

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

<b>HAROLD STANLEY,</b>	)	
	)	
<b>Plaintiff.</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 06-752-CV-W-GAF</b>
	)	
<b>HON. JACK GRATE, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**ORDER**

Pending before the Court are two Motions to Dismiss, filed pursuant to Fed. R. Civ. P. 12(b)(6) (“Rule 12(b)(6)”) by Defendants Les G. Wight II (“Wight”) and Hon. Jack Grate (“Judge Grate”) (collectively “Defendants”). (Doc. #13, #17). Judge Grate is a judge for the Circuit Court of Jackson County, Missouri and Wight is counsel for Plaintiff Harold Stanley’s (“Plaintiff”) ex-wife, Marcia E. Stanley (“Ms. Stanley”). Plaintiff, who is proceeding *pro se*, asserts that Defendants intentionally inflicted emotional distress and deprived him of his rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution by pursuing litigation against Plaintiff in Missouri state court to enforce a state court judgment requiring Plaintiff to pay alimony to Ms. Stanley. (Doc. #1). Plaintiff claims that Defendants’ pursuit of such litigation violates his rights because the Missouri state court lacks jurisdiction over matters related to Plaintiff’s divorce. Id.

Because Judge Grate is entitled to judicial immunity from suit, his Motion to Dismiss all counts against him is GRANTED. Further, Plaintiff fails to state a claim for declaratory judgment against Wight

in Count I because Plaintiff does not indicate what relief he seeks by way of declaratory judgment. Plaintiff also fails to state a claim against Wight in Count IV for intentional infliction of emotional distress (“IIED”) because Plaintiff sets forth no facts to support a finding that Wight engaged in extreme and outrageous conduct or that Wight’s actions were intended only to cause Plaintiff emotional harm. Finally, Plaintiff fails to state claims against Wight in Counts II and III under the First, Fifth, or Fourteenth Amendments because Wight, as a private attorney, is not subject to liability for alleged violations of individual constitutional rights. Accordingly, Wight’s Motion to Dismiss all counts against him is GRANTED.

## **DISCUSSION**

### **I. Facts**

Plaintiff was divorced from Ms. Stanley in December 2000 in the Circuit Court of Jackson County, Missouri. (Doc. #1). Plaintiff filed a “removal complaint” with this Court on March 24, 2005, purporting to remove civil contempt proceedings filed against him by Ms. Stanley for Plaintiff’s alleged failure to pay court-ordered alimony in accordance with the parties’ divorce decree. (Case No. 05-cv-00281-GAF). Plaintiff’s “removal complaint” claimed that the Missouri Dissolution of Marriage Maintenance Provisions violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution because they infringed upon his “personal decisions relating to marriage” and his “fundamental right to privacy to dissolve his marriage.” *Id.* at Doc. #1. Plaintiff further alleged that the Missouri alimony statute violated the Thirteenth Amendment of the U.S. Constitution by “den[ying] him his property rights and permanently enslav[ing] him to labor for the benefit of his former spouse.” *Id.*

On October 25, 2005, the Court dismissed Plaintiff’s “removal complaint,” finding that removal of Plaintiff’s counterclaims was improper because this Court did not have original subject matter jurisdiction

over Ms. Stanley's actions for civil contempt. Id. at Doc. #12. The Court further found that it lacked jurisdiction pursuant to the domestic relations exception to federal jurisdiction because Plaintiff's claims closely related to his marriage dissolution and, therefore, jurisdiction was proper only in Missouri state court. Id. This Court dismissed Plaintiff's "removal complaint" for lack of subject matter jurisdiction.

On November 15, 2005, following this Court's dismissal of Plaintiff's "removal complaint," Judge Grate issued a Notice of Hearing for December 9, 2005. (Doc. #1). Plaintiff informed the state court that it was without jurisdiction to proceed in the case. Id. Plaintiff claims that the Missouri state court lacked jurisdiction to pursue litigation against him to enforce its judgment because this Court dismissed Plaintiff's claims but did not explicitly state in its Order that the case was therefore remanded to the Missouri state court.<sup>1</sup> (Doc. #15-1, #21). Following this Court's October 25, 2005 Order, the Missouri state court has pursued litigation against Plaintiff relating to his alleged failure to pay court-ordered alimony, which Plaintiff contends constitutes intentional infliction of emotional distress and violates his rights under the First, Fifth, and Fourteenth Amendments.

Judge Grate argues that Plaintiff's claims against him should be dismissed because he is entitled to judicial immunity. (Doc. #13). Wight argues that Plaintiff's claim in Count I, entitled "Declaratory Relief,"

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<sup>1</sup>This Court clearly divested itself of jurisdiction in its October 25, 2005 Order and made abundantly clear to Plaintiff that jurisdiction was proper in Missouri state court. Plaintiff did not appeal the Order. However, due to an inadvertent error, the Order neglected to explicitly state that the case was thereby remanded and to instruct the clerk's office to mail a certified copy of the order of remand to the clerk of the state court. This Court does not believe that such an order is necessary, given the record herein. However, to avoid any potential for dispute on this question from this point forward, the clerk's office is hereby instructed to mail a certified copy of Doc. #12 in Case No. 05-cv-00281-GAF to the clerk of the state court together with the explicit order of remand which has been entered in said case.

should be dismissed because Count I does not actually seek declaratory relief, or any relief at all. (Doc. #18). Wight further argues that Plaintiff's Complaint fails to allege facts under Count IV which support his claim for IIED. Id. Lastly, Wight argues that he is not subject to liability under Counts II and III for alleged violations of Plaintiff's constitutional rights because he is a private attorney, not a state actor. Id.

## II. Standard

A motion to dismiss is the proper method to test the legal sufficiency of the complaint. Schuer v. Rhodes, 416 U.S. 232, 236 (1974). Rule 12(b)(6) provides that a cause of action may be dismissed for the failure to state a claim upon which relief may be granted. When considering a motion to dismiss, the court treats all well pled facts as true and grants all reasonable inferences therefrom in favor of the non-moving party. Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). However, the court is not required to accept the pleader's own legal conclusions. Id. A motion to dismiss should only be granted if it appears from the face of the complaint that the plaintiff cannot prove any set of facts to support his claims for relief. Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986).

## III. Analysis

### *A. Judicial Immunity*

Judge Grate contends that judicial immunity bars Plaintiff's claims against him. (Doc. #13). Plaintiff argues that Judge Grate is not immune from suit because Judge Grate lacked jurisdiction to enforce the state court judgment requiring Plaintiff to pay alimony. (Doc. #15-1). It is essential to the administration of justice that a state court judge exercising his authority "shall be free to act upon his own convictions, without apprehension of personal consequences to himself." Mireless v. Waco, 502 U.S. 9, 10 (1991). Accordingly, a judge may be subject to suit only for non-judicial acts or for actions taken in the complete

absence of all jurisdiction. Duty v. City of Springdale, Arkansas, 42 F.3d 460, 462 (8<sup>th</sup> Cir. 1994). The scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge, because some of the most difficult questions a judge determines are those related to his jurisdiction. Id. quoting Stump v. Sparkman, 435 U.S. 349, 356 (1978). An act in excess of jurisdiction will not deprive the judge of immunity. Id. Acts done in excess of jurisdiction are far different from acts done in the complete absence of jurisdiction. Id. A "judge acts in excess of jurisdiction if the act complained of is within his general power of jurisdiction but is not authorized because of certain circumstances." Id. quoting Billingsley v. Kyser, 691 F.2d 388, 389 (8<sup>th</sup> Cir. 1982) (per curiam). In contrast, "there is a clear absence of jurisdiction when a court of limited jurisdiction attempts to adjudicate a case outside of its jurisdiction, such as when a probate court conducts a criminal trial." Id. citing Mann v. Conlin, 22 F.3d 100, 104 (6<sup>th</sup> Cir. 1994), cert. denied, 513 U.S. 870 (1994).

In this case, Plaintiff argues that Judge Grate lacked jurisdiction to enforce his own judgment requiring Plaintiff to pay alimony because this Court did not explicitly remand the case to state court in its October 25, 2005 Order. However, as discussed at length in this Court's October 25, 2005 Order, domestic relations proceedings are subject to the exclusive jurisdiction of the state court. The Order made clear that jurisdiction was proper in Missouri state court, and that no basis whatsoever existed for federal court jurisdiction. Plaintiff's filing of frivolous counterclaims in federal court clearly cannot be said to deprive Judge Grate "of all jurisdiction" to enforce his own judgment. Further, an inadvertent clerical error made by this Court does not divest Judge Grate of judicial immunity and subject him to suit for alleged violations of Plaintiff's civil rights, particularly in light of this Court's clear finding in its October 25, 2005 Order that jurisdiction was proper in state court. Accordingly, judicial immunity protects Judge Grate from

suit and his Motion to Dismiss all counts against him is GRANTED.

*B. Declaratory Judgment*

Count I of Plaintiff's Complaint is entitled "Declaratory Relief." (Doc. #1). Wight argues that this Count should be dismissed because it consists entirely of abstract invocations of the First, Fifth, and Fourteenth Amendments but does not indicate what relief Plaintiff seeks by way of a declaratory judgment. (Doc. #18). "The same pleading standards that apply in other civil actions govern proceedings under the [Declaratory Judgment Act]." Miller v. Pacific Shore Funding, 224 F.Supp.2d 977, 993 (D. Md. 2002) *citing* Marchese v. Shearson Hayden Stone, Inc., 644 F.Supp. 433, 439 (D.Md. 1992); 5 Wright & Miller, Federal Practice and Procedure: Civil 3d § 1238 (3d ed. 2004). Thus, in seeking a declaratory judgment, a plaintiff must state a claim for which relief may be granted. Marchese, 644 F.Supp. at 993 *citing* Fed. R. Civ. P. 8(a). The failure to indicate what the plaintiff seeks by way of declaratory judgment is itself a failure to state a claim. Conkey v. Reno, 885 F.Supp. 1389, 1392 (D. Nev. 1995) (citations omitted).

In this case, Count I simply incorporates previously pleaded allegations and adds: "The Plaintiff is entitled to the protections of the First, Fifth, and Fourteenth Amendments to the United States Constitution liberty interests, particularly the right of association, right to travel, right to due process and equal protection." Count I does not pray for declaratory judgment and does not make factual allegations sufficient to support a claim for declaratory judgment. Instead, Count I consists only of abstract invocations of the First, Fifth, and Fourteenth Amendments. Because Plaintiff fails set forth factual allegations in support of his claim for declaratory judgment and fails to indicate what he seeks by way of a declaratory judgment, Wight's Motion to Dismiss Count I is GRANTED.

*C. IIED*

Wight argues that Plaintiff's claim against him for IIED fails to set forth facts which would support a finding that Wight engaged in extreme and outrageous conduct or that the sole purpose of Wight's conduct was to cause Plaintiff emotional distress. To state a claim for IIED under Missouri law, "a plaintiff must plead extreme and outrageous conduct by a defendant who recklessly or intentionally causes severe emotional distress that results in bodily harm." Sansonetti v. City of St. Joseph, 976 S.W.2d 572, 579 (Mo. App. W.D. 1998) *citing* Gibson v. Brewer, 952 S.W.2d 239, 249 (Mo. banc 1997). Extreme and outrageous conduct is difficult to define; however, "it is clear that the defendant's conduct must be more than simply malicious and intentional." Viehweg v. Vic Tanny Int'l of Mo., Inc., 732 S.W.2d 212, 213 (Mo. Ct. App. 1987). "Mere insults, indignities, inconsiderations or petty oppressions do not rise to the level of outrageous conduct." Wooten v. Pleasant Hope R-VI School Dist., 139 F.Supp.2d 835, 843 (W.D. Mo. 2000) *quoting* Evans v. Six Flags, 613 F.Supp. 219, 220 (E.D. Mo. 1985). Indeed, Missouri courts have recognized that, to meet the definition of extreme and outrageous conduct, the defendant's conduct must "go beyond all possible bounds of decency, [so as to] be regarded as atrocious and utterly intolerable in a civilized community." Viehweg, 732 S.W.2d at 213. Under Missouri law, it is for the Court to determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Wilt v. Kansas City Area Transp. Authority, 629 S.W.2d 669, 671 (Mo. App. W.D. 1982). The Court should grant a motion to dismiss if it is not reasonably debatable that the conduct described in the complaint is not shocking or atrocious. *See* Wooten, 139 F.Supp.2d at 843.

Here, Plaintiff claims that "[t]he conduct of all Defendants was odious, perverse, and outrageous, to relish in the delight of repeated ex parte ultra vires conduct to deprive the Plaintiff of his freedom and to

utterly disregard and flaunt voluminous federal law denying them the authority to which they exercised self aggrandizement of jurisdiction.” (Doc. #1). Though Plaintiff’s allegations consist of many colorful adjectives and phrases, nowhere does Plaintiff allege any actual facts which support a finding that Wight’s conduct was extreme and outrageous. When translated into plain English, Plaintiff’s Complaint appears to allege only that, in the course of representing Ms. Stanley, Wight appeared and/or filed motions before Judge Grate, and that Judge Grate made rulings favorable to Wight’s client and adverse to Plaintiff, allegedly without jurisdiction to do so. These allegations and any inferences that may be drawn from them do not support the conclusion that Wight’s alleged conduct may reasonably be regarded as extreme and outrageous.

Further, an essential element of the tort of intentional infliction of emotional distress is that “the conduct must be intended **only** to cause extreme emotional distress to the victim.” Thomas v. Special Olympics Missouri, Inc., 31 S.W.3d 442, 446 (Mo. App. W.D. 2000) *quoting* K.G. v. R.T.R., 918 S.W.2d 795, 799 (Mo. banc 1996) (emphasis in original). Accordingly, “one must allege not just that the actor knew that emotional distress would result from his or her acts, but that [inflicting emotional distress] was the **sole** motivation for the actor’s conduct.” *Id.* at 448 (emphasis in original). Plaintiff’s Complaint contains no such allegations or inferences. Because Plaintiff fails to set forth facts which would support a finding that Wight engaged in extreme and outrageous conduct or that Wight’s actions were intended solely to cause emotional harm, Wight’s Motion to Dismiss Plaintiff’s IIED claim against him is GRANTED.

*D. First, Fifth, and Fourteenth Amendments*

Count II is entitled “Deprivation of Constitutional Rights and Privileges,” and Count III is entitled “Conspiracy to Deprive Persons of Equal Protection of the Laws.” (Doc. #1). Both Counts appear to

allege violations of the First, Fifth, and Fourteenth Amendments. Wight argues that lawyers acting in the representation of their clients cannot be held liable for alleged constitutional violations because they do not act under color of state law. Indeed, it is well settled that the conduct of legal counsel generally does not constitute action under color of law.<sup>2</sup> DuBose v. Kelly, 187 F.3d 999, 1003 (8<sup>th</sup> Cir. 1999); *see also* Polk County v. Dodson, 454 U.S. 312, 325 (1981) (public defender appointed by state court to represent an indigent defendant does not act under color of state law when performing lawyer's traditional functions); Chambers v. Kaplan, 648 F.2d 1193, 1194 (8<sup>th</sup> Cir. 1981) (private attorney representing inmate in a lawsuit against the state department of corrections did not act under color of state law).

Only in extraordinary circumstances where a private attorney acts as a “willful participant in joint action with the State or its agents” can § 1983 liability be imposed on a private attorney. DuBose, 187 F.3d at 1003. “The key inquiry is whether the private party was a willful participant in [a] corrupt conspiracy.” Id. To withstand a motion to dismiss, allegations of conspiracy “must be pled with sufficient specificity and factual support to suggest a ‘meeting of the minds.’” Manis v. Sterling, 862 F.2d 679, 681 (8<sup>th</sup> Cir. 1988) *quoting* Smith v. Bacon, 699 F.2d 434, 436 (8<sup>th</sup> Cir. 1983). To state a claim for a § 1983 conspiracy, “a plaintiff must plead in detail, through reference to material facts, the relationship or nature of the conspiracy between the state actor(s) and the private persons.” Harvey v. Harvey, 949 F.2d 1127, 1133 (11<sup>th</sup> Cir. 1992) *citing* Fullman v. Graddick, 739 F.2d 553, 556-57 (11<sup>th</sup> Cir. 1984). Conclusory, vague and general allegations of conspiracy are not sufficient to state a claim upon which relief may be granted. Fullman, 739 F.2d at 557.

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<sup>2</sup>Though Plaintiff does not explicitly state in his Complaint, the Court treats Counts II and III as being brought pursuant to 42 U.S.C. § 1983 (“§ 1983”).

The DuBose case presents a rare example of the circumstances under which a private attorney may be considered to have acted under color of law by acting as a willful participant in a conspiracy with state actors. In DuBose, a plaintiff had prosecuted a malpractice case against his attorney in an earlier matter. Id. at 1000. After the plaintiff lost the suit against his attorney, the plaintiff filed an action under § 1983, alleging that his attorney, his attorney's attorneys, and the state trial judge who heard the suit had conspired to deprive him of his right to due process. Id. The plaintiff alleged that he had overheard his attorney and his attorney's attorneys, through court chamber doors, conspiring with the judge to prevent the plaintiff's attorney from being held liable in the malpractice suit the plaintiff had filed. Id. at 1001. The plaintiff alleged that, after the parties went over the pros and cons involved, the judge stated to the attorneys that the plaintiff's attorney could "enjoy his retirement." Id.

In the instant case, Plaintiff's factual allegations imply, at most, that Wight appeared before Judge Grate in the course of Wight's representation of Ms. Stanley, and that Judge Grate made rulings adverse to Plaintiff. The fact that a court makes a ruling favorable to one side and adverse to the other in a contested proceeding does not imply a "corrupt conspiracy" which transforms a private attorney into a state actor under § 1983. Though Plaintiff concludes in his Complaint that Judge Grate, Wight, and Ms. Stanley conspired to deprive him of his civil rights, Plaintiff fails to put forth any material facts which would suggest that there was a "meeting of the minds" between Wight and either Judge Grate or Ms. Stanley. Because conduct of private legal counsel generally does not constitute action under color of law and because Plaintiff sets forth no facts which would support an inference that Wight engaged in a conspiracy with state actors, Wight's Motion to Dismiss Counts II and III is GRANTED.

### **CONCLUSION**

Because Judge Grate did not act in the absence of jurisdiction in pursuing litigation to enforce the Missouri state court's judgment against Plaintiff, Judge Grate is entitled to judicial immunity from suit. Accordingly, Judge Grate's Motion to Dismiss all counts against him is GRANTED. Plaintiff fails to state a claim for declaratory judgment against Wight in Count I because Plaintiff does not indicate what relief he seeks by way of declaratory judgment. Plaintiff also fails to state a claim against Wight for IIED in Count IV because Plaintiff sets forth no facts to support a finding that Wight engaged in extreme and outrageous conduct or that Wight's actions were intended only to cause Plaintiff emotional harm. Finally, Plaintiff fails to state claims against Wight in Counts II and III under the First, Fifth, or Fourteenth Amendments because Wight did not act under color of law and is therefore not subject to liability for alleged violations of Plaintiff's constitutional rights. Accordingly, Wight's Motion to Dismiss all counts against him is GRANTED.

**IT IS SO ORDERED.**

/s/ Gary A. Fenner  
GARY A. FENNER, JUDGE  
United States District Court

DATED: January 9, 2007