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 ALL CLAIMS ASSERTED AGAINST IT IN THE AMENDED COMPLAINT

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

Introduction

Plaintiff, Mr. Wilkenson, brings this action to reprise a lawsuit he brought in this Court nearly fifteen years ago, styled *David E. Wilkenson v. Mesa County District Court, State of Colorado, et al.*, Case No. 98-M-1839. In his new lawsuit, he brings claims against the State of Colorado arising from orders, now long final and unassailable, entered in actions for dissolution of his marriage and for the dependency and neglect of his children, that were previously brought against Mesa County District Court and court officers, Judge Nicholas Massaro, Judge Amanda Bailey, Magistrate Jane Westbrook, and Magistrate Cynthia Cyphers; and court employees Sandy Casselberry and Chris-

tine Gatty. *See* Appendix A and Appendix B to Judge Richard Matsch's August 29, 2000, Order of Dismissal in Case No. 98-M-1839, attached to this Motion as Exhibit A; *see also In re Marriage of Wilkenson*, Case No. 98CA0560, slip op. (Colo.App. June 10, 1999) (NSFOP) (affirming orders that underlie Mr. Wilkenson's claims) attached to this Motion as Exhibit B.[1] To claims asserted in the 1998 lawsuit, Mr. Wilkenson has added only claims of an alleged conspiracy between a person or persons at the Colorado Court of Appeals with a person or persons at the U.S. Post Office to falsify and destroy the record in his domestic litigation and failure to dismiss the dissolution action in which child support orders continue to be enforced against Mr. Wilkenson. Amended Complaint, ¶¶ 100-101, pp.30-31.

In the current action, finding that the complaint failed to comply with federal and local rules requiring "(1) a short and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, Fed. R. Civ. P. 8.," this Court struck Mr. Wilkenson's complaint and required him to file an Amended Complaint which provides "a short and concise statement explaining what each defendant did to him, when each defendant did it, how each defendant's action harmed him, what specific legal right each defendant violated, and what remedy he seeks for each violation." Order Regarding Complaint, Doc. #12, June 24, 2013, at p.3. In response to such Order, Mr. Wilken-

[1] This Court may take notice of its own files and of public records of the Colorado Court of Appeals without converting this motion to one under Rule 56. *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n.1 (10th Cir. 2004).

son filed his First Amended Complaint, Doc. #14, on July 10, 2013. The First Amended Complaint does little toward eliminating "unnecessary and lengthy factual statements" pertaining to the custody and child support battle with the mother of his two children, Doc. #12 at p.3, or to "clearly and manageably articulate the specific allegations as to each defendant and the corresponding basic details," *id.*, and the First Amended Complaint is even more lengthy than its predecessor, but Mr. Wilkenson has added a new section in his First Amended Complaint which purports to set forth his "Causes of Action against Defendant State of Colorado." Doc. #14, ¶¶ 92-101, at pp. 28-31. This delineation of his claims against the State of Colorado neither establishes a basis for this Court's jurisdiction over the subject matter or this action nor advances Mr. Wilkenson's claims over the goal line of plausibility established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (U.S. 2009). Mr. Wilkenson's claims against the State of Colorado should therefore be dismissed.

Argument

I. This Court lacks subject matter jurisdiction.

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 Am.*, 511 U.S. 375, 377 (1994). It is presumed that a cause of action lies outside the limited jurisdiction of federal courts, and it is a plaintiff's burden to show that the court has jurisdiction over each claim in the complaint. *Id.* "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); *accord*, Fed.R.Civ.P. 12(h)(3). 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.

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 (*see* Argument Section II B., below), 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 misplaces his reliance on the *Ex Parte Young* doctrine.[3] *See* Amended Complaint, Doc. #14, ¶¶52-53, 63. 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), *overruled on other grounds*, *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007); *Elephant Butte Irrigation Dist. v. Dep't of Interior*, 160 F.3d 602, 607 (10th Cir. 1998) ("the *Ex parte Young* doctrine is not actually an exception to Eleventh Amendment state immunity because it applies only when the lawsuit involves an action against state officials, not against the state"). Mr. Wilkenson's Amended Complaint by contrast is against the State itself and does not seek only prospective injunctive relief for a continuing violation of federal law. Rather, he seeks damages from the State as a remedy for alleged past wrongs, and such relief is barred by the Eleventh Amendment. *See Papasan v. Allain*, 478 U.S. at 277-78; *see also Hill* 478 F.3d at 1259 (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"). Because Mr. Wilkenson seeks legal remedies against the State of Colorado itself for alleged past wrongs, the *Ex Parte Young* exception does not apply to this case.

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