IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-01469-CMA-KLM

DAVID E. WILKENSON,

Plaintiff,

v.

STATE OF COLORADO, et al., and
MESA COUNTY, COLORADO, et al.,

Defendants.

DEFENDANT STATE OF COLORADO'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION
AND FAILURE TO STATE A CLAIM FOR RELIEF

Defendant State of Colorado, by and through its undersigned attorney, moves pursuant to Fed.R.Civ.P. 12(b)(1) and (6) to dismiss all claims against it for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted and, in support of this motion, states the following:

Plaintiff's Claims

More than 17 years ago, Plaintiff Mr. Wilkenson became mired in domestic litigation in the district court in Mesa County, Colorado, in parallel proceedings related to the dissolution of his marriage to Johannah C. Wilkenson and to the dependency and neglect of his minor children. Complaint ¶1. The domestic litigation resulted in orders, first on April 16, 1997, requiring Mr. Wilkenson to pay child support to Johannah of $705.00 per month, plus $176.25 per month to retire a child support arrearage of $4230.00, Appendix A to Complaint at App. p.37, and subsequently on December 18, 1997, awarding

sole custody of children from the marriage to Johannah, Complaint ¶31.[1] Since then, he has been subjected to enforcement of child support obligations through the Mesa County Department of Human Services-Child Support Enforcement Unit, Complaint ¶16, including jailing for contempt, Complaint ¶22, threat of future jailing, and holds placed on Mr. Wilkenson's driver's license and passport, Complaint ¶62. Mr. Wilkenson alleges that he has been deprived of his fundamental constitutional rights, including his rights to parent and have relationships with his sons, and he contends that the State of Colorado is responsible for most or all of these deprivations. In addition, Mr. Wilkenson alleges that the State falsified or destroyed records in the domestic cases, Complaint ¶¶8, 13, & 26, made false charges against him of domestic violence in order to support rulings in the domestic litigation, Complaint ¶17, allowed Johannah to leave the country with their two boys in 1998 and thus to escape enforcement of a visitation and parenting time order, Complaint ¶39, and failed or refused to dismiss the dissolution of marriage case, through which child support orders are enforced, in rulings of the Mesa County District Court and the Colorado Court of Appeals, and including denial of a Petition for Certiorari on March 11, 2013, by the Colorado Supreme Court, Complaint ¶¶13-15.

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[1] Mr. Wilkenson filed numerous orders, transcripts, and other papers related to the underlying domestic litigation as attachments to his Complaint. This Court may consider documents attached to the Complaint on a motion to dismiss without converting the motion to one under Rule 56. *Smith v. United States,* 561 F.3d 1090, 1098 (10th Cir. 2009); *see also Wheeler v. Hurdman*, 825 F. 2d 257, 259 n.5 (10th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987) (consideration of extraneous evidence does not convert a 12(b)(1) motion to a motion under Rule 56).

Mr. Wilkenson brings claims against the State of Colorado under 42 U.S.C. § 1983 to remedy violations of his fundamental constitutional rights, including rights protected under the First, Fifth, and Fourteenth Amendments to the United States Constitution. Complaint ¶50. Mr. Wilkenson seeks compensatory and punitive damages against the State of Colorado, Complaint ¶¶90, 98, 99-104, and in addition he seeks an injunction restraining the State of Colorado from continuing any further litigation in the dissolution case in Mesa County District Court, Complaint ¶91. For the reasons set out below, this Court lacks jurisdiction to consider Mr. Wilkenson's claims against the State of Colorado, and in any event the Complaint fails to state a claim on which relief can be granted.

Argument

I. This Court lacks subject matter jurisdiction over all claims against Defendant State of Colorado.

A. Standard for deciding Motions to Dismiss for lack of subject matter jurisdiction.

Mr. Wilkenson appears in this Court *pro se*, and therefore he is entitled to have his pleadings read liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). However, such liberal construction is intended merely to overlook a *pro se* party's failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or unfamiliarity with pleading requirements. *Hall* at 1110. *Pro se* status does not relieve Mr. Wilkenson of the requirement to comply with rules of procedure governing litigants and attorneys alike, or the substantive law, and in these regards Courts treat the parties according to

the same standard as applied to attorneys licensed to practice law. *See McNeil v. U.S.*, 508 U.S. 106, 113 (1993); *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994). Mr. Wilkenson is not entitled to have the Court act as an advocate on his behalf. *Hall* at 1110.

Federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the action must be dismissed." *Tuck v. United Services Auto. Ass'n*, 859 F.2d 842, 844 (10th Cir. 1988) (citation omitted); see Fed.R.Civ.P. 12(h)(3) (providing that a court must dismiss an action whenever it appears that it lacks subject matter jurisdiction.) A motion to dismiss based on the Eleventh Amendment's limitation on federal court jurisdiction is decided under Fed.R.Civ.P. 12(b)(1). *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). A motion based on the *Rooker-Feldman* doctrine also concerns the subject matter jurisdiction of the court and is decided under Rule 12(b)(1). *See Mann v. Boatright*, 477 F.3d. 1140, 1146 (10th Cir. 2007).

On a Rule 12(b)(1) motion, such as this one, that raises facial challenges to subject matter jurisdiction, the court presumes the well-pleaded facts in the complaint to be true, *Ruiz* at 1180, but "the court need accept as true only the plaintiff's well-pleaded

factual contentions, not his conclusory allegations."[2] *Hall v. Bellmon*, 935 F.2d at 1110. It is the plaintiff's burden to show that the court has jurisdiction over each claim in the complaint. *Kokkonen* at 377.

B. The Eleventh Amendment bars claims against the State of Colorado.

The Eleventh Amendment to the United States Constitution provides that the judicial power of federal courts does not extend to actions by private parties against the states. *E.g.*, *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (collecting cases). Absent an unmistakable waiver by a state of its Eleventh Amendment immunity, or an explicit abrogation of such immunity by Congress, the Eleventh Amendment provides absolute immunity from suit in federal courts for states and their agencies. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 241, 243 (1985); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978). The Eleventh Amendment bar to claims against the states applies "whether the relief sought is legal or equitable." *Papasan v. Allain*, 478 U.S. 265, 276 (1986). Although Mr. Wilkenson brings claims pursuant to 42 U.S.C. § 1983, alleging violations of his civil rights, this statute contains no abrogation of Eleventh Amendment protections. *Quern v. Jordan*, 440 U.S. 332, 345 (1979). Colorado also has not waived the protections of the Eleventh Amendment, and the Eleventh Amendment therefore bars Mr. Wilkenson's claims against the State of Colorado.

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[2] Much or most of the Complaint consists of legal argument, and Mr. Wilkenson alleges many legal conclusions. His legal conclusions are not entitled to any deference from this Court on a motion to dismiss. *See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).*

Mr. Wilkenson asserts that the *Ex Parte Young* doctrine[3] applies in this case to preserve his claims despite the Eleventh Amendment limitation on judicial powers of federal courts. Complaint ¶¶53, 61. The *Ex Parte Young* doctrine creates a legal fiction that state officials sued in their official capacities are not the State for purposes of federal court actions that seek exclusively prospective injunctive relief for continuing violations of federal law. ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1188 (10th Cir. 1998). But Mr. Wilkenson does not seek only prospective injunctive relief and he does not allege a continuing violation of federal law; he seeks damages as a remedy for alleged past wrongs that do not come within the *Ex Parte Young* exception, and such relief is barred by the Eleventh Amendment. *See Papasan v. Allain*, 478 U.S. at 277-78; *see also Hill v. Kemp,* 478 F.3d 1236, 1259 (10th Cir. 2007) (sole question for the court on proceeding under *Ex Parte Young* is "whether the relief sought ... is prospective, not just in how it is captioned but also in its substance"). Moreover, the *Ex Parte Young* "exception" to Eleventh Amendment immunity is a narrow one that does not permit suits against the State itself or state agencies. *Elephant Butte Irrigation Dist. v. Dep't of Interior*, 160 F.3d 602, 607 (10th Cir. 1998). Because Mr. Wilkenson seeks relief for past wrongs against the State of Colorado itself, the *Ex Parte Young* exception does not apply to this case.

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[3] *Ex Parte Young*, 209 U.S. 123 (1908).