

No. 09-2198

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

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-

**Petition for Rehearing and Rehearing En Banc—
Appellant Harold Stanley**

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The panel of this court, without written opinion, affirmed the district court order dismissing a 42 U.S.C. § 1983 action, and defendants--a state court judge, opposing attorney and his client. All knowingly acted in the complete absence of all jurisdiction, to issue a civil contempt arrest warrant, still in effect, against Mr. Stanley (Plaintiff/Appellant). The defendants conduct took place in the state court after the proceeding had been properly removed to federal court but prior to “remand.”

The panel decision affirming the district court order is contrary to the following binding decisions of the Supreme Court of the United States and of this court; *Int’l Primate Prot. League v. Admin. of Tulane Ed. Fund*, 500 U.S. 72 (1991); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Dennis v Sparks*, 449 U.S. 24, (1980) ; *C.I.R. v. Sunnen*, 333 U.S. 591 (1948); *Filla v. Norfolk S. Ry. Co.*, 336 F.3d 806 (8th Cir. 2003); *Cont’l Cablevision of St. Paul, Inc. v. United States Postal Serv.*, 945 F.2d 1434 (8th Cir. 1991); *First Nat’l Bank of Salem v. Wright*, 775 F.2d 245 (8th Cir. 1985).

Second, the panel decision is contrary to, vitiates and renders impotent federal removal statutes 28 U.S.C. § 1446 (d) and 28 U.S.C. § 1447 (c) and their associated precedential caselaw.

Third, the panel decision rewrites law dictionaries to effect that “dismissal” is a synonym for “remand,” i.e. they are interchangeable words.

Lastly, the erroneous panel decision, without written opinion, favoring a judge and an attorney strains credulity of the judiciary having a capacity for self monitoring and accountability.

The core element for a properly functioning judiciary is public respect. In an age when the judiciary and its work are under unprecedented attack from the public a non opinion order from a federal appellate court reviewing a civil rights case in which a state court judge, acting in the clear absence of all jurisdiction, issued a civil contempt arrest warrant denying a citizen liberty and freedom will profoundly diminish respect for the judiciary.

FACTUAL BACKGROUND¹

The facts have never been disputed.

December 2000 Mr. and Mrs. Stanley were divorced in Jackson County Missouri. Lifetime, permanent alimony was levied against Mr. Stanley. Four years later, in 2004, Mrs. Stanley filed proceedings alleging alimony arrearages.

On March 24, 2005 Mr. Stanley properly effected removal of the state action to federal court when Mrs. Stanley voluntarily chose to enforce the alimony statute against Mr. Stanley. Mr. Stanley removed predicated on the federal question that the state court proceedings to enforce the alimony statute and the alimony statute itself violated his Thirteenth and Fourteenth Amendment rights. The proper effecting of removal was never disputed and relevant documents have been included in the Appendix.

¹ For a more complete factual statement with record citations, see Appellant's Initial Brief.

On March 25, 2005, in state court, counsel for Mr. Stanley informed Mr. Wight (attorney for Mrs. Stanley and defendant in this civil rights action), as well as state court Judge Jack Grate that the case had been removed to federal court.

In federal court Mrs. Stanley's new federal attorney moved for dismissal of the claims and action—not for remand.

On October 25, 2005 federal district court judge, the Honorable Gary A. Fenner, granted the motion and dismissed all claims. (C. # 14; Appendix # 3, Order of Dismissal, and Appendix # 4, Judgment in a Civil Case). Dismissal not remand was judgment entered.

On December 9, 2005, Judge Grate, Mr. Wight and Mrs. Stanley together had a hearing which Mr. Stanley did not attend as he had again noticed the defendants in writing the proceeding had been dismissed and never remanded. Nonetheless, the defendants, knowing they were acting in complete absence of all jurisdiction, entered a civil contempt arrest warrant against Mr. Stanley that is still active.

On September 6, 2006 Mr. Stanley filed this 42 U.S.C. § 1983 action against the defendants in the federal district court where the same district court judge as presided over the dismissed removed action again presided. The complaint is thorough, explicit and documents the elements and facts of all claims raised.

On January 9, 2007 the state judge defendant was dismissed deemed to have judicial immunity. Attorney Wight was dismissed deemed not to have acted under color of state law and for attorney privilege.

November 9, 2007 the district court judge dismissed Mrs. Stanley as she was deemed not to have acted under color of state law. Judgment was entered November 13, 2007. An appeal to this court by Mr. Stanley was dismissed as untimely as there was a counterclaim not disposed of by the district court. Mr. Stanley returned to district court and obtained a dismissal of the counterclaim against him. This appeal timely followed.

In addition, On January 9, 2007, simultaneous with his final partial order of dismissal in this action, the same district court judge in both this and the prior removed action, sua sponte *and* fifteen (15) months after he had dismissed the prior removed state action entered a separate new order of remand!

ARGUMENT

I. THE PANEL'S RULING CONFLICTS WITH BINDING PRECEDENT

A. Conflict with *Int'l Primate Prot. League v. Admin. of Tulane Ed. Fund*, 500 U.S. 72 (1991).

The district court order in the removed action that is at issue in this subsequent civil rights action is clear—it is a dismissal order...not a remand order. Dismissal orders are impermissible yet one was entered at the request of Mrs. Stanley through her attorney. Neither Mrs. Stanley's attorney, Attorney Wight nor Judge Jack Grate asked for rehearing or appealed this removed action order of dismissal. It stands. Mr. Stanley did not challenge the dismissal order because it was to his benefit. His divorce action now is reposed in the judicial system. The defendants and the district court judge have not treated the action as reposed.

Now the district court judge, in dismissing this civil rights action, wants to have all believe his order of dismissal in the removed action was an order of remand--even though fifteen months later he sua sponte entered a remand order in the removed action! The same district court judge in this action now also says his dismissal order in the removed case through an "inadvertent" error by the clerk was not sent to the state court. All of this begs credulity. It rewrites legal dictionaries and fundamental rules of court and caselaw. The panel has, without written opinion, affirmed the district court's gobbledygook. If accepted as such, the courts can only be places of chaos where parties can speculate on the meaning of judicial words. For this reason alone this full panel should accept this non written opinion for review.

In the district court order appealed here, the district court judge's recharacterized order of dismissal in the removed action is in fact contrary to the Supreme Court ruling in, *Int'l states...*"the literal words of § 1447(c) . . . give . . . no discretion to dismiss rather than remand an action" (quotation marks omitted; second omission in the original." Dismissal is not permitted, only remand. The district court order affirmed by this court's panel impermissibly rewrites and interprets a final judgment in another action.

B. Conflict with *C.I.R. v. Sunnen*, 333 U.S. 591 (1948).

The crux of this civil rights appealed action is the order entered in the removed action. This court's panel affirmation of the district court is an affirmation to completely alter the judgment in a totally different action, i.e. the removed action. The district courts' sua sponte revision of a final judgment in another action is shocking. The panel's affirmation of the conduct is breathtaking.

C.I.R. v. Sunnen, 333 U.S. 591 (1948) makes clear the effect of a dismissal order.

Here the district court order, and the panel order conflict with *Sunnen*, 333 U.S. 591, 597 (1948)

“The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See von Moschzisker, 'Res Judicata,' 38 Yale L.J. 299; Restatement of the Law of Judgments, 47, 48.”

When the defendant Mrs. Stanley through her counsel petitioned the district court to dismiss the removed action instead of asking to remand they made a fatal mistake to their cause. The court granted their motion. They created their own problem. They had a second, and third chance to fix the problem they and the district court created when, after his order of dismissal they could have asked for a rehearing--and if needed an appeal.

The defendants and the district court judge, having created their own demise and twice neglecting to resurrect it wish to change a final judgment and make a mockery of well established meaning of legal words and procedure. Astounding! What the defendants want, and have been given by the district court and this court's panel is reprieve from their voluntary procedural errors in the prior separate removed action. A truly mind boggling expectation only exceeded by having been granted their expectations by the district court and this court's panel. Was it because they were members of the judicial system? One will never know. The absurdity of the ruling is disheartening in itself, but its consequence is to deny the core of civil liberty and freedom to Mr. Stanley by the continued open arrest warrant issued without authority. Liberty cries for justice.

If this petition for rehearing is denied it will encourage sloppy lawyering and sloppy judicial thinking and writing...all being blessed by the Eighth Circuit Court of Appeals. Mr. Stanley should not be the one to suffer the consequences of the sloppiness of a district court attorney and a district court order—and a circuit court affirmation without opinion. Those who created the sloppiness should be accountable. Those who had several opportunities to timely correct *their* own errors should be accountable.

C. Conflict with *Stump v. Sparkman*, 435 U.S. 349 (1978).

28 U.S.C. § 1446 (d) and 28 U.S.C. § 1447 (c) removed all jurisdiction from the state court and thus immunity was not available to the defendant. The district court order granting immunity to the state court judge defendant thus conflicts with *Stump v. Sparkman*, 435 U.S. 349, 357 (1978), “A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be **subject to liability only when he has acted in the ‘clear absence of all jurisdiction’**”

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

The district court order deeming Attorney Wight and Mrs. Stanley not to be state officials and could not thus act under color of state law thus being dismissed conflicts with the clear law in *Dennis v Sparks*, 449 U.S. 24, 27-28 (1980).

“As the Court of Appeals correctly understood our cases to hold, to act ‘under color of state law for 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting ‘under color’ of law for purposes of 1983 actions.”

E. Conflict with *Filla v. Norfolk S. Ry. Co.*, 336 F.3d 806 (8th Cir. 2003); *Cont'l Cablevision of St. Paul, Inc. v. United States Postal Serv.*, 945 F.2d 1434, (8th Cir. 1991); *First Nat'l Bank of Salem v. Wright*, 775 F.2d 245 (8th Cir. 1985).

This court, too, has consistently ruled only remand is a proper remedy for a removed action—dismissal is impermissible! Nonetheless Dismissal was done and is now final.

Cont'l Cablevision of St. Paul, Inc. v. United States Postal Serv., 945 F.2d 1434, 1441 n.3 (8th Cir. 1991) (“When a federal court to which a case has been removed from a state court determines that it lacks jurisdiction, the proper action is not dismissal of the complaint, but remand to the state court.”); *First Nat'l Bank of Salem v. Wright*, 775 F.2d 245, 246 (8th Cir. 1985) (“If the federal court determines that no federal jurisdiction exists, it must remand the case back to state court.”)

II. Conflict with 28 U.S.C. § 1446 (d) and 28 U.S.C. § 1447 (c).

The federal removal/remand statutes are unambiguous. The caselaw associated with them is universally consistent. The district court order here affirmed by the appellate panel is contrary to all caselaw on the two statutes.

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 the removal and **the State court shall proceed no further unless and until the case is remanded.**

28 U.S.C. § 1447 (c)

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446 (a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction,

the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. **A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.**

The state court, and thereby the defendants, were acting in the clear absence of all jurisdiction. None of the statutory requirements were met by the defendants. All had been informed of the statutory requirements before they convened and denied Mr. Stanley his liberty and freedom. The panel ruling conflicts and is contrary to the federal statutes.

III. The Panel's Order Rewrites Law Dictionaries

The panel affirmed the district court's recharacterization of its order of dismissal into an order of remand. "Dismissal" now means "remand." The district court order appealed is astonishing. More astonishing is the same district court judge sua sponte ordering a remand order in a totally different action, albeit one over which the same district court judge presided, i.e. the removed action fifteen months after he dismissed it. If he dismissed the action and there were no postjudgment motions the remand order is null and void. If his sua sponte remand order is valid then it is either a duplicate or – the original judgment order was a dismissal order. All conclusions lead to absurdities.

The fact the district court judge sua sponte fifteen months later entered an order of remand makes it clear that in his mind he did not enter a remand order in the final judgment of the removed action.

The district court's circuitous unprecedented sua sponte conduct is what this court's panel is condoning by its affirmation.

IV. The Panel Order Negatively Impacts Judicial Accountability and Respect.

The multiple unique aspects of this action and appeal are worthy of a written opinion. The unique aspects are compounded by the opposing parties being a judge and an attorney—members of the judiciary.

The district courts efforts to obfuscate and offer judicial cover for other members' wrong doing should not be brushed aside, nor taken lightly.

If the Appellant's presented view is wrong on all aspects it should be an easy task for this court to point out the correct laws that apply to the procedural issues in this case. (The facts have never been disputed) This case is a matter of pure law, procedural law.

If on the other hand the Appellant's caselaw is found correct then this court has a duty to the public to acknowledge the error. A show of judicial accountability is of enormous import, particularly in this day and age. A show of accountability will improve the care and quality of future deliberations.

Quality in all other institutions depends on the identification, acknowledgment, and correction of past errors. Quality can never be achieved or improved when errors are, and are perceived to be covered up.

This court also owes a duty to Mr. Stanley to give him back his liberty and freedom. This latter task is the reason this court exists—to protect the constitutional rights of Americans.

CONCLUSION

The court should grant an en banc rehearing, find the district court erred in dismissing this civil rights action and all defendants. It should permit the civil rights action to proceed in the district court against all the defendants.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Appellant's Petition for Rehearing and Rehearing en banc was mailed via commercial carrier, prepaid, this 3rd day of April, 2010 to the clerk of the U.S. Court of Appeals for the Eighth Circuit and to:

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