

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

HAROLD STANLEY.
Plaintiff. *Pro se*

v.

MARCIA E. STANLEY, et al
Defendants

Civil Case No. 05-0281-CV-W-GAF

PLAINTIFF'S CROSS MOTION TO DENY MOTION TO DISMISS

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

HAROLD STANLEY.
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MARCIA E. STANLEY, et al
Defendants

PLAINTIFF'S CROSS MOTION TO DENY MOTION TO DISMISS

Comes now the Plaintiff, *pro se*, to move this court to deny Defendant Marcia E. Stanley's motion to dismiss. In support he offers,

1. Defendant's Fed. Rule Civ. Proc. 12 (b) (4) and 12 (b) (5) motion to dismiss must be denied because service of process is not required for this removed lawsuit.
2. 28 U.S.C. 1446 (d) (Procedure After Removal) does not require service of process. It merely requires notice. Notice was timely and proper to all Defendants, the Clerk of the Jackson County Court, Missouri and to the Missouri Attorney General on March 24, 2005, the date of Removal. (Attached copies of U.S. Postal Service return receipts).
3. Defendant's Fed. Rule Civ. Proc. 12 (b) (1) motion to dismiss for lack of subject matter must be denied because this court has proper federal question original jurisdiction, 42 U.S.C. 1983 as well as 28 U.S.C. 1331 and removal jurisdiction, 28 U.S.C. 1441.
4. This court has federal question jurisdiction (28 U.S.C. 1331) over Plaintiff's 42 U.S.C. 1983 claim as well as his facial and as applied constitutional challenges that the Missouri Dissolution of Marriage alimony provisions impermissibly infringe the federal constitution

liberty interest, 14th Amendment substantive due process right of privacy in the privacy protected zone of the personal decision relating to his marriage to divorce.

5. The associational interests in the Plaintiff's marital status are protected by the U.S. Constitution Fourteenth Amendment right of privacy. Littlejohn v. Rose, 786 F.2d 785, 786 (6th Cir. 1985) (citing Zablocki v. Redhail, 434 at 385) ("...such 'adjustments' as divorce and separation are naturally included within the umbrella of protection accorded to the right of privacy.").
6. The federal questions which create original jurisdiction (28 U.S.C. 1331) and removal jurisdiction (28 U.S.C. 1441) became first evident to the Plaintiff when the Defendant's attorney served him a proposed order of contempt in the state court proceedings. Removal was properly effected within thirty of that voluntarily submitted other paper by the Defendant Marcia E. Stanley. 28 U.S.C. 1446 (a)
7. Subject matter jurisdiction is proper because the substantial federal questions in this lawsuit transcend or exist apart from the family law issue. See Palmore v. Sidoti, 466 U. S. 429, 432-434 (1984) and Elk Grove Unified School District v. Newdow, 124 S. CT. 2301 (2004) (federal courts have jurisdiction over federal questions and fundamental constitutional rights issues in family law cases).
8. Plaintiff's 42 U.S.C. 1983 claim is sufficiently pled and alleges the Defendant Marcia Stanley acted under color of law in concert with the state officials who were acting in a ministerial capacity, not a neutral adjudicatory capacity. The state Defendants encouraged the Defendant Marcia Stanley by willingly entertaining proposed orders by Marcia E. Stanley's attorney which would deprive the Plaintiff of his liberty interest and right of privacy secured by the Constitution. See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922, (1982); Edmonson

v. Leesville Concrete Co., 500 U.S. 614, 627–28 (1991); Shelley v. Kraemer, 334 U.S. 1, 22–23 (1948).

9. Rooker-Feldman is inapplicable to both the as applied and the facial constitutional challenge to the Missouri alimony statute provisions. See Exxon Mobil v. Saudi Basic Industries, 544 US ____ (2005) (holding the very narrow scope of the Rooker-Feldman doctrine).
10. Ankenbrandt abstention is inapplicable. See Elk Grove Unified School District v. Newdow, 124 S. CT. 2301 (2004); Ankenbrandt v. Richards, 504 U. S. 689 (1992) (Ankenbrandt only applies when a divorce, alimony or child custody decree is the relief sought).
11. Younger abstention is inapplicable as no current state court proceeding exists and this court's acceptance of its congressionally authorized jurisdiction will not unduly interfere with a state court proceeding. New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 US 350, 109 S. Ct. 2506, 2513 (1989); Wexler v. Lepore, 385 F.3d 1336, (11th Cir. 2004).
(Parallel state and federal court proceedings based on the same set of facts is permissible.)
(Younger abstention is not triggered unless the federal injunction would create an “undue interference with state proceedings.)

Respectfully submitted,

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MEMORANDUM OF LAW TO DENY DEFENDANT'S MOTION TO DISMISS

Introduction

The Plaintiff is an alimony payor in Missouri as the result of a state court order of Dissolution of his marriage. He does not challenge the state court judgment. The voluntary conduct of the Defendant Marcia E. Stanley, under color of law in concert with the state Defendants, acted to deny the Plaintiff his civil rights when encouraged by the state court's enforcement power. Together acting under color of law, Marcia E. Stanley as a private party, and the state officials acting in a ministerial role, not a neutral adjudicator role, sought to enforce a court order predicated upon a Missouri state statute in order to deprive the Plaintiff of his civil rights. Among those civil rights, were his liberty interest, right of privacy, and bodily freedom by attempting to hold him in contempt and possibly jail him based upon the Missouri alimony statute. The state case thus was transformed into a federal constitutional infringement qualifying as a federal question. The Plaintiff now asks this court for a declaratory judgment on the constitutionality of the Missouri alimony statute, and a trial, for damages, on the 42 U.S.C. 1983 civil rights violation.

A. Dismissal under Fed. Rule Civ. Proc. 12 (b) 4 and 12 (b) 5

Defendant erroneously argues that formal service of process was necessary yet insufficient. In fact, no service of process was necessary pursuant to 28 U.S.C. 1446 (d). The statute merely requires notice. Notice was timely executed March 24, 2005 to all Defendants and the Clerk of the Jackson County Court, and the attorney general of Missouri. (Attached copies of U.S. Postal Service return receipts)

This is not a new lawsuit in federal court but a continuation of an ongoing state court proceeding.

All pleadings here in federal court, after the initial state court pleading, may properly be served by U.S. mail pursuant to Fed. Rule Civ. Proc. 5 (b) (2) (B),

Fed. Rule Civ. Proc. Rule 5. Service and Filing of Pleadings and Other Papers
Rule 5 (b) Making Service.

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under Rule 5(a) is made by:

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

The Plaintiff "served" notice in compliance with Fed. Rule Civ. Proc. 5 (b) (2) (B) by mailing copies of all pleadings to the Defendant's then known attorney as attested to by the Plaintiff in his Certificate of Service on all removal documents. Therefore, Defendant's motion to dismiss under Fed. Rule Civ. Proc. 12 (b) (4) and 12 (b) (5) must be denied.

B. Dismissal under Fed. Rule Civ. Proc. 12 (b) (1)

14th Amendment Right of Privacy Infringement

This court does have subject matter jurisdiction based on the 42 U.S.C. 1983 pleading that the Defendants acted under color of law to deny the Plaintiff his federal liberty interest and fundamental substantive due process rights representing allegations of civil rights violations.

This court has original jurisdiction under 28 U.S.C. 1331 for the constitutional challenge of a state statute impermissibly infringing the Plaintiff's liberty interest and 14th amendment right of privacy and equal protection. Carey v. Population Serv. Int'l., 431 U.S. 678, 684-685 (1977); Zablocki v. Redhail, 434 US 374 (1978); Planned Parenthood v. Casey, 505 U.S. 833, 859 (1992) (personal decisions relating to marriage are protected by the 14th amendment right of privacy.); Littlejohn v. Rose, 786 F.2d 785, 786 (6th Cir. 1985) (citing Zablocki v. Redhail, 434

at 385) ("...such 'adjustments' as divorce and separation are naturally included within the umbrella of protection accorded to the right of privacy.")

Thirteenth Amendment ban on Involuntary Servitude

This court has original jurisdiction under 28 U.S.C. 1331 as the challenged Missouri alimony statute impermissibly infringes the U.S. Constitution Thirteenth Amendment ban on involuntary servitude. United States v. Kozminski, 487 U.S. 931, 942 (1998) the Supreme Court defined involuntary servitude as a compulsory condition "in which a person lacks liberty especially to determine one's course of action or way of life." Involuntary servitude "necessarily means a condition...in which the victim is forced to work for [another] by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." Id at 931. "...the Amendment's drafters thought that involuntary servitude generally includes situations in which the victim is compelled to work by law." Id at 931

42 U.S.C. 1983

The Plaintiff has alleged that the Defendants acted under color of state law to deny him fundamental constitutional civil rights. (Removal Complaint # 66,67,68, 104-114)

C. Abstention Doctrine

Though not raised by the Defendant in her motion to dismiss, this court may sua sponte raise lack of subject matter jurisdiction under an abstention doctrine. The Plaintiff argues that none of the traditional abstention doctrine (Rooker-Feldman, Ankenbradt or Younger) are applicable to his as applied nor to his general statutory constitutional challenge and certainly not to his 42 U.S.C. 1983 claim for non equitable relief. (Removal Complaint #114 and #123)

Rooker-Feldman Abstention

Exxon Mobil v. Saudi Basic Industries, 544 US ____ (2005) is now controlling authority on the application of the Rooker-Feldman doctrine in this as applied as well as facial (general) constitutional statutory challenge lawsuit.

Exxon Mobil at 544 reaffirmed the very narrow application of the jurisdictional character of the Rooker-Feldman doctrine,

"The Rooker-Feldman doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."

Exxon Mobil at 544 also reiterates that general challenges to the constitutionality of state statutes is outside the scope of Rooker-Feldman.

"...Thus, the Court reasoned, 28 U. S. C. § 257 did not bar District Court proceedings addressed to the validity of the accreditation Rule itself. Feldman, 460 U. S., at 486. The Rule could be contested in federal court, this Court held, so long as plaintiffs did not seek review of the Rule application in a particular case. Ibid."

The Appellant asks no review or rejection of state court judgments. He specifically pled he did not seek such relief. (Removal Complaint # 17) He is making an as applied and a general constitutional challenge to the constitutionality of the Missouri Dissolution of Marriage alimony provisions.

Ankenbrandt Abstention

Ankenbrandt v. Richards, 504 U. S. 689 (1992) is an exceedingly narrow ruling that federal courts hae dramatically, and erroneously expanded in scope. Ankenbrandt at 504 and as reiterated by the U.S. Supreme Court in Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, (2004) only applies when relief requested is a decess of divorce, alimony or child custody, or when the status of the parties in a marriage is requested to be changed. Here the status of the

parties has been established by the state court and the Plaintiff specifically requests that not be altered. (Removal Complaint # 17). The Defendant is not requesting any adjudication of the parties or the rights of the family parties. He is not requesting a divorce, alimony or child custody decree. (Removal Complaint # 16)

Ankenbrandt at 504 itself and as clarified again in Elk Grove at 542 is very narrow and inapplicable to this proceeding. Elk Grove at 542, Rehnquist concurring,

"The domestic relations exception is not a prudential limitation on our federal jurisdiction. It is a limiting construction of the statute defining federal diversity jurisdiction, 28 U. S. C. §332, which divests the federal courts of power to issue divorce, alimony, and child custody decrees, *Ankenbrandt*, 504 U. S., at 703."

"...concluding that the domestic relations exception only applies when a party seeks to have a district court issue a divorce, alimony, and child custody decree, *Ankenbrandt*, 504 U. S., at 704. We further held that abstention was inappropriate because the status of the domestic relationship ha[d] been determined as a matter of state law, and in any event ha[d] no bearing on the underlying torts alleged, *id.*, at 706." Elk Grove at 124

"As in *Ankenbrandt*, the status of the domestic relationship has been determined as a matter of state law, and in any event has no bearing on the under-lying [constitutional violation] alleged."

"The Court cites *Palmore v. Sidoti*, 466 U. S. 429 (1984), as an example of the exceptional case where a substantial federal question that transcends or exists apart from the family law issue" makes the exercise of our jurisdiction appropriate."

In this proceeding as in Palmore at 466 and Elk Grove at 542, the removal pleadings raise a substantial federal question that transcends and exists apart from the family law issue. That is the gravamen of this proceeding-- the constitutionality of a state statute impermissibly infringing a liberty interest and fundamental right of parenting and the Defendants depriving the Plaintiff of those rights under color of law of the Missouri alimony statute.

Younger Abstention

Here there is no ongoing state court proceeding so the Younger abstention is inapplicable. Furthermore, the correct application of the Younger abstention is that in New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 US 350, 109 S. Ct. 2506, 2513 (1989) (“NOPSI”)

NOPSI, as it would apply to this case, is well discussed in Wexler v. Lepore, 385 F.3d 1336, (11th Cir. 2004) which further cites Rogers v. Desiderio, 58 F.3d 299, 301 (7th Cir. 1995); Marks v. Stinson, 19 F.3d 873, 882 (3rd Cir. 1994); Crawley v. Hamilton County Comm’rs, 744 F.2d 28, 30 (6th Cir. 1984). Wexler at 385, 1340,

"The Supreme Court’s most recent decision under Younger illustrates that the abstention doctrine is not triggered unless the federal injunction would create an “undue interference with state proceedings.” NOPSI, 109 S. Ct. at 2513 (citing Younger, 91 S. Ct. at 751)...

First, we find no federal authority supporting the proposition that federal claims that might be supported by the same alleged facts must be raised by state plaintiffs in cases arising under state law in state courts. Instead, we recall the Supreme Court’s reasoning from 1964: “[t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled . . . to accept instead a state court’s determination of those claims.” England v. La. State Bd. of Med. Examiners, 84 S. Ct. 461, 464 (1964). We recently wrote that “generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.” Ambrosia Coal & Constr. Co. v. Morales, 368 F.3d 1320, 1328 (11th Cir. 2004) (quoting Colorado River)...

Second, we have found no binding precedent requiring federal plaintiffs to raise federal claims in pending state court proceedings where they are also plaintiffs...

Third, we do not accept that the existence of a parallel state court action would warrant abstention in federal court, unless the requested federal relief would result in meticulous and burdensome federal oversight of state court or court-like functions..."

If the District Court assumes its Congressionally delegated authority to adjudicate the federal question raised here it will not cause "undue interference" with a non-existent state court

proceeding. Without the Defendants showing this Court's accepting jurisdiction would unduly interfere with the state court proceeding this court is not *permitted* to abdicate its responsibility.

Wexler at 385,

"To determine whether Younger abstention was proper, the district court considered whether the federal action before it would interfere with the ongoing state action. See Wexler v. Lepore, 319 F. Supp. 2d 1354, 1361-63 (S.D. Fla. 2004). It answered that question in the affirmative... We conclude that this determination constituted an error of law: without showing an *undue* interference on state proceedings, abstention is not permitted. NOPSI, 109 S. Ct. at 2513 (citing Younger, 91 S. Ct. at 751); 31 Foster Children, 329 F.3d at 1276. [Emphasis in original]

CONCLUSION

The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.

Planned Parenthood v. Casey, 505 U.S. 833, 859 (1992)

For the above reasons the Defendant's motion to dismiss fails and must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July, 2005, I caused a true and accurate copy of
'the foregoing to be served in the manner specified on the following.

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