

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 07-2069

In Re:

Harold R. Stanley

Petition from U.S. District Court for the Western District of Missouri - Kansas City
Division
(4:05-cv-00281-GAF)

PETITION FOR WRIT OF MANDAMUS

Pursuant to 28 U.S.C. § 1651 and Rule 21 of the Federal Rules of Appellate Procedure, Harold R. Stanley, *pro se* with assistance of counsel, respectfully petitions this court for a writ of mandamus directing the Honorable Gary A. Fenner, Judge of the United States District Court Western Missouri, Western (Kansas City) Division, to vacate his ultra vires, out of term order of remand entered without cite of permissive authority and without jurisdiction fifteen (15) months after he rendered a final judgment of dismissal in Case No. 4-05-cv-00281-GAF. (Exhibit A. Order at issue)

The facts giving rise to this petition are quickly summarized. There are two distinct district court actions at issue in this writ. The Honorable Gary A. Fenner was presiding district court judge in both.

The Honorable Gary A. Fenner rendered a non final order of dismissal January 9, 2007 in Case No: 06-0752-cv-W-GAF, a 42 U.S.C. § 1983 action with the Petitioner as Plaintiff, his former wife, her attorney and a state court judge as Defendant. The action alleged deprivation of civil rights because of an ultra vires state court proceeding after removal of a state court action to the district court and before remand that resulted in a civil arrest warrant against the Petitioner here (Plaintiff in the district court)

Concomitant with issuing his dismissal of the 42 U.S.C. § 1983 action the Honorable Gary Fenner decided he wished to substantively alter the judgment between the same parties in a prior action (Case No. 4-05-cv-00281-GAF) in which he had rendered a final judgment of dismissal October 25, 2005. On January 9, 2007 Judge Fenner, sua sponte, rendered an order of remand to state court in Case No. 4-05-cv-00281-GAF without citing any authority to do so and without jurisdiction. The order of remand completely reversed the rights and liabilities of the parties adjudicated by the final judgment of dismissal rendered fifteen (15) months earlier in Case No. 4-05-cv-00281-GAF.

STATEMENT

A. Background

The Background of the case in which this petition for mandamus is filed is set out in Stanley v. Stanley, Case NO. 4-05-cv-00281-GAF, judgment of dismissal dated October 25, 2005 (Exhibit B.).

On March 24, 2005, Petitioner, Harold Stanley, properly effected removal of his state court alimony arrearages contempt proceeding when the proceeding created federal questions as to the constitutionality of the Missouri alimony statutes.^{1,2} The former wife, erroneously, moved for dismissal of the action in the district court. Judge Fenner rendered a judgment of dismissal of all claims on October 25, 2005. (Exhibit B.)

The order was not appealed because the order was to the benefit of the former husband (Petitioner here). Because of the former wife's attorney's motion for dismissal—instead of a motion for remand--and the rendered judgment of dismissal, instead of an order of remand, Judge Fenner effectively reposed the state court action. All liabilities of the former husband were extinguished by the dismissal.

¹ Removal was properly effected pursuant to 28 U.S.C. § 1446 (d)

² Petitioner's marriage was dissolved with a final order of dissolution December 22, 2000. He was ordered to pay permanent alimony \$1,750 a month till he or his wife died.

No further motions have ever been entered after the judgment of dismissal of Case No. 4-05-cv-00281-GAF.

On October 31, 2005, after removal and before remand (and even before judgment of dismissal was final), the former wife through her attorney initiated and participated in ex parte proceedings in state court to obtain a contempt order and incarceration warrant against the former husband. (Exhibit C. State Court Order of Contempt and Commitment). This ultra vires conduct was contrary to 28 U.S.C § 1446 (d) (“... and the State court shall proceed no further unless and until the case is remanded.

On September 6, 2006, the Petitioner filed a 42 U.S.C. § 1983 action (Case No. 06-0752-cv-W-GAF) against the former wife, her attorney and the state court judge for deprivation of his civil rights under color of state law. The alleged conduct at issue was the ultra vires state court proceedings before remand that resulted in an arrest warrant for alleged alimony arrearages. Two of the defendants moved for dismissal from the case and on January 9, 2007 Judge Fenner rendered an order of dismissal.³ (Exhibit D. Judgment Order of Dismissal of the Removed Action)

³ That order was appealed to this court. (Case Number 07-1304) This court ruled the order was a non final order not reviewable under 28 U.S.C. § 1291. (Exhibit F.)

In reviewing the filings and rendering his order it appears that it dawned on Judge Fenner what were the consequences of his dismissal in the prior removed action. Therefore in his order dismissing the 42 U.S.C. § 1983 action he decided, without citing authority to do so, to substantively alter his fifteen month old judgment of dismissal by entering the order of remand at issue in this writ.

The former husband untimely appealed the rendered order of remand at issue and this court denied appeal.⁴

B. Writ of Mandamus Timely Filed

This Petition was originally filed as part of the Motion for Reconsideration within the fourteen day grace period permitted by this court when it dismissed, as untimely filed, the appeal in the 42 U.S.C. § 1983 action.

The clerk of this circuit court did not permit this Writ to be part of the Motion for Reconsideration. It is therefore filed as a new filing before this court.

This writ is proper. The Petitioner agrees his appeal was untimely taken but moved this court to consider this Writ within the same filed appeal in the interest of judicial economy of the court clerk's filing and case assignments. The clerk of court, however, demanded a separate filing fee before accepting this writ.

⁴ This Court's Order of Dismissal in Case No. 07-2069 rendered May 18, 2007. (Exhibit E.)

C. Nature of the Subject Order

The January 9, 2007 order at issue is a post judgment order entered sua sponte without cited authority and without jurisdiction --fifteenth (15) months after final judgment--that substantively alters the original judgment dramatically reversing the post judgment rights and liabilities of the parties in the action.

The subject order is a post judgment order entered sua sponte without jurisdiction. The nature of the order, i.e. order of remand, is inconsequential. Because the order is entered without jurisdiction 28 U.S.C. §1447 is not a consideration. The issue is whether the district court can sua sponte and *untimely* enter a post judgment order that substantively alters the original final judgment. The nature of the substantively altering order is immaterial.

REASONS WHY THE PETITION SHOULD BE GRANTED

“That concern is with orders that have irrevocable consequences. The orthodox, and as it seems to us the adequate, routes for obtaining immediate appellate review of orders that cause irreparable harm are mandamus (see 28 U.S.C. sec. 1651; Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 383-85 (1987) (concurring opinion)” Chief Judge Posner in Bogard v. Wright, 159 F.3d 1060, 1063 (7th Cir. 1998)

The subject order was entered sua sponte when the district court, while presiding over a different action realized it wished to change the outcome in the former dismissed removed action. When the district court decided it wanted to

change the outcome in Case No. 4-05-cv-00281-GAF fifteen (15) months later it did so even though it lacked jurisdiction to do so. U.S. v. Mayer, 235 U.S. 55, 67 (1914); U.S. v. Benz, 282 U.S. 304 (1931)

A post judgment substantive judgment alteration can be entered sua sponte but there is a time limit on such conduct within which the district court must act.

U.S. v. Mayer, 235 U.S. 55, 67 (1914),

“In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term.”

The subject order was a sua sponte post judgment order to substantially alter and realign the rights of the parties entered beyond any term of the court---fifteen (15) months later.

There were no post judgment motions, i.e. Fed R. Civ. Proc. Rule 59 or Rule 60 motions to trigger the court’s response.

The district court cited no authority in either case before it to indicate that it had jurisdiction to render the order at issue.

The district court order was a substantive, not a clerical, alteration of its final order. It drastically realigns the rights and liabilities of all the parties.

The Petitioner has relied on the finality of the final judgment of dismissal of October 25, 2005.

Finality of proceedings is a cornerstone of the judicial process.

The Petitioner should not be punished for the mistake of opposing counsel to move for dismissal instead of remand. Nor should he be punished fifteen months later by the district court for its failure to recognize *its* error... an error generated at the instigation of the former wife's counsel. The former wife's counsel never filed for reconsideration or filed a Rule 59 or Rule 60 motion, or an appeal...all avenues available to him to correct the error that he created.

The order of remand was an ultra vires order. Notice of the order has been sent to the state court and the state court is poised to re-exert its jurisdiction to the detriment of the Petitioner.

Conclusion

It would be contrary to existing law, and a manifest injustice if this court did not grant this writ. A sua sponte substantive alteration to a final court order entered fifteen (15) months after final judgment without cited authority and entered ultra vires cries to be vacated.

Prayer for Relief

Wherefore the Appellant pray this court grant this writ of mandamus to the Honorable Gary A. Fenner to vacate his Order of Remand of January 9, 2007 rendered in Case No. 4-05-cv-00281-GAF, fifteen (15) months after he entered a judgment of dismissal.

Respectfully Submitted,

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June 13, 2007

Index of Appendix Exhibits

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| A. | Order at issue, Postjudgment Order of Remand, <u>Stanley v. Stanley</u> , Case No. 4-05-cv-00281-GAF, January 9, 2007 | 1 page |
| B. | Judgment of Dismissal <u>Stanley v. Stanley</u> , Case No. 4-05-cv-00281-GAF, October 25, 2005 | 6 pages |
| C. | State Court ultra vires order of incarceration entered December 9, 2005 after removal was effected and before remand | 4 pages |
| D. | Order of Dismissal, <u>Stanley v. Stanley, Grate, et al.</u> , Case No. 06-0752-cv-W-GAF, January 9, 2007 | 11 pages |
| E. | Order This Court Dismissing Appeal <u>Stanley v Stanley, et al.</u> , Case No. 07-2069, May 18, 2007 | 1 page |
| F. | Order This Court Dismissing Appeal, <u>Stanley v. Grate, et al.</u> , Case No. 07-1304, February 27, 2007 | 1 page |

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was sent return receipt requested via first-class U.S. Mail, postage pre-paid, this 13th Day of June, 2007 to

The Honorable Gary A. Fenner
U.S. District Court
Western District of Missouri
400 E. 9th Street
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