders be entered only after giving the affected parties notice and an opportunity to be heard."

"Cf. Kloeb v. Armour & Co., 311 U.S. 199, 201, 204, 61 S. Ct. 213, 215-16 (1940) (where, on plaintiff's remand motion, district court took evidence before deciding to grant remand, remand was unreviewable, for the remand statutes 'entrust determination concerning such matter to the informed judicial discretion of the district court') (emphasis supplied)." [Emphasis in original]

“Given that judges are human, a court that would rule without listening is appreciably more likely to err than one that considers both sides' input. Since we ordinarily do not scrutinize district courts' subject matter jurisdiction remand decisions for substantive error, it is critically important that we preserve the prophylactic requirement that the court hear first from the parties before remanding. Indeed, providing notice and an opportunity to be heard may even reduce delays, for by reducing the chances of erroneous remands, this rule makes it less likely that parties will need to remove actions more than once (where the time period permits) in order to use a subsequent removal notice to explain the governing law to the district court.”

III. Because the district court exceeded the grounds for remand contained in 28 U.S.C. § 1447(c), 28 U.S.C. § 1447(d) poses no bar to review.

The district court chose to remand based on “collateral estoppel” and “res judicata” related to its prior remand order. Though use of the magical words “remand for lack of subject matter jurisdiction” are not a necessity to preclude appeal based on § 1447 (c), here the district court purposefully and expressly chose two other legal doctrine as its reasons for remand.

In re Bethesda Memorial Hospital, Inc., 123 F.3d 1407 (11th Cir. 1997) states,

“See *New v. Sports and Recreation, Inc.*, 114 F.3d 1092, 1096 (11th Cir.1997) (stating that "a district court does not have to expressly state its reliance on section 1447(c) to preclude appellate review.... Rather, a district court must openly state its reliance on grounds other than those contained in section 1447(c) to permit review of the remand order.")”

Here the district court openly stated its reliance on the doctrine of collateral estoppel and res judicata. It was not relying on lack of subject matter jurisdiction but collateral estoppel as applied to a prior ruling in a different case between the parties with different allegations and claims than this removed case. The district court was free to simply remand this action again as it did before for lack of subject matter jurisdiction but it chose to reason otherwise. This is a distinction with a difference. This appealed order falls outside the scope of § 1447 (c) and this court's jurisdiction under 28 U.S.C. § 1291 is proper.

Liberty Mutual v. Ward Trucking Corp., 48 F.3d 742, 749 (3d Cir. 1995) states the Congressional intent of § 1447 (d) to avoid delay in proceedings,

“ By adopting section 1447(d) and its statutory predecessors, Congress sought to make the judgment of a district court remanding a case final and conclusive in order to avoid the delay caused by appellate review of remand decisions. United States v. Rice, 327 U.S. 742, 751-52 (1946).”

This court's appellate review of the collateral estoppel remand order will in no way cause delay. The Georgia state court has already entered a divorce decree and ruled on the state claims.

CONCLUSION

This appeal is not foreclosed by 28 U.S.C. § 1447 (d) because the remand order was entered without notice and opportunity to be heard, was thus ultra vires and reviewable.

The remand grounds were expressly stated as collateral estoppel and res judicata which are outside the scope of §1447 and thus reviewable.

This Court has often, and should have here, requested a jurisdictional brief before entering a sua sponte dismissal pursuant to 28 U.S.C. § 1447 (d).

The premature sua sponte dismissal by this court was done without the opportunity to be informed by the timely filed Appellant's Initial Brief of the application of *England Jennings* and *Fields* reservations to the claims of this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this petition with the page count set forth in 11th Cir. R Rule 40. This petition contains 3, 159 words as computed by Word word processing system, and contains Times new Roman, 14-point typeface. The undersigned has also prepared to download the file to the Eleventh Circuit Court of Appeals when permission is received from the Court.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Appellant's Initial Brief has been served via U.S. mail on this 11th day of September, 2005 to

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