

07-2390

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

No. ~~07-2069~~

In Re:  
Harold R. Stanley

FILED

JUN 18 2007

MICHAEL GANS  
CLERK OF COURT

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

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**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.

RECEIVED

JUN 15 2007

U.S. COURT OF APPEALS  
EIGHTH CIRCUIT

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.<sup>1,2</sup> 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.

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

<sup>2</sup> 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.<sup>3</sup> (Exhibit D. Judgment Order of Dismissal of the Removed Action)

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<sup>3</sup> 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.<sup>4</sup>

### **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.

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<sup>4</sup> 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 (7<sup>th</sup> 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.

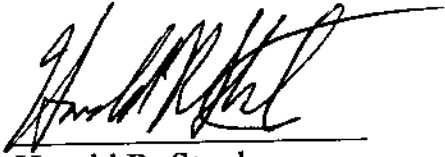
### **Conclusion**

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,

A handwritten signature in black ink, appearing to read "Harold R. Stanley", with a long horizontal flourish extending to the right.

Harold R. Stanley, *pro se*  
10707 E. 240th Street  
Peculiar, MO 64078  
Telephone: 816-779-4284  
E-mail: [hstanley@fairpoint.net](mailto:hstanley@fairpoint.net)

June 13, 2007

**Index of Appendix Exhibits**

- A. Order at issue, Postjudgment Order of Remand, Stanley v. Stanley, Case No. 4-05-cv-00281-GAF, January 9, 2007 1 page
- B. Judgment of Dismissal Stanley v. Stanley, 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, Stanley v. Stanley, Grate, et al., Case No. 06-0752-cv-W-GAF, January 9, 2007 11 pages
- E. Order This Court Dismissing Appeal Stanley v Stanley, et al., Case No. 07-2069, May 18, 2007 1 page
- F. Order This Court Dismissing Appeal, Stanley v. Grate, et al., Case No. 07-1304, February 27, 2007 1 page

**Certificate of Service**

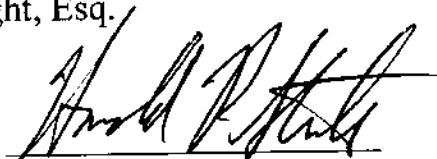
The undersigned hereby certifies that a true and correct copy of the foregoing was sent return receipt requested via first-class U.S. Mail, postage pre-paid, this 13<sup>th</sup> Day of June, 2007 to

The Honorable Gary A. Fenner  
U.S. District Court  
Western District of Missouri  
400 E. 9<sup>th</sup> Street  
Kansas City, Missouri 64106

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P.O. Box 899  
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Harold R. Stanley, Petitioner, *pro se*  
10707 E. 240th Street  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

<b>In re Marriage of:</b>	)	
	)	
<b>HAROLD STANLEY,</b>	)	
	)	
<b>Plaintiff.</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 05-281-CV-W-GAF</b>
	)	
<b>MARCIA E. STANLEY, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**ORDER OF REMAND**

Pursuant to this Court's October 25, 2005 Order divesting itself of jurisdiction (Doc. #12), the Court considers this case to have been remanded.

**IT IS SO ORDERED.**

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

**DATED: January 9, 2007**

**EXHIBIT A**

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

**JUDGMENT IN A CIVIL CASE**

In re Marriage of:	)	
	)	
<b>HAROLD STANLEY,</b>	)	
	)	
<b>Plaintiff.</b>	)	
	)	
v.	)	<b>Case No. 05-281-CV-W-GAF</b>
	)	
<b>MARCIA E. STANLEY, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

   **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**Decision by Court.** This action came before the Court. The issues have been determined and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED that**

the claims asserted in Harold Stanley's "removal complaint" must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

October 25, 2005  
Date

Patricia L. Brune  
Clerk

/s/ Tracy L. Diefenbach  
(by) Deputy Clerk

**EXHIBIT B**



Stanley failed to comply with the terms of the dissolution, prompting Marcia Stanley to file at least two motions for civil contempt in the 16<sup>th</sup> Judicial Circuit Court of Jackson County, Missouri, Case Numbers 16DR-08993-02, and -04. *Id.* Case Number 16 DR-08993-02 was initiated by Marcia Stanley on January 5, 2004 and Harold Stanley was personally served with a summons on February 6, 2004. Case Number 16DR-08993-04 was initiated by Marcia Stanley on February 17, 2005 and Harold Stanley was personally served with a summons on February 25, 2005. No federal claims were asserted in either the original Petition for dissolution of marriage or the subsequent motions for civil contempt. (Doc. #4).

On March 24, 2005, Harold Stanley filed a "removal complaint" purporting to remove these civil contempt proceedings, Case Numbers 16DR96-08993-02 and -04, to federal district court. (Doc. #1, Attach. 1). In his "removal complaint," Harold Stanley claims that the Missouri Dissolution of Marriage Maintenance Provisions (Mo. Rev. Stat. § 452.335 et al.) violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution because they infringe upon his "personal decisions relating to marriage" and his "fundamental right to privacy to dissolve his marriage." (Doc. #1). Harold Stanley further alleges that the Missouri alimony statute functions "as state imposed legal coercion to effect involuntary servitude" and, therefore, violates the Thirteenth Amendment of the U.S. Constitution because it "denies him his property rights and permanently enslaves him to labor for the benefit of his former spouse." *Id.*

Harold Stanley claims that his assertion of various Constitutional violations raises a federal question and, therefore, confers subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. (Doc. #6). Marcia Stanley contends original subject matter jurisdiction premised on 28 U.S.C. § 1331 does not

**EXHIBIT B**

exist over the removed action because there were no federal questions raised in Case Numbers 16DR-08993-02, and -04. (Doc. #4).

## II. Standard and Legal Analysis

An action may be removed by a defendant where the case falls within the original subject matter jurisdiction of the federal district courts. 28 U.S.C. § 1441(a). District courts have original subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The removing party bears the burden of establishing federal subject matter jurisdiction. Green v. Ameritrade, Inc., 279 F.3d 590, 595 (8<sup>th</sup> Cir. 2002).

In analyzing the propriety of removal, the Court must begin by applying the "well-pleaded complaint rule" which provides:

Whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance or defenses which it is thought the defendant may interpose.

Taylor v. Anderson, 234 U.S. 74, 75-76 (1914). The well-pleaded complaint rule makes the plaintiff "the master of the claim and he or she may avoid federal jurisdiction by exclusive reliance on state law." Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).<sup>1</sup> Accordingly, where the face of the complaint does not invoke or establish federal court jurisdiction, a defendant is not entitled to remove a case to federal

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<sup>1</sup>See The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("The party who brings a suit is master to decide what law he will rely upon."); Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 809, n. 6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced."); Great North R. Co. v. Alexander, 246 U.S. 276, 282 (1918) ("The plaintiff may by the allegations of his complaint determine the status with respect to removability of a case.").

court on the basis of a counterclaim over which the federal court has jurisdiction. McClymonds v. Brandle, 171 F.Supp. 457, 457-58 (E.D. Mo. 1959).

Here, Harold Stanley asserts that the Constitutional violations he asserts in his "removal complaint" are sufficient to confer original subject matter jurisdiction over the civil contempt proceedings filed by Marcia Stanley in the 16<sup>th</sup> Judicial Circuit Court of Jackson County, Missouri. However, upon application of the well-pleaded complaint rule, this Court finds that it does not have original subject matter jurisdiction over Marcia Stanley's civil contempt proceedings because no federal question was raised in either Case Number 16DR-08993-02 or 16DR-08993-04. Accordingly, removal is not proper.

In addition to removal being improper, the Court does not have subject matter jurisdiction to hear the claims asserted in Harold Stanley's "removal complaint." Harold Stanley has asserted these Constitutional claims in response to the civil contempt proceedings filed by Marcia Stanley. Marcia Stanley's civil contempt proceedings, Case Number 16DR-08993-02 and -04, arise out of Harold Stanley's failure to comply with the terms of the Order dissolving the couple's marriage. The domestic relations exception, first articulated in Barber v. Barber, 62 U.S. (1 How. 582, 584 (1859)), divests the federal courts of jurisdiction over any action for which the subject is a divorce, allowance of alimony, or child custody. Kahn v. Kahn, 21 F.3d 859, 861 (8<sup>th</sup> Cir. 1994) citing Ankenbrandt v. Richards, 504 U.S. 689 (1992). Furthermore, even where a cause of action "closely relates to but does not precisely fit into the contours of an action for divorce, alimony or child custody, federal courts generally will abstain from exercising jurisdiction." Id. The subject of the present case is the order dissolving Harold and Marcia Stanley's marriage. Accordingly, this Court does not have subject matter jurisdiction over this action.

**CONCLUSION**

**EXHIBIT B**

Removal is improper in this case because this Court does not have original subject matter jurisdiction over Marcia Stanley's actions for civil contempt. Furthermore, the domestic relations exception completely divests this Court of jurisdiction over any action where the dispute concerns a marriage dissolution or "closely relates" to a marriage dissolution. Accordingly, the claims asserted in Harold Stanley's "removal complaint" must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

**IT IS SO ORDERED.**

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

DATED: October 25, 2005

**EXHIBIT B**

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE**

**IN RE THE MARRIAGE OF:**

Harold Stanley  
10707 E. 240<sup>th</sup> Street  
Peculiar, MO 64078  
SS# 482-60-4265

Petitioner,

v.

Marcia Stanley

Respondent.

Case No. 16DR06-8993-02

**JUDGMENT ENTRY**  
**REVIEW OF CONTEMPT**

Now on this 9<sup>th</sup> day of December, 2005, after the parties were duly notified of a review, at which time appeared Respondent in person and through counsel, Les Wight, and the Petitioner appeared not. The Court heard evidence concerning the payment of monies ordered to be paid by Petitioner to Respondent that were subject of this court's contempt order of July 1, 2004.

After hearing the evidence, the court makes the following findings and orders:

The Petitioner and Respondent received a Dissolution of Marriage from this Court on December 21, 2000.

In said order the Petitioner was ordered to pay Respondent the sum of One Thousand Five Hundred and no/100 Dollars (\$1,500.00) each month beginning January 1, 2001 as and for maintenance.

Petitioner failed to make said maintenance payments as of the time of filing the

**EXHIBIT C**

application for contempt in the amount of Four Thousand Five Hundred Twenty-Nine and no/100 Dollars (\$4,529.00) and since has made payment of \$2500.00 leaving a balance of \$2029.00 unpaid. Petitioner has ignored previous provisions for payment and the stay of execution ordered in this matter.

Said continued failure or refusal to pay said maintenance is without justification and shows the Petitioner's continued contempt of this Court's Order. Petitioner has filed unnecessary legal actions in Federal Court and has caused Petitioner to incur attorney fees not normally needed in this type of action.

The Court makes further findings consistent with the following orders:

**IT IS THEREFORE, ORDERED ADJUDGED AND DECREED**, that Petitioner is Remains in contempt of this Court for his willful failure and refusal to pay maintenance to Respondent in the amount totaling Two Thousand Twenty-Nine and no/100 Dollars (\$2,029.00) and that a *capias* shall issue immediately.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Respondent have judgment against Petitioner in the amount of Five Thousand and no/100 Dollars (\$5,000.00) as and for attorney fees and in default thereof, let execution issue therefore.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Petitioner shall pay the costs of this action.

Date 12/19/05

Judge Jack Bate

A TRUE COPY-FILED  
CIRCUIT COURT OF JACKSON COUNTY  
COURT ADMINISTRATOR  
DEPARTMENT OF CIVIL JUSTICE

*Hebert*

**EXHIBIT C**

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE**

**IN RE THE MARRIAGE OF:**

Harold Stanley  
10707 E. 240<sup>th</sup> Street  
Peculiar, MO 64078  
SS# 492-60-4265

Petitioner,

v.

Marcia Stanley  
730 B SE London Way  
Lee's Summit, MO 64081  
SS# 497-60-7622

Respondent.

Case No. 16DR96-8993-02

**TO THE COURT ADMINISTRATOR  
JACKSON COUNTY DEPARTMENT OF CORRECTIONS AND  
THE JACKSON COUNTY SHERIFF'S DEPARTMENT**

**GREETINGS:**

NOW THEREFORE, you are hereby commanded to attach the body of Harold Stanley, born September 27, 1953, Social Security Number 492-60-4265, and have him delivered over into the custody of the Jackson County Department of Corrections and thereafter brought before me to be dealt with according to law or release him only after he has purged himself of his Contempt on this Court upon which this Citation and Order is issued by payment of Two Thousand Twenty-Nine and no/100 Dollars (\$2,029.00) to the Respondent herein.

**EXHIBIT C**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this matter is set for March 24, 2006 at 9:00 a.m. for review of Petitioner's compliance with this Court's Orders.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner shall pay the costs of this action.

Date 12/9/05

Judge Jack Bata

Approved as to Form:

CLERK OF COURT  
COURT OF JACOBI  
JACOB ADMINISTRATION  
DEPARTMENT OF  
*Spencer*

**EXHIBIT C**

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

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

**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

EXHIBIT D

in Court 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 Court 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 al subject matter jurisdiction

EXHIBIT D

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 is 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.

**EXHIBIT D**

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

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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

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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.

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*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. Wilk 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

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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

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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").

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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

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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 or 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

**EXHIBIT D**

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

**No: 07-2069**

**Harold R. Stanley,**

**Appellant**

**v.**

**Marcia E. Stanley, et al.,**

**Appellees**

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

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**JUDGMENT**

The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed as untimely taken.

May 18, 2007

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

**EXHIBIT E**

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

**No: 07-1304**

**Harold R. Stanley,**

**Appellant**

**v.**

**Jack Grate, Honorable, et al.,**

**Appellees**

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Appeal from U.S. District Court for the Western District of Missouri - Kansas City  
(4:06-cv-00752-GAF)

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**JUDGMENT**

The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed for lack of jurisdiction as there is no final appealable order.

February 27, 2007

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

**EXHIBIT F**