Copy

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.

MESA COUNTY, COLORADO, et. al.

Defendants.

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

COMES NOW, the Plaintiff, DAVID E. WILKENSON, pro se, pursuant to Fed R.Civ. P. 12, and the inherent equity powers of the Court, and requests the Court to deny Defendant State of Colorado's June 12, 2013, Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim for Relief.

1. Because Plaintiff is not a lawyer, he specifically requests the extra latitude he is entitled to by *Haines v. Kerner*, 404 US 519, *Puckett v. Cox*, 456 F2d 233, and *Picking v. Pennsylvania Railway*, 151 F2d 240, etc. in all matters of substance over form and not affecting the rights of the parties.

2. Plaintiff objects to Attorney Haines misstating the facts, arguments, and claims for relief Plaintiff has made in his complaint in an attempt to have inapposite case law fit Attorney Haines' arguments for dismissing Plaintiff's complaint.

3. The plain language contained in Plaintiff's complaint speaks for itself. Plaintiff has sworn under penalty of perjury that the statements of fact contained in the complaint are true to the best of his knowledge and belief and has included in the complaint various copies of official records and documents as appendices which prove the allegations Plaintiff has made in his complaint.

4. The inaccuracies and untruths contained in Attorney Haines' motion to dismiss start in the very first paragraph of his motion and continue throughout the motion. For example, contained in the first paragraph Attorney Haines said, "...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..." The truth is the Title 14 domestic case no. 96 DR 372 was filed on April 19, 1996. Whereas the jurisdictionless Title 19 juvenile case no. 96 JV 180 was filed on April 29, 1996, through a shelter hearing in which the presiding Judge, Nicholas R. Massaro, was also the referral source in the case.

5. The threshold jurisdictional fact used by Mesa County District Court (MCDC) Judge Amanda Bailey against Plaintiff at the April 29, 1996 shelter hearing to create the Title 19 case, was the outcome determinative, "Mr. Wilkenson has a history of domestic violence", lie/finding to justify the Title 19 juvenile dependency and neglect case against Plaintiff. There is no instance of Plaintiff ever having been violent anywhere at any time.

6. Completely unlike the Title 14 domestic case where the parties were Johannah C. Wilkenson, petitioner, and Plaintiff, as the respondent, in the Title 19 juvenile case the parties were Johannah C. Wilkenson, Plaintiff, and Paul Sowerby, respondents, with the People of State of Colorado as the prosecution, being represented by Assistant Mesa County attorney Valerie Robison, in the interests of Tom Sowerby, and Ben and Toby Wilkenson.

7. Everything about the Title 14 case and the Title 19 case are different. The Title 14 court is a court of general jurisdiction, whereas the Title 19 court is a court of statutory jurisdiction. Title 14 cases are civil cases pitting the parties as litigants against each other as adversaries, whereas Title 19 cases are quasi-criminal cases pitting the defendants as adversaries against the State. The parties, actions, procedures, evidence, and rules are totally removed and different between Title 14 and Title 19 actions. They are certainly not "parallel" proceedings as characterized by Attorney Haines.

8. Plaintiff's description in his complaint is accurate and legally correct when he said, "the Title 14 case was already active and involved the same children, in addition to which the children were at the time in the temporary custody of the Mesa County Department of Human Services per Court order. Under the circumstances, the creation of a Title 19 case was prohibited by, C.R.S. 19-3-308, C.R.S. 19-1-104(6) and C.R.Juv.P. Rule 4.4(a), as well as being completely in violation of the finding on point in *Everett v. Barry*, 252 P 2d 826. The Title 19 case was created in prima facie violation of an express legislative prohibition of jurisdiction, and was therefore a nullity for the purposes of *Ex Parte Fisk*, 113 US 713, and *Thrap v. People*, 558 P 2d 576. Plaintiff was never under any obligation to obey the illegal nullity orders." Here again the Title 14 case and the Title 19 case are certainly not "parallel" proceedings as incorrectly characterized by Attorney Haines. From a legal point of view, the Title 19 case was void *ab initio* and never lawfully existed.

9. Next Attorney Haines states that, "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,..." This statement of alleged fact is untrue. The only child support order that was ever issued was issued on May 6, 1997 in the void-ab-initio Title 19 case (See Appendix A to Complaint at App. p. 37), and was terminated along with the entire Title 19 case by court order on May 21, 1997, with the custody of Tom Sowerby to Paul Sowerby being certified to divorce case of Johannah C. Wilkenson and Paul Sowerby in England. See Appendix A to Complaint at App. p. 40.

10. Plaintiff has already objected to Attorney Haines' misstatements of the facts contained and presented in Plaintiff's complaint. Rather than wasting the Court's time and becoming mired down in correcting all of Attorney Haines' inextricably intertwined misstatements of fact, Plaintiff will respond to the main jurisdictional arguments presented by Attorney Haines in his motion to dismiss. The real issue is not the factually complex nature of the underlying state case. It is the unconstitutionality of the *Rooker- Feldman* doctrine itself, particularly as Attorney Haines is requesting that it be applied in this case.

11. The thrust of Attorney Haines' arguments to have this Court grant his motion to dismiss for lack of subject matter jurisdiction and failure to state a claim for relief are based on his misstatement of the facts contained in Plaintiff's complaint as they relate to the *Ex Parte Young* exception to the Eleventh Amendment, and his inapposite use of the *Rooker-Feldman* doctrine.

12. The *Ex Parte Young* exception, as it is called, is based on *Ex Parte Young*, 209 US 123, a case which the U.S. Supreme Court heard between the Northern Pacific Railroad and the State of Minnesota. In weighing the interests of the individual Constitutional rights as they are applied to the states in the Fourteenth Amendment and the interests of the Sovereign Immunity protections from suit through the Eleventh Amendment that the states enjoy, the Court carved out an exception to the Eleventh Amendment giving lower federal courts equity

jurisdiction to hear cases in which violations of fundamental Constitutional rights are alleged.

13. The issue of the case was whether the penalties for noncompliance of the freight and passenger rates as fixed by the State legislature were Constitutional or not.

14. The U.S. Supreme Court held that the State could be sued through equity jurisdiction in the federal courts because the state law was unconstitutional on grounds that the penalties for noncompliance violated the due process and equal protection clauses of the Fourteenth Amendment.

15. Justice Peckham, in writing the opinion of the Court said about the Courts decision to make an exception to the Eleventh Amendment, "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or other would be treason to the Constitution."

16. In making the *Ex Parte Young* exception to the Eleventh Amendment the Court found that the State's actions were unconstitutional, which triggered the equity jurisdiction of the federal courts. In the instant case the State's actions are not only unconstitutional and voidable, they are jurisdictionless and void and therefore are nullities *ab initio* for the purposes of *Ex Parte Fisk*, 113 US 713, and *Thrap v. People*, 558 P 2d 576.

17. *Ex Parte Young*, 209 US 123 is not only apposite and on point in this case, the facts of the instant case against the State of Colorado are much more offensive and serious because many of the individual Defendants' actions were violations of criminal statutes, thereby constituting a fraud upon the institution of the State Court.

18. Clearly the *Ex Parte Young* exception does apply to the facts of this case as Plaintiff has presented them in his Complaint and because, under Fed.R.Civ.P. 12(b)(6), well pleaded factual allegations of the Complaint are taken as true and inferences from the Complaint are drawn in favor of the Plaintiff. Therefore this Court does in fact have equity jurisdiction to hear this case.

19. Attorney Haines' claim that the *Rooker-Feldman* doctrine bars subject matter jurisdiction in this case is misplaced, because the *Rooker-Feldman* is inapposite to the instant case now before this Court. The U. S. Supreme Court, in *Lance v. Dennis*, 546 US 459 (2006), a Colorado