IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

DENNY C. CORMIER,	*	
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Plaintiff,	*	**Case No.:**
	*	**7:09-cv-68 (HL)**
vs.	*	
	*	
FRANK D. HORKAN, et al.,	*	
	*	
	*	
Defendants.	*	

BRIEF IN SUPPORT OF DEFENDANTS' PRE-ANSWER MOTION TO DISMISS

COME NOW Defendants the Honorable Frank D. Horkan, Superior Court Judge for the Southern Judicial Circuit, and State of Georgia Governor Sonny Perdue, by and through the Attorney General of the State of Georgia, pursuant to Fed.R.Civ.P. 12(b)(6), and file this Brief in Support of their Pre-Answer Motion to Dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has filed a Complaint under 42 U.S.C. § 1983, alleging that Defendants violated various provisions of state and federal law in connection with divorce proceedings conducted in Colquitt County Superior Court from 2003

through 2006.[1] (See generally Doc. 1). Plaintiff contends that Defendants conspired to violate the Fifth, Thirteenth and Fourteenth Amendments, 42 U.S.C. §§ 1982, 1983, 1985 and 1994, 28 U.S.C. § 1446, due process, equal protection, Federal RICO statutes, and provisions of Georgia law. (Id., pp. 2, 8-9).

With regard to Governor Perdue, Plaintiff specifically alleges that he "is the responsible party for *ultra vires* actions on the part of state judges and other public officials presiding in more than one county." (Id., p. 7). As to Judge Horkan, Plaintiff avers that he had a business and political relationship with Defendant Dwight May, who represented Plaintiff's former spouse during his divorce proceedings. (Id.) Plaintiff speculates that, because of Judge Horkan's ties to Defendant May, Judge Horkan ruled in favor of his former spouse throughout his state proceedings and alleges that they improperly failed to disclose their purported conflict of interest. (Id., pp. 8, 15). In particular, Plaintiff alleges that Judge Horkan violated his state and federal rights by:

(1) denying a November 19, 2003, Motion for Revision of Alimony at a hearing on May 25, 2004, in violation of due process and equal protection;

(2) threatening to have Plaintiff arrested at a March 8, 2005, if Plaintiff removed the case to federal court;

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[1] Although Plaintiff does not clearly indicate whether he sues Defendants in their individual or official capacities, this brief addresses both capacities in an abundance of caution.

(3) not allowing Plaintiff to question his former spouse and failing to compel her to produce certain documentation at the March 8, 2005, hearing, which demonstrated gender bias in violation of due process and equal protection;

(4) overruling Plaintiff's Motion for Declaratory Judgment, entering a finding of contempt against Plaintiff for not transferring furniture to his former spouse, and ordering Plaintiff's incarceration if he did not pay attorney's fees and other debt, on March 25, 2005, in violation of due process and equal protection;

(5) proceeding in a "rush to judgment" from May 2005 to July 2005, in violation of due process and equal protection;

(6) awarding attorney's fees to Defendant May, ordering Plaintiff to pay a debt, declaring that he would proceed with the state court trial, and "conspir[ing] to make *ultra vires* state court awards," on June 14, 2005, in violation of Georgia Superior Court Rule 24.2, 28 U.S.C. § 1446, due process and equal protection;

(7) failing to review or rule on a Writ of Mandamus on July 5, 2005, in violation of due process and equal protection;

(8) conducting an ex parte hearing on July 7, 2005, wherein Judge Horkan allegedly "conspired" to proceed with the state court trial on August 1, 2005,

even though Plaintiff had sought removal to federal court, in violation of due process and equal protection;

(9) failing to review a Motion for Recusal on July 25, 2005;

(10) failing to rule on a Motion for New Hearing after a final judgment hearing on August 1, 2005, that was allegedly conducted ex parte after Plaintiff was unable to attend, in violation of due process, equal protection and Federal RICO statutes;

(11) entering an order on August 1, 2005, that "forced Plaintiff into a perpetual alimony-peonage contract" and required him to assume all marriage debts, in violation of 42 U.S.C. § 1994, the Thirteenth Amendment, due process, equal protection and Georgia law;

(12) ruling that Plaintiff had to pay a $50,000 debt to his former spouse on August 3, 2005, demonstrating gender bias in violation of due process, equal protection, and 42 U.S.C. § 1994; and

(13) failing to rule on a Motion for Re-hearing on August 9, 2005, in violation of due process and equal protection. (Id., pp. 8-15).

Plaintiff does not make specific allegations against Judge Horkan occurring after August 9, 2005. (See generally Doc. 1). In fact, the only specific allegations made by Plaintiff occurring after this date are that the Georgia Supreme Court

entered an "erroneous[]" order on June 26, 2006, in violation of 28 U.S.C. § 1446, and that unspecified Defendants obtained an order to domesticate the final judgment from Georgia in a state court in Virginia on October 5, 2007, in violation of the Federal Anti-Peonage and RICO statutes. (Id., pp. 9, 15-16).

Plaintiff further asserts the following claims against all Defendants generally: (1) Plaintiff was denied due process by not being permitted to present certain testimony at trial and because his efforts to obtain discovery were obstructed; (2) Defendants violated the Thirteenth Amendment by "conspiring to forever force, compel and otherwise obligate Plaintiff into involuntary servitude, indenture and perpetual peonage, under duress and threats of false imprisonment," and for conspiring to force Plaintiff into bankruptcy; (3) Defendants conspired to violate Plaintiff's due process, equal protection and Fourteenth Amendment privacy rights, and further violated such rights through gender bias; (4) Defendants violated § 1982 by depriving Plaintiff of property rights; (5) Defendants participated in willful and reckless conduct, impeded Plaintiff's abilities to seek declaratory relief, obstructed his right to a fair trial, and discriminated against him based on his gender in violation of various Constitutional Amendments under § 1983; (6) Defendants conspired to deprive Plaintiff of constitutional rights in violation of § 1985; (7) Defendants conspired to coerce Plaintiff into illegal alimony-peonage

contracts for the collection of unlawful debts in violation of § 1994; (8) Defendants coerced and extorted money and property from Plaintiff by collecting unlawful debts by misusing Georgia Alimony statutes in violation of Federal RICO statutes; (9) Defendants intentionally inflicted emotional distress on Plaintiff; and (10) Defendants interfered with Plaintiff's economic advantage and breached special and fiduciary relationships with Plaintiff. (Id., pp. 16-21).

In relief, Plaintiff requests $1,000,000, in compensatory and punitive damages, as well as injunctive relief, declaratory relief, attorney's fees and court costs. (Id., p. 21-22).

On this date, Defendants file this Pre-Answer Motion to Dismiss.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiff's claims under 42 U.S.C. §§ 1982, 1983 and 1985 are barred by the statute of limitations.

Plaintiff's claims under 42 U.S.C. §§ 1982, 1983 and 1985 are barred by the applicable statute of limitations. It is well established that federal courts should apply "their forum state's statute of limitations . . . to actions brought pursuant to 42 U.S.C. § 1983." Lovett v. Ray, 327 F.3d 1181, 1182 (11th Cir. 2003). "The statute of limitations for a [§] 1983 claim arising out of events occurring in Georgia is two years." Thigpen v. Bibb County, 223 F.3d 1231, 1243 (11th Cir. 2000); O.C.G.A. §9-3-33. The same is true for claims brought under § 1982,

Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1216-17 (11th Cir. 2001), and those brought under § 1985, Rozar v. Mullis, 85 F.3d 556, 561 (11th Cir. 1996). Although state law determines the applicable statute of limitations, "[f]ederal law determines when the statute of limitations begins to run." Lovett, 327 F.3d at 1182. As a general rule, "the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Id.

A review of Plaintiff's Complaint reveals that almost every allegation arose out of state court proceedings occurring from 2003 until 2006. (See Doc. 1, pp. 2, 4-5, 13, 31). In fact, the *only* claim alleged in Plaintiff's Complaint that occurred after that time is his allegation that unspecified Defendants obtained an order to domesticate the final judgment from Georgia in a state court in Virginia on October 5, 2007. Notably, Plaintiff did not file the instant Complaint until May 29, 2009. As a result, his claims under §§ 1982, 1983 and 1985, with the exception of his assertion that an order was obtained to domesticate the final judgment in Virginia, are untimely. See Moore, 267 F.3d at 1216-17; Thigpen, 223 F.3d at

1243; Rozar, 85 F.3d at 561. Because these claims are barred by the statute of limitations, they should be dismissed.[2]

B. Plaintiff's claims are barred by the doctrine of laches.

Plaintiff's claims for equitable relief are otherwise barred by the doctrine of laches. Indeed, "[i]njunctive relief is an equitable remedy that is not available as a matter of right." Grayson v. Allen, 491 F.3d 1318, 1322 (11th Cir. 2007). In determining whether the doctrine of laches should apply, factors to evaluate include: (1) the delay in bringing the claims; (2) whether the delay was excusable; and (3) whether the defendants have been unduly prejudiced by the delay. Kason Indus. v. Component Hardware Group, 120 F.3d 1199, 1203 (11th 1997); see also Costello v. United States, 365 U.S. 265, 282 (1961).

Here, as discussed above, Plaintiff is complaining regarding court proceedings that ended in 2006. His latest allegation is regarding the domestication of a state court judgment in Virgina in 2007, yet Plaintiff has waited until 2009 to file this lawsuit seeking equitable relief. Notably, Plaintiff has failed to provide any basis for his delay. Additionally, the Defendants are unduly

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[2] Plaintiff's claim regarding the domestication of his final judgment is subject to dismissal on other grounds as discussed further below. See Section II.C, infra. Additionally, although Defendants acknowledge that Plaintiff's claims under RICO are not barred by the applicable four-year statute of limitations, those claims are otherwise barred as well. See Rotella v. Wood, 528 U.S. 549, 552 (2000); Section II.C, infra.

prejudiced by Plaintiff's delay because his lawsuit seeks to undermine state court rulings and a final judgment entered three years ago that, according to his Complaint, has already been domesticated in another state. Notably, nearly two years have passed since the time of the alleged domestication. In light of these circumstances, Plaintiff should not be entitled to the relief he seeks. Accordingly, his claims seeking equitable relief should be barred by the doctrine of laches.

C. Plaintiff's Complaint is Barred by the Rooker-Feldman Doctrine.

In addition, Plaintiff's Complaint is barred by the Rooker-Feldman doctrine. According to the Rooker-Feldman doctrine, "federal district courts do not have jurisdiction to act as appellate courts," and are not permitted to review final state court decisions. Green v. Jefferson County Commission, Manuscript Op. at 12 (11th Cir. March 31, 2009); see generally Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia v. Feldman, 460 U.S. 462 (1983). This Circuit has explained that, "because federal review of state court decisions is entrusted solely to the Supreme Court, the lower federal court may not decide federal issues that are raised in state proceedings and inextricably intertwined with the state court's judgment." Staley v. Ledbetter, 837 F.2d 1016, 1017 (11th Cir. 1988) (quotations and citation omitted). Although this Court recently reaffirmed the Supreme Court's position that the Rooker-Feldman doctrine is limited to "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 arguments," Plaintiff's Complaint presents such a case. See Green, Manuscript Op. at 12-13 (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005)).

Indeed, Cormier's Complaint expressly challenges state court judgments regarding his divorce proceedings in an attempt to "appeal" from the state court's rulings. (Doc. 1). Issues regarding the propriety of the state court decisions could have and should have been raised and addressed in a state appellate proceeding, not in a collateral federal action. In fact, based on the allegations contained in Plaintiff's Complaint, it appears that they were. Specifically, Plaintiff did raise these issues before the state appellate court, and the judgment was affirmed. (See Doc. 1, p. 15); see also Cormier v. Cormier, 280 Ga. 693 (Ga. 2006). Thus, it is clear that Plaintiff now seeks to appeal from the Georgia Supreme Court's decision. Because Plaintiff should not be permitted to challenge state court decisions in a federal forum, his Complaint is due to be dismissed. See Gogola v. Zingale, 141 Fed. Appx. 839 (11th Cir. 2005) (affirming district court's dismissal of civil rights lawsuit filed by plaintiff because his claims regarding alimony were inextricably intertwined with his state court divorce proceedings).

C. Plaintiff's Complaint fails to state a claim

1. Plaintiff's conclusory allegations fail to state a claim for relief.

With regard to Plaintiff's alleged violations of various provisions of federal law, he largely cites broad legal concepts and makes conclusory allegations that do not entitle him to relief. As recently explained by the Supreme Court, although a Complaint is not required to contain detailed factual allegations, it must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. ___ (2009), slip. op. at 13-14. Simply setting forth legal conclusions or recitations of the elements of a cause of action is insufficient to state a claim absent supportive factual allegations. Id. at 14-15.

Specifically, a review of Plaintiff's Complaint reveals that he fails entirely to make *any* specific allegations against Governor Perdue. (See generally Doc. 1). In addition, Plaintiff only baldly alleges violations of the Thirteenth Amendment, § 1982, § 1985, § 1994, and Federal RICO statutes, and his legal conclusions in the absence of specific factual allegations do not entitle him to any relief. See Ashcroft, slip. op. at 13-15. In particular, Plaintiff continuously alleges that Defendants conspired to violate his various rights; however, this Circuit has made clear that conclusory allegations of a conspiracy are insufficient to state a claim for relief. See Fullman v. Gaddick, 739 F.2d 553, 556-57 (11th Cir. 1984) (dismissing

civil rights complaint alleging a conspiracy because the allegations were "vague and conclusory"). Accordingly, Plaintiff's claims relying on conclusory allegations should be dismissed.

2. Plaintiff fails to state a claim under § 1983 based on alleged violations of Georgia law.

In order to establish a § 1983 violation, a plaintiff must show that the conduct was committed by a person acting under color of state law and that the conduct deprived him of rights, privileges or immunities secured by the Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988). As an initial matter, Defendants admit acting under color of state law as the Governor and a Judge for the State of Georgia. Thus, the only remaining issue is whether Plaintiff sufficiently has alleged that Defendants deprived him of a constitutional right. Plaintiff's claims based on alleged violations of Georgia law fail to state a claim entitling him to relief under § 1983 because "Section 1983 does not create a remedy for every wrong committed under the color of state law, but only for those that deprive plaintiff of a federal right." Knight v. Jacobson, 300 F.3d 1272, 1276 (11th Cir. 2002) (explaining that violations of state law may give

rise to state claim, but does not by itself state a claim under § 1983). Thus, Plaintiff is not entitled to relief on this basis.[3] See id.

3. Plaintiff fails to state claim under 42 U.S.C. § 1982.

Section 1982 provides that, "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. Thus, the crux of § 1982 is its proscription of racial discrimination. Notably, however, Plaintiff's Complaint is devoid of any allegations suggesting racial discrimination. Accordingly, he fails to state a claim for relief under § 1982.

4. Plaintiff fails to state claim under 42 U.S.C. § 1985.

Section. § 1985, which is derived from the Ku Klux Klan Act of 1871, prohibits conspiracies to interfere with civil rights and contains three subsections. See Childree v. UAP/GA Chem. Inc., 92 F.3d 1140, 1146 (11th Cir. 1996). Plaintiff does not state which of the three subsections form the basis of this action; however, he is not entitled to relief under any of the three. First, no claim under Section 1985 can be stated in the absence of racial or other class-based animus. Moody v. City of Albany, 228 Fed. Appx. 859, 861 (11th Cir. 2007); Griffin v.

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[3] Plaintiff's state law claims are further barred by the Georgia Tort Claims Act as discussed further below. See Section II.G, infra.

Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971) (requiring the showing of "some racial, or perhaps otherwise class-based, invidiously discriminator animus behind the conspirators' action"). Plaintiff has failed to allege any facts to suggest that Defendants' alleged conduct was motivated by racial or other class-related animus. Instead, with regard to § 1985, Plaintiff alleges only that "Defendants, willfully and wantonly, directly or indirectly, in whole or in part, did with unqualified deliverance, conspire to deprive Plaintiff of his inherent constitutional rights and privileges, thus causing him irreparable harm." (Doc. 1, p. 19). Accordingly, Plaintiff fails to state a claim under § 1985.

Plaintiff additionally fails to otherwise make allegations sufficient to state a claim under § 1985. Section 1985(1), provides a cause of action for preventing an individual from holding an office or for an officer that is prevented from performing his or her duties. 42 U.S.C. § 1985(1). A review of Plaintiff's Complaint reveals that he has made no such allegations here. Thus, he fails to state a claim for relief under § 1985(1).

To state a claim under § 1985(2), Plaintiff must show: (1) a conspiracy, (2) to deter a witness by force, intimidation, or threat from attending or testifying before a United States court, (3) that results in injury to the plaintiff. Morast v.

Lance, 807 F.2d 926, 929-30 (11th Cir. 1987). A review of Plaintiff's Complaint reveals that he has made no such allegations. Also, the phrase "court of the United States" refers only to Article III courts, not to state courts. McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 1036 n.2 (11th Cir. 2000) (*en banc*). Here, Plaintiff complains of actions occurring in state court. Thus, he fails to state a claim for relief under § 1985(2).

Finally, to state a claim under § 1985(3), Plaintiff is required to show: (1) a conspiracy, (2) for the purpose of depriving any person equal protection either directly or indirectly, as well as (3) an act in furtherance of the conspiracy, (4) through which the person or his property is injured or he is deprived any right or privilege as a United States citizen. Denney v. City of Albany, 247 F.3d 1172, 1190 (11th Cir. 2001). Plaintiff has failed sufficiently to make any allegations in this regard. Therefore, he is not entitled to any relief under § 1985(3).

5. Plaintiff fails to state claim based on the federal RICO Act.

The RICO Act, 18 U.S.C. § 1961 *et seq.* provides for civil liability for persons who are engaged in "a pattern of racketeering activity." Langford v. Rite Aid of Ala., Inc., 231 F.3d 1308, 1311 (11th Cir. 2000) (quoting 18 U.S.C. § 1962). In order to state a claim under the RICO Act, the plaintiff must demonstrate: "(1) conduct (2) of an enterprise (3) through a pattern (4) of

racketeering activity." Id. "The plaintiff must, of course, allege each of these elements to state a claim." Sedima v. Imrex Co., 473 U.S. 479, 496 (1985). A review of Plaintiff's Complaint shows that he fails entirely to do so. Instead, as already discussed, Plaintiff simply makes vague and conclusory allegations that the RICO Act has been violated. Accordingly, his RICO claims must be dismissed.

6. Plaintiff fails to state a claim under the Thirteenth Amendment, as implemented by 42 U.S.C. § 1994.

Section 1994 prohibits peonage, or a system of involuntary servitude outlawed by the Thirteenth Amendment. See 42 U.S.C. § 1994 (abolishing the "holding of any person to service or labor under the system known as peonage"); see also Clyatt v. United States, 197 U.S. 207, 215 (1905) (defining peonage as the "status or condition of compulsory service, based upon the indebtedness of the peon to the master"). Plaintiff's Complaint is devoid of specific allegations that he has been subjected to involuntary servitude as prohibited by the Thirteenth Amendment. Accordingly, he fails to state a claim for relief. See Foskey v. Rendell, 261 Fed. Appx. 428, 430 (3rd Cir. 2008) (dismissing claim under § 1994 because the inmate did not allege that he had been coerced to work in violation of the Thirteenth Amendment); Loubser v. United States, 606 F. Supp. 2d 897 (N.D. Ind. 2009) (providing that legal obligations, such as alimony, under a divorce decree do not amount to peonage).

7. Plaintiff's § 1983 claims against Governor Perdue are impermissibly based on vicarious liability.

Additionally, Plaintiff seeks to hold Governor Perdue liable for the alleged conduct of others; however, a supervisory official is not liable under § 1983 solely on the basis of *respondeat superior* or vicarious liability. Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990). Instead, a plaintiff must allege that the named defendants actually participated in the alleged constitutional violation or exercised control or direction over the alleged violation. Gilmere v. City of Atlanta, 774 F.2d 1495, 1504 (11th Cir. 1985). There must also be a causal connection between the actions of the supervising official and the alleged constitutional violation. Braddy v. Florida Dep't of Labor & Empl. Sec., 133 F. 3d 797, 802 (11th Cir. 1998). A party can establish a causal connection by showing that a supervisor should have been on notice of the need to correct unconstitutional conduct by "a history of widespread abuse" that is "obvious, flagrant, rampant and of continued duration." Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990). "A causal connection can also be established by facts which support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so." Dalrymple v. Reno, 334 F.3d 991, 996 (11th Cir. 2003). In addition, a plaintiff can show that a supervisor imposed an improper custom or policy that constituted

deliberate indifference to constitutional rights. Hartley v. Parnell, 193 F.3d 1263, 1269 (11th Cir. 1999).

Here, the entirety of Plaintiff's specific allegations against Governor Perdue are that he "is the responsible party for *ultra vires* actions on the part of state judges and other public officials presiding in more than one county." (Doc. 1, p. 7). Plaintiff fails to make any specific allegations suggesting that Governor Perdue had any personal participation or involvement in his divorce proceedings, nor does Plaintiff allege a history of alleged problems in such proceedings, that Governor Perdue directed state officials to take certain actions during his state court proceedings, or that there is a custom or policy of taking certain actions in state court divorce proceedings. (See Doc. 1). Instead, Plaintiff's Complaint against Governor Perdue clearly relies on his supervisory authority and is not cognizable under § 1983. Accordingly, Plaintiff's § 1983 claims against Governor Perdue should be dismissed.

D. Plaintiff's Complaint is barred by absolute judicial immunity.

Moreover, Plaintiff's allegations against Judge Horkan are based entirely on his judicial functions. As a result, Judge Horkan has absolute immunity from this lawsuit. Specifically, judges acting within their judicial function are generally accorded absolute immunity from suit. See Cleavinger v. Saxner, 474 U.S. 193,

199-200 (1985); Jones v. Cannon, 174 F.3d 1271, 1281 (11th Cir. 1999). Absolute immunity rests on the nature of the function performed by the official, not on the official's identity or status. Mireles v. Waco, 502 U.S. 9, 12-13 (1991).

Plaintiff's allegations against Judge Horkan are based on the actions taken in connection with his state court proceedings. Specifically, Plaintiff's Complaint arises out of his allegations that Judge Horkan improperly entered court orders, made improper rulings, and improperly conducted court hearings. (See generally Doc. 1). Thus, his allegations are based upon judicial functions. As a result, Plaintiff's allegations fall squarely within the protections of absolute judicial immunity and his claims seeking damages from Judge Horkan should be dismissed. See Cleavinger, 474 U.S. at 199-200.

Additionally, Plaintiff's § 1983 claims for injunctive relief against Judge Horkan are statutorily barred. In particular, under § 1983, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. Because it is clear that Plaintiffs' allegations relate solely to Judge Horkan's judicial capacity and he has not alleged that a declaratory decree was violated or unavailable, Section 1983 cannot provide the injunctive relief he requests.

E. Defendants in their official capacities are not "persons" within the meaning of 42 U.S.C. § 1983.

Plaintiff brought this suit pursuant to 42 U.S.C. § 1983, which provides a cause of action for violations of federal constitutional or statutory rights by any "person" acting under color of law. The Supreme Court has ruled that the term "person" in this context is to be given its ordinary meaning; "a State is not a 'person' within the meaning of § 1983." Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989). Furthermore, the Supreme Court has explained that the definition of a "State" includes State agencies and individual state officers sued in their official capacity. Id. at 70, 71. Therefore, Plaintiff's § 1983 claims against Defendants as state officials are barred by the statutory construction of § 1983.

F. Plaintiff's claims for monetary relief against Defendants in their official capacities are barred by the Eleventh Amendment.

To the extent Plaintiff seeks monetary damages against Defendants in their official capacities, his claims are barred by the Eleventh Amendment. The Eleventh Amendment bars suit against a State or one of its agencies, departments or officials, absent a waiver by the State or a valid congressional override, when the State is the real party in interest or when any monetary recovery would be paid from state funds. Kentucky v. Graham, 473 U.S. 159, 169 (1985). "The general test for determining whether the state is the real party in interest, even though it is

not a named defendant, is whether the relief sought against the nominal defendant would in fact operate against the state. . ." Jackson v. Georgia D.O.T., 16 F. 3d 1573, 1577 (11th Cir. 1994) (citation omitted). Here, there is no question that the monetary relief Plaintiff seeks from Governor Perdue and Judge Horkan as state officials sued in their official capacities operate against the State.

Congress has not overridden the protections of the Eleventh Amendment in the context of §1983 lawsuits. Instead, the Supreme Court has repeatedly held that §1983 does not override a State's Eleventh Amendment immunity. Will, 491 U.S. at 66; Quern v. Jordan, 440 U.S. 332, 342 (1979); Kentucky, 473 U.S. at 169 n. 17. Moreover, Plaintiff's injunctive relief claims are barred to the extent they are not seeking prospective injunctive relief. See Arizonans for Official English v. Ariz., 520 U.S. 43, 69 n. 10 (1997) (noting that the Ex Parte Young exception to Eleventh Amendment immunity is limited to lawsuits against individuals in their individual capacities for prospective injunctive relief).

In addition, the State of Georgia has not consented to being sued under any of the provisions of federal law relied on by Plaintiff. Instead, the Georgia Constitution specifically preserves the State's sovereign immunity from suit unless that immunity is waived by an Act of the Georgia General Assembly, and only on the limited terms and conditions set forth in such an Act. Ga. Const. Art. I, § II,

¶ IX (e). Further, the Georgia Constitution provides that "[n]o waiver of sovereign immunity shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution." Ga. Const. Art. I, §II, ¶ IX (f).

The Act that was passed by the General Assembly, known as the Georgia Tort Claims Act ("GTCA"), provides only a limited waiver of the State's sovereign immunity for actions alleging torts committed by state officers or employees, under certain limited terms and conditions; however, that waiver does not apply to cases brought in federal court. Specifically, O.C.G.A. § 50-21-23(b) provides: "The state waives its sovereign immunity only to the extent and in the manner provided in [the GTCA] and only with respect to actions brought in the courts of the State of Georgia. The state does not waive any immunity with respect to actions brought in the courts of the United States." Similarly, O.C.G.A. § 50-21-28 provides that all tort actions against state government entities under the GTCA "shall be brought in the state or superior court of the county wherein the loss occurred."

Federal case law is clear that states may waive their sovereign immunity from suit on certain limited terms and conditions (which conditions the states themselves set) and preserve their sovereign immunity from suit in all other

instances. One of the instances in which federal courts have consistently held that a state's sovereign immunity has been preserved is when a state entity or its officials are sued in federal court and the state has not consented to be sued in federal court on those claims. United States Supreme Court cases that recognize and enforce this concept include Smith v. Reeves, 178 U.S. 436 (1900); Chandler v. Dix, 194 U.S. 590 (1904); and Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944). In Smith, the Court found that the suit was a suit against the State of California, and noted that "[n]othing heretofore said by this court justifies the contention that a State may not give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal courts…". Smith, 178 U.S. at 445. Thus, the Court in Smith said that "[i]n our judgment it was competent for the State to couple with its consent to be sued… the condition that the suit be brought in one of its own courts." Id.

In addition, the following District Court and Eleventh Circuit rulings in Georgia hold that the State has not waived its sovereign immunity from suit on state law claims brought in federal court: Alyshah v. State of Georgia, 2006 U.S. Dist. LEXIS 66550 (N.D. Ga., Sept. 1, 2006), *aff'd* at 239 Fed. Appx. 473, 2007 U.S. App. LEXIS 8357 (April 11, 2007); Alyshah v. State of Georgia, 2006 U.S.

Dist. LEXIS 66546 (N.D. Ga., Sept. 1, 2006), *aff'd* at 230 Fed. Appx. 949, 2007 U.S. App. LEXIS 18581 (August 2, 2007); and Manning v. Ellis, 2006 U.S. Dist. LEXIS 51426 (M.D. Ga., July 27, 2006).

In Manning, the District Court held that the "State defendants" were entitled to a dismissal of the state law claims asserted against them for three separate reasons, one of which was "the legislature of the State of Georgia clearly has not waived Georgia's sovereign immunity for tort actions brought in the courts of the United States." Manning, 2006 U.S. Dist. LEXIS 51426, *10. In Alyshah, the District Court held that the Plaintiff's state law claims were "barred by sovereign immunity as well as the Eleventh Amendment", for "[t]he GTCA specifically preserves the State's sovereign immunity from suit for tort claims filed in federal courts. See O.C.G.A. § 50-21-23(b). The State has similarly preserved its Eleventh Amendment immunity." Alyshah, 2006 U.S. Dist. LEXIS 66550, * 4-5; Alyshah, 2006 U.S. Dist. LEXIS 66546, *11-12. The Alyshah case also cites to the Eleventh Circuit case of Robinson v. Georgia DOT, 966 F.2d 637 (1992). The Robinson case arose before the GTCA was passed and it did not involve tort claims, but it is pertinent on the issue of a state government entity being sued in federal court and whether it has waived its sovereign or Eleventh Amendment immunity. The Court in Robinson noted: "The Eleventh Amendment bars suit in federal court against a

state. The immunity provided by the Eleventh Amendment applies to states and state officials but not to municipal corporations, counties, or other political subdivisions of the state." Id. at 638 (citing Mt. Healthy City School Dist. Bd. of Educ. V. Doyle, 429 U.S. 274, 280 (1977)).

Plaintiff's Complaint shows that Defendants are state officers or employees who, at all times relevant, were acting within the course and scope of their official duties or employment with a state government entity of the State of Georgia. The State of Georgia has not consented for either the State or its employees or officials to be sued in federal court on any state law claims at issue in this action. Therefore, the Defendants, as state officers or employees acting within the course and scope of their official duties or employment, are entitled to sovereign immunity and Eleventh Amendment immunity with regard to the state law claims asserted in Plaintiff's Complaint.

In addition, as set forth below, even if the State of Georgia had waived its sovereign or Eleventh Amendment immunity from suit in federal court for state law claims against the State or its officers and employees, or even if this action had been brought in state court, the Plaintiff would still not be able to prevail on his state law tort claims against Defendants in this case.

G. Plaintiff's state law claims would be barred by the GTCA even if they were filed in state court.

1. Defendants, as state officers or employees acting within the course and scope of their official state duties or employment, are immune from suit in tort.

Under the GTCA, "[a] state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefor." O.C.G.A. § 50-21-25(a). This code section requires that a plaintiff "name as a party defendant only the state government entity for which the state officer or employee was acting and shall not name the state officer or employee individually." O.C.G.A. § 50-21-25(b). Further, if an employee is sued for a tort committed while acting within the scope of employment, "the state government entity for which the state officer or employee was acting must be substituted as the party defendant." O.C.G.A. § 50-21-25(b).

In the case of Riddle v. Ashe, 269 Ga. 65, 65-67 (Ga. 1998), the Georgia Supreme Court found the GTCA's employee immunity provision to be constitutional and held that the defendant state employee's motion to dismiss should have been granted, reversing the trial court's failure to do so.

In Hardin v. Phillips, 249 Ga. App. 541, 543 (Ga. Ct. App. 2001), the Court of Appeals used a three-part test for determining the legal issue of whether a defendant is entitled to immunity under the GTCA: (1) whether the GTCA applies

to the action; (2) whether the defendant is a state employee; and if so, (3) whether the defendant's actions were committed within the scope of his employment. The Court in Hardin concluded that the defendants were entitled to immunity under the GTCA because: (1) the cause of action arose after the GTCA's effective date; (2) the defendants were state employees; and (3) the defendants were acting within the scope of their official duties or employment. Id. at 543-545. For other Georgia appellate cases discussing state employee immunity, see, e.g., Ridley v. Johns, 274 Ga. 241, 242-243 (Ga. 001); Tootle v. Cartee, 280 Ga. App. 428, 430-431 (Ga. Ct. App. 2006); Wang v. Moore, 247 Ga. App. 666, 667-670 (Ga. Ct. App. 2001); and Coultas v. Dunbar, 220 Ga. App. 54, 57-58 (Ga. Ct. App.1996).

In the present case, it is undisputed that any actions allegedly taken in relation to the incident described in Plaintiff's Complaint were within the scope of Defendants' employment as State employees. Because the Defendants were state officers or employees acting within the scope of their official duties or employment and because this case arose after the GTCA's 1992 effective date, the Defendants are immune from suit on any state law tort claims in this action and, thus, in accordance with O.C.G.A. § 50-21-25(b), the state law tort claims asserted against them should be dismissed. The sole possible defendant for the Plaintiff to sue for alleged torts by the Defendants would be the state government entity or

entities for whom they were working. See O.C.G.A. § 50-21-25(b). However, such a lawsuit could be brought only in a state or superior court in Georgia and only after a proper and timely ante litem notice was given.

2. Plaintiff's state law tort claims against Judge Horkan are expressly barred by O.C.G.A. § 50-21-24(4).

In addition, the GTCA explicitly states that "[t]he state shall have no liability for losses resulting from (4) Legislative, judicial, quasi-judicial, or prosecutorial action or inaction." O.C.G.A. § 50-21-24(4) (2008). As a result, Plaintiff's state law tort claims against Judge Horkan are barred.

3. Plaintiff's state law tort claims are barred because Plaintiff has failed to satisfy the ante litem notice requirements of O.C.G.A. § 50-21-26.

Prior to filing a tort lawsuit against a state government entity, the GTCA requires a claimant to provide ante litem notice to the Risk Management Division of the Department of Administrative Services ("DOAS") within 12 months, and to send a copy to the allegedly negligent state government entity. The statute provides:

> (a) No person having a tort claim against the state under this article shall bring any action against the state upon such claim without first giving notice of the claim as follows:
>
> (1) Notice of a claim shall be given in writing within 12 months of the date the loss was discovered or should have been discovered . . . ;

> (2) Notice of a claim shall be given in writing and shall be mailed by certified mail or statutory overnight delivery, return receipt requested, or delivered personally to and a receipt obtained from the Risk Management Division of the Department of Administrative Services. In addition, a copy shall be delivered personally to or mailed by first class mail to the state government entity, the act or omissions of which are asserted as the basis of the claim.

O.C.G.A. § 50-21-26(a)(1) and (2).

O.C.G.A. § 50-21-26(a)(3) further provides that "[n]o action against the state under this article shall be commenced and **courts shall have no jurisdiction thereof** unless and until a written notice of claim has been timely presented to the state as provided in this subsection." (emphasis added).

> Compliance with the ante litem notice provisions is a condition precedent to the claimant's right to file suit against the State, and the courts lack jurisdiction to adjudicate any such claims against the State "unless and until [the] written notice of claim has been timely presented to the state as provided in [O.C.G.A. § 50-21-26 (a)] …
>
> It is well established that strict compliance with the notice provisions is a prerequisite to filing suit under the GTCA, and substantial compliance therewith is insufficient. [*Williams v. Dept. of Human Resources*, 272 Ga. 624 (2000)] This is because the GTCA represents a limited waiver of the State's sovereign immunity, crafted, as is constitutionally authorized, by our Legislature, and not subject to modification or abrogation by our courts. *Sylvester v. Dept. of Transp.*, 252 Ga. App. 31 (555 S.E.2d 740) (2001).

Cummings v. Dept. of Juvenile Justice, 282 Ga. 822, 824 (Ga. 2007); see also Dept. of Transp. v. Baldwin, 292 Ga. App. 816, 825 (Ga. Ct. App. 2008).

Furthermore, the legislature provided that not only must an ante litem notice be given, **a copy of the notice and a receipt for its delivery must be attached as exhibits to the Complaint**:

> Any complaint filed pursuant to this article must have a copy of the notice of claim presented to the Department of Administrative Services together with the certified mail or statutory overnight delivery receipt or receipt for other delivery attached as exhibits. **If failure to attach such exhibits to the complaint is not cured within 30 days after the state raises such issue by motion, then the complaint shall be dismissed without prejudice**.

O.C.G.A. § 50-21-26(a)(4) (emphasis added).

In the present case, Plaintiff failed to comply with these ante litem notice requirements, as evidenced by the lack of any ante litem notice exhibits attached to the Complaint. If the ante litem notice exhibits are not attached by amendment to the pleadings within 30 days, this action should be dismissed.

The case of Georgia Ports Authority v. Harris, 274 Ga. 146, 150-51 (Ga. 2001), reiterates that a delivery receipt is required and that the GTCA must be strictly construed. In addition, the case of Baskin v. Georgia Department of Corrections, 272 Ga. App. 355, 356-359 (Ga. Ct. App. 2005), addresses this issue. Holding that the plaintiff there had "presented no evidence of 'a receipt obtained from the Risk Management Division of [DOAS]'" as required by O.C.G.A. § 50-21-26(a)(2), the Court of Appeals affirmed the dismissal of the Complaint for

failure to attach the required ante litem notice delivery exhibit to the Complaint. Baskin, 272 Ga. App. at 358-359.

4. Plaintiff's state law tort claims are barred because Plaintiff has not complied with the service requirements under O.C.G.A. § 50-21-35.

The service of process and mailing provisions for tort actions brought against state government entities are set forth in the GTCA at O.C.G.A. § 50-21-35. The required statutory components for service of process are that claimants must (1) cause process to be served upon the chief executive officer of the state government entity involved; and (2) cause process to be served upon the director of the Risk Management Division of DOAS. In addition, the claimant must mail a copy of the Complaint to the Attorney General in a specified manner, and attach a certificate to the Complaint that this requirement has been met. See O.C.G.A. § 50-21-35.

In the cases of Sylvester v. Georgia Department of Transportation, 252 Ga. App. 31 (Ga. Ct. App. 2001), and Green v. Central State Hospital, 275 Ga. App. 569 (Ga. Ct. App. 2005), the Georgia Court of Appeals confirmed that service of process upon the director of the DOAS Risk Management Division is necessary to perfect service of process upon state government entities in tort claims, and without such service having been perfected, no valid action is pending to toll the

running of the statute of limitation. See Sylvester, 252 Ga. App at 32-33; Green, 275 Ga. App. at 571; see also Henderson v. Department of Transportation, 267 Ga. 90, 90-91 (Ga. 1996) (affirming a trial court's dismissal of an action where there was no service of process on the Risk Management Division Director of DOAS and no mailing of the complaint to the Attorney General).

In addition, the Georgia Supreme Court has confirmed that the requirement for mailing the complaint to the Attorney General is mandatory though the Court allowed that in some circumstances this requirement may be accomplished by amendment. See Camp v. Coweta County, 280 Ga. 199, 203-204 (Ga. 2006) (providing that "[t]he statute demands that a copy of the complaint be sent to the Attorney General as soon after filing as possible").

In the present case, the requirements of O.C.G.A. § 50-21-35 have not been met. Specifically, neither the Director of the DOAS Risk Management Division nor the chief executive officer of the state government entity for whom the allegedly tortious employees were working have been served with process and service of process upon such persons is required before a tort action against a state government entity may be maintained. Nor has a copy of the Complaint been mailed to the Attorney General, as evidenced by the fact that no certificate of fulfilling this requirement was attached to the Complaint.

IV. CONCLUSION

For the reasons stated above, Defendants respectfully request that this Court:

1) enter an order Dismissing Plaintiff's Complaint, with prejudice;

2) tax all costs against Plaintiff;

3) require nothing further from these Defendants; and

4) grant such further and other relief as this Court deems appropriate.

Respectfully submitted this 17th day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing **DEFENDANTS' PRE-ANSWER MOTION TO DISMISS AND BRIEF IN SUPPORT** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record: None

I further certify that I have mailed, by United States Postal Service, postage prepaid, the documents to the following non-cm/ecf participants:

Denny C. Cormier
11712 Jefferson Avenue C279
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This 17th day of June, 2009.

/s/ Meghan Robson Davidson
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