

**Eighth Circuit Case No. 07-3728**

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

**FILED**  
FEB 21 2008  
MICHAEL GANS  
CLERK OF COURT

Harold R. Stanley,

Plaintiff-Appellant, *pro se*

v.

The Honorable Jack Grate, et al.

Defendants-Appellees

Appeal from the United States District Court  
for the Western District of Missouri  
Honorable Gary A. Fenner, Presiding  
Case Number 4:06-cv-0752-GAF

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**Appellant's Reply Brief**

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**U.S. COURT OF APPEALS  
EIGHTH CIRCUIT**

## Table of Contents

Table of Contents .....	i
Table of Authorities.....	iii
Introduction .....	1
A. “Clear Absence of Jurisdiction” v “in Excess of Jurisdiction” .....	2
B. Attorney Wight and Mrs. Stanley Acted Under Color of State Law .....	4
C. Conspiracy Claim .....	5
D. Attorney Wight and Mrs. Stanley Conspired with Judge Grate .....	6
E. “Dismiss” Is Not the Same As “Effectively Remand”.....	6
F. Logical Fallacies .....	7
1. Reframing .....	8
2. Ad Hominem .....	8
3. Poisoning the Well .....	9
4. Personal Attack .....	9
5. Red Herring.....	10
6. Special Pleading.....	11
Conclusion.....	11
Prayer for Relief .....	12
Certificate of Service .....	13
Certificate of Compliance.....	14

**Table of Authorities**

**Cases**

*Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) ..... 5

*Borkowski v Abood*, 169 Ohio App.3d 31, 35 (2006) ..... 2

*Bradley v. Fisher*, 80 U.S. (13 Wall.)..... 4

*Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980)..... 5

*Duty v. City of Springdale*, 42 F.3d 460, 462 (8th Cir. 1994) ..... 4

*Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005)..... 11

*Fox v. Stames* (Dec. 8, 1989), 11th Dist. No. 88-L-13-192..... 3

*Howes v. Childers* (E.D.Ky. 1977)..... 3

*Kerr v. Lyford*, 171 F.3d 330,340 (5th Cir. 1999)..... 5

*Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983). ..... 3

*Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 941 (1982) ..... 5

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*Ramseyv. A.I.U. Ins. Co.* (June 18, 1985), 10th Dist. No. 84AP -317..... 3

*Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980)..... 4

*Shunk v. Shunk Mfg. Co.* (1945), 75 Ohio App. 253, 256 ..... 3

*State Ex Rel. Nixon v. Moore*, 108 S.W.3d 813,818 (Mo.App.W.D. 2003)..... 3

*State v Banks*, 215 S.W.3d 118, 122 (Mo.banc 2007)..... 10

*Turner v. Raynes*, 611 F.2d 92, 95 (5th Cir. 1980)..... 4

*Williams v. Fedor*, 69 F.Supp.2d 649,665-66 (M.D.Pa.) ..... 5

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**Statutes**

28 U.S.C. § 1446 (d)..... 2, 5, 6, 12

28 USC § 1446 (d)..... 1

42 U.S.C. § 1983 ..... 2, 5, 12

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<http://www.nizkor.org/features/fallacies/> ..... 8

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(1988) ..... 2

The framing of decisions and the psychology of choice, A Tversky and D  
Kahneman, *Science*, Vol 211, Issue 4481, 453-458..... 8

### **Introduction**

Judge Grate, Attorney Wight and Mrs. Stanley, despite their having had complete control and repeated opportunities to avert the claims raised in this action, wish this court to give them a pass on their conduct as did the district court.

The only apposite Appelles' answer argument alluded to, but not crisply articulated, is whether conduct by a state court judge alleged to have violated 28 USC § 1446 (d) is conduct that occurred in the "clear absence of all jurisdiction" (thus removing immunity) or whether it is merely conduct "in excess of jurisdiction" (thereby retaining immunity).

Appellees' answer briefs are important for what they do not say. They do not engage the core argument of this case, i.e. whether 28 USC § 1446 (d) and its case law were violated. Instead Judge Grate's and Mrs. Stanley's attorneys use a series of traditional logical fallacies to attempt to persuade. They try to reframe this civil rights action as a domestic relations case; they mix in non relevant prior state court proceedings; they try to taint the claims raised by Mr. Stanley by personal attacks on him with vituperative language (Mrs. Stanley's Brief, pages 5, 6, 9, 13) ; they argue the properness of the district court's decision in the prior removed action (i.e., Rooker-Feldman doctrine was properly applied); and they wish this court to affirmed the inter-changability of legal terms of art in a homogeneous melting fashion ( i.e "dismiss" means "effectively remand," Judge

Grate Brief page 3). These represent the traditional argumentative logical fallacies of circumstantial ad hominem, poisoning the well, personal attack, red herring and special pleading.

42 U.S.C. § 1983 was created to address the denial of civil rights of citizens by others including judges who used the machinery of state courts to effect their social policy. (Eric Foner, *Reconstruction, America's Unfinished Revolution: 1863-1877*, 228-80 (1988)). Subsequently, the United States Supreme Court extended broad immunity to judges-except when they act in a non judicial role or in the clear absence of jurisdiction, *Mireles v. Waco*, 502 U.S. 9, 9 (1991) (per curiam). 28 U.S.C. § 1446 (d), when properly *effected* removes *all* jurisdiction from a state court judge and renders immunity a nullity. Jurisdiction is returned to a state court judge *only* if and when the action is *remanded*.

**A. "Clear Absence of Jurisdiction" v "in Excess of Jurisdiction"**

This court must decide whether the application of 28 U.S.C. § 1446 (d) creates a "clear absence of jurisdiction" in a state court if the state court proceeds after proper removal is *effected* but before *remand*. An Ohio Appellate court addressed this precise question. Citing other caselaw it concluded state court conduct in violation of 28 U.S.C. § 1446 (d) is "in clear absence of jurisdiction." *Borkowski v Abood*, 169 Ohio App.3d 31, 35 (2006),

"16 '28 U.S.C. § 1446 (d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written

notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded.'

17 At the time appellant's removal petition was filed, there existed in addition to the federal statute, longstanding and consistent federal and Ohio caselaw which provided that as long as a defendant strictly complied with the federal procedural rule, including providing proper notice, the state court was immediately divested of jurisdiction. See, e.g., *Fox v. Stames* (Dec. 8, 1989), 11th Dist. No. 88-L-13-192; *Ramseyv. A.I.U. Ins. Co.* (June 18, 1985), 10th Dist. No. 84AP -317; *Shunk v. Shunk Mfg. Co.* (1945), 75 Ohio App. 253, 256 (interpreting former 28 U.S.C.S. §72); *Anderson v. United Realty Co.* (1908), 79 Ohio St. 23, 43; *Howes v. Childers* (E.D.Ky. 1977), 426 F.Supp. 358; *South Carolina v. Moore* (C.A.4, 1970), 447 F.2d 1067, 1073.

18 Here, there was no evidence or allegation that appellant failed to comply with the federal rule. Thus, at the time appellant filed his removal petition, the applicable law expressly deprived appellee of jurisdiction over the eviction action. In light of this conclusion, we are constrained to find that appellee acted in the clear absence of jurisdiction, rather than in excess of his jurisdiction, and, therefore, lost judicial immunity in this case. See *Rankin, supra.*"

Through the entire proceedings the Appellees have never challenged that removal was not properly effected. In fact, it was properly effected with supporting documents in the complaint.

The Missouri Court of Appeals has also ruled that its state courts lack jurisdiction until remand. *State Ex Rel. Nixon v. Moore*, 108 S.W.3d 813,818 (Mo.App.W.D. 2003)

So long as a judge acts with "at least a semblance of subject matter jurisdiction," he is immune. *Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983).

In this case, 28 U.S.C. §1446 (d) removed even “a semblance of...jurisdiction” thereby making immunity inapplicable.

Judge Grate’s reliance on *Duty v. City of Springdale*, 42 F.3d 460, 462 (8th Cir. 1994) is misplaced in light of well established law that 28 U.S.C. 1446 (d) creates a clear absence of jurisdiction of a state court after proper removal is effected, as here.

Judicial immunity is lost when a valid statute deprives jurisdiction and the Judge acts. *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980),

“[23] But when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 351 (‘when the want of jurisdiction is known to the judge, no excuse is permissible’); *Turner v. Raynes*, 611 F.2d 92, 95 (5th Cir. 1980) (*Stump* is consistent with the view that ‘a clearly inordinate exercise of unconferrred jurisdiction by a judge — one so crass as to establish that he embarked on it either knowingly or recklessly — subjects him to personal liability’).[fn14]

[24] If, as alleged, Judge Zeller knew the jurisdictional allegations to be fraudulent, or if valid Kansas statutes expressly foreclosed personal jurisdiction over a proposed ward in *ex parte* proceedings for temporary guardianship, then the judge acted in the clear and complete absence of personal jurisdiction. If his acts were part of a conspiracy, he is properly held responsible for the consequences.” [Emphasis added]

#### **B. Attorney Wight and Mrs. Stanley Acted Under Color of State Law**

Mr. Stanley relies on his Initial Brief caselaw and arguments that because Attorney Wight and Mrs. Stanley acted together with, and allegedly conspired

with, Judge Grate to deny Mr. Stanley his liberty interest and freedom they acted under color of state law and are liable for suit and damages under 42 U.S.C. § 1983. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 941 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Wyatt v. Cole*, 504 U.S. 158 (1992).

### **C. Conspiracy Claim**

Mrs. Stanley's brief does not argue the law as it relates to conspiracy under 42 U.S.C. § 1983. Under § 1983 law, for a conspiracy claim, there must be evidence of (1) an actual violation of a right protected under § 1983 and (2) actions taken in concert by defendants with the specific intent to violate that right.

*Williams v. Fedor*, 69 F.Supp.2d 649,665-66 (M.D.Pa.), *afd*, 211 F.3d 1263 (3d Cir. 2000) (citing *Kerr v. Lyford*, 171 F.3d 330,340 (5th Cir. 1999)). See also *Parkway Garage, Inc. v. City of Phila.*, 5 F.3d 685,700 (3d Cir. 1993) (plaintiff must show that two or more conspirators reached an agreement to deprive him or her of a constitutional right under color of law); *Kelley v. Myler*, 149 F.3d 641,648-49 (7th Cir. 1998) (an agreement or an understanding to deprive the plaintiff of constitutional rights must exist).

Judge Grate, Attorney Wight and Mrs. Stanley were expected to know 28 U.S.C. § 1446 (d) and its implications. Even if they did not know it, they were advised by Mr. Stanley's counsel of the lack of jurisdiction should they proceed

before the case was remanded to state court. Mr. Stanley never waived the jurisdictional issue. He never participated in the ultra vires state court proceeding. Judge Grate, Attorney Wight, and Mrs. Stanley, together, held ultra vires proceedings with the full intent of depriving Mr. Stanley of his civil rights. This conduct is well pled in the complaint.

If nothing else, Mr. Stanley is entitled to the protections of well settled 28 U.S.C. § 1446 (d) which all the Appellees knowingly violated.

**D. Attorney Wight and Mrs. Stanley Conspired with Judge Grate**

Mr. Stanley alleges that Attorney Wight and Mrs. Stanley conspired with Judge Grate...not with each other. Mrs. Stanley's argument that she and her attorney agent de facto cannot conspire with one another is misplaced and inapposite.

**E. "Dismiss" Is Not the Same As "Effectively Remand"**

Judgments that dismiss are different that judgments that remand. "Dismiss" and "Remand" are terms of art with separate meaning and consequences. It is inconceivable a federal judge can confuse the two. The Judge prepares the order then reviews and signs it. He had two opportunities to correct a clerical error. Federal Rules of Civil Procedure provide an opportunity for counsel to call to the attention of the court a clerical error and request it be altered. No one did that.

Mr. Dodig, Mrs. Stanley's federal attorney in the removed action, requested the district court to "dismiss." He did not request it to remand the removed action. When the court granted the "dismissal" the action and all its claims reposed unless appealed. There was no appeal. Attorney Dodig and Judge Grate cannot now ask this court to correct their error when they had ample opportunity to do so, and when now deadlines to do so have long since passed. They must live with the error they requested and created, otherwise Mr. Stanley is prejudiced.

Should this court not support Mr. Stanley's argument on this point, then this ruling will be used in other proceedings as support for the proposition that legal terms of art no longer matter and are interchangeable. For the integrity of the judiciary and the validity of future court orders this court must maintain the terms of art and their consequences.

#### **F. Logical Fallacies<sup>1</sup>**

Judge Grate's and Mrs. Stanley's briefs fail and cannot not be persuasive because they not only are silent on the pertinent issue, but because they are logically flawed. Mrs. Stanley's brief, predominantly, and Judge Grate's to a lesser extent, seek to persuade under illusory logic. Mr. Stanley here does not wish to be, nor appear to be, pedantic but briefly recites the logical flaws of the Appellants' briefs to request this court not be persuaded by the arguments.

## 1. Reframing<sup>2</sup>

Both Appellee briefs seek to reframe this civil rights action as a part of a domestic relations action. The prior domestic relations action is essentially immaterial and irrelevant to the conduct at issue. The reframing is merely to prejudice this court against Mr. Stanley, not to attack his claims or appellate issues.

## 2. Ad Hominem

An Ad Hominem is a general category of fallacies in which a claim or argument is rejected on the basis of some irrelevant fact about the author of or the person presenting the claim or argument. The reason why an Ad Hominem (of any kind) is a fallacy is that the character, circumstances, or actions of a person do not (in most cases) have a bearing on the truth or falsity of the claim being made (or the quality of the argument being made).

In the instant action, it is not the conduct or circumstances of Mr. Stanley that are at issue. Those whose conduct is at issue seek to persuade this court to rule for them by diminishing the value and character of Mr. Stanley and create the illusion he is not worthy of a favourable ruling. Reciting the state court *unproven allegations* of Mr. Stanley's failing to pay past spousal support (and nowhere is it

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<sup>1</sup> Dr. Michael C. Labossiere, Fallacy Tutorial Pro 3.0 and at <http://www.nizkor.org/features/fallacies/>. Text used with permission.

<sup>2</sup> The framing of decisions and the psychology of choice, A Tversky and D Kahneman, Science, Vol 211, Issue 4481, 453-458

noted whether he had the ability to pay) is meaningless and irrelevant to the claims at issue.

### **3. Poisoning the Well**

This sort of "reasoning" involves trying to discredit what a person might later claim by presenting unfavorable information (be it true or false) about the person. The person making such an attack is hoping that the unfavorable information will bias listeners against the person in question and hence that they will reject any claims he might make. However, merely presenting unfavorable information about a person (even if it is true) hardly counts as evidence against the claims he/she might make.

By painting Mr. Stanley in an unfavourable light the Appellees' briefs hope to persuade this court his claims are invalid.

### **4. Personal Attack**

A personal attack is committed when a person substitutes abusive remarks for evidence when attacking another person's claim or claims. This line of "reasoning" is fallacious because the attack is directed at the person making the claim and not the claim itself. The truth value of a claim is independent of the person making the claim. Mrs. Stanley's brief's allusion to Mr. Stanley's "inventive outhouse-lawyering" does not attack the validity of Mr. Stanley's claims, arguments, or caselaw, but is merely meant to prejudice.

One wonders whether the Missouri Supreme Court had in mind legal writing such as Mrs. Stanley's brief when it said, *State v Banks*, 215 S.W.3d 118, 122 (Mo.banc 2007),

“Judges, lawyers, and observers have for a number of years increasingly decried the incivility between lawyers themselves and towards parties and witnesses in judicial proceedings. The use of vituperative language, if not acceptable, has become too tolerated. In trial, counsel sometimes seem to believe that zealous advocacy permits, if not demands, that opponents be personally derided and that cases should be decided by appeals to prejudice, fear, envy, and bias, regardless of whether those emotions have anything to do with the facts and law of the case. Rhetoric is too often substituted for logic and reason.

Although every witness, party, opposing counsel, and other participant in a trial is a victim and injured by such conduct, the ultimate victim is our system of justice itself. Respect for the rule of law and our system of administering it depend upon public trust and confidence, whether it is in civil or criminal cases. Historically fundamental to that system has been the concept that individuals and corporations are tried (civilly or criminally) for their acts and not for simply who they are (or are alleged to be). It is tragic that the common observation of laymen is that it is just lawyers being lawyers.”

## **5. Red Herring**

Red Herring is a fallacy in which an irrelevant topic is presented in order to divert attention from the original issue. The basic idea is to "win" an argument by leading attention away from the argument and to another topic. Judge Grate's brief going into detail about the application of Rooker-Feldman in the separate removal action is a red herring. It has no application to the facts, parties, conduct or claims in this action. Mr. Stanley would also contend that Judge Grate's brief errs on this

point because in the removed action Mr. Stanley specifically pled he did not wish the district court to review, alter or amend a state court proceeding, i.e. the *only* time Rooker Feldman is to be applied. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005).

#### **6. Special Pleading**

Special Pleading is a fallacy in which a person applies standards, principles, rules, etc. to others while taking herself to be exempt, without providing adequate justification for the exemption. Judge Grate and Mrs. Stanley would attempt to persuade that Mr. Stanley should be held to one standard, but that they should be exempt from the same standard, i.e. following court proceedings, rules of procedure, rules of jurisdiction. Here, Mr. Stanley's compliance or non compliance with rules of procedure and jurisdiction are not at issue.

#### **Conclusion**

The relevant law to this action and appeal is unambiguous. When a state court acts after removal is effected and before remand it acts in the clear absence of all jurisdiction. The ultra vires conduct is more egregious when the law is brought to the court's attention and it proceeds regardless.

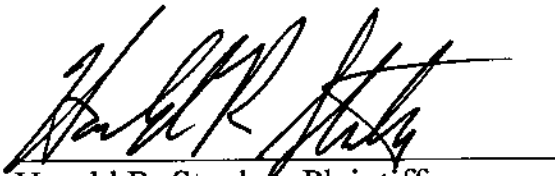
Non state actors are acting under color of state law and are liable for lawsuit and damages when they act with a state actor to deprive a citizen of his civil rights. This applies equally to attorneys and their clients.

28 U.S.C. § 1446 (d) creates a “clear absence of jurisdiction” after removal is properly effected and until remand. Here the state court conduct of Judge Grate, Attorney Wight and Mrs. Stanley was done knowingly, and wilfully and in collusion to deny Mr. Stanley his civil rights in the clear absence of jurisdiction.

**Prayer for Relief**

Wherefore this court should reverse the district court orders of dismissal, rule that Mr. Stanley has stated a cause of action under 42 U.S.C. § 1983 against all the defendants/appellees and instruct the district court to proceed with discovery and further proceedings.

Respectfully submitted,



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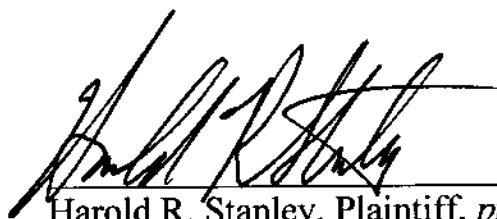
### Certificate of Service

The undersigned hereby certifies that a true and correct copy of this Appellant's Reply Brief, was mailed via first-class U.S. Mail, postage pre-paid, this 19th Day of February, 2008 to

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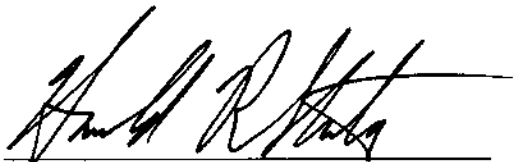


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### Certificate of Compliance

I certify, pursuant to Fed. R. App. P. 32 (a) (7), that this principal brief contains no more than 7,000 words and no more than fifteen (15) pages as indicated by the word-processing program used to prepare this brief, Microsoft Word, excluding any addendum containing decisions, statutes, rules, or regulations. This brief was prepared with 14-point Times New Roman font.

I also certify, pursuant to Local Rule 28A(d), that the CD-ROM tendered with this brief has been scanned and is virus-free.

A handwritten signature in black ink, appearing to read "Harold Stanley", written over a horizontal line.

Harold Stanley, *pro se*, with assistance of counsel