

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Richard P. Matsch

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

AUG 29 2000

JAMES R. MANSPEAKER
CLERK

Civil Action No. 98-M-1839

DAVID E. WILKENSON,

Plaintiff,

v.

MESA COUNTY DISTRICT COURT, STATE OF COLORADO, NICHOLAS R. MASSARO, CYNTHIA CYPHERS, JANE E. WESTBROOK, CATHERINE C. BURKEY, SANDRA CASSELBERRY, CHRISTINE A. GATTY, FRANK J. DANIELS, DANIEL P. RUBENSTEIN, GORDON P. GALLAGHER, BRADFORD L. GEIGER, KATHY HALL, DORALYN GENOVA, JAMES R. BAUGHMAN, LYLE MAURICE DECHANT, VALERIE ROBISON, LORI RIENSTRA, JULIA L. WIDDOP, VICTORIA MINARD, COLORADO WEST MENTAL HEALTH CENTER, GAIL ADDIX, EFFECTIVE PARENTS PROJECT, COLIN M. BRESEE, MARK SCOFIELD, RODNEY L. HOLLANDSWORTH, ABIGAIL S. LANGE, PH.D., CAROL FORTE, MILLIE KARRER, HILLTOP COMMUNITY RESOURCES INC., MARK HAND, AMANDA BAILEY, JONI VOHS, DANIEL A. WILKENSON, ANITA L. VIEIRA AND JOHN VIEIRA

Defendants.

ORDER OF DISMISSAL

This civil action was initiated by a complaint filed by David E. Wilkenson, pro se, on August 25, 1998, with a request for a temporary restraining order to prevent the relocation of his children to England by his former wife as a result of an order entered in a custody dispute in the District Court of Mesa County, Colorado. At an *ex parte* hearing on August 25, 1998, the court denied the temporary restraining order, observing that the order complained of had been appealed to the Colorado Court of Appeals. On September 14, 1998, the then defendants Mesa County District Court,

Mesa County District Judge Nicholas Massaro, Mesa County District Judge Amanda Bailey, Mesa County District Court Magistrate Jane Westbrook and Mesa County District Court Magistrate Cynthia Cyphers filed a motion to dismiss, noting the pending appeal and suggesting *Younger* abstention. The plaintiff responded on September 21, 1998, and said that his children had in fact been relocated to England, despite the pending appeal. No further pleadings were filed in this case and on March 31, 2000, this court issued an order to show cause why this case should not be dismissed without prejudice. On April 19, 2000, the plaintiff responded to that order to show cause saying that the Colorado Court of Appeals had affirmed and that a petition for writ of certiorari to the Colorado Supreme Court had been denied. The plaintiff also filed a verified complaint on April 19, 2000, consisting of 128 pages with 662 numbered paragraphs naming 36 defendants and 36 "causes of action." All of the claims are based on the plaintiff's contention that the defendants conspired to obstruct justice and to deny him fundamental rights protected by the United States Constitution in the course of the family litigation in Mesa County. Mr. Wilkenson alleges a conspiracy to violate 18 U.S.C. §§ 241 and 242.

The defendants filed motions to dismiss and answers which included the defenses of the failure to state a claim upon which relief can be granted. The most comprehensive of these motions is that filed for the defendants Mesa County District Court, Judge Massaro, Judge Bailey, Magistrate Westbrook and Magistrate Cyphers, identified as state defendants. A factual summary of the underlying litigation is contained in a brief in support of their motion and copies of pertinent documents were

submitted as exhibits. The essential facts are succinctly summarized in the opinion of the Colorado Court of Appeals, attached as Appendix A to the state defendants' motion to dismiss. The date of the opinion is June 10, 1999.

The plaintiff's response to the state defendants' motion to dismiss was filed on July 31, 2000. The plaintiff has separately responded to the motions and defenses in answers filed by other defendants. There has been no appearance by some defendants.

The court has construed the plaintiff's pleadings liberally as required by *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), and *Hall v. Ballmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). The court has also accepted plaintiff's factual allegations as true where those allegations are stated as objectively provable facts as opposed to suspicion and conjecture. Allegations of intent and state of mind have been accepted to the extent that they are reasonable inferences from the stated facts. While the state defendants' motion has included fact statements and exhibits not contained in the complaint, they are consistent with the plaintiff's allegations in the complaint and the additional allegations in his responses to defendants' motions. Thus, the plaintiff's 36 causes of action are analyzed under Fed. R. Civ. P. 12(b)(1) and (6).

The plaintiff is asserting subject matter jurisdiction for federal questions under 28 U.S.C. §§ 1331 and 1343. To the extent that he has alleged violations of state law, there is no jurisdiction. *Malek v. Haun*, 26 F.3d 1013, 1016 (10th Cir. 1994).

The central theme of all of the plaintiff's pleadings is that in two judicial proceedings in the District Court of Mesa County, Colorado, a dependency and neglect

action in juvenile court, 96 JV 180, and a child custody dispute arising out of a dissolution of marriage action, 96 DR 372, Mr. Wilkenson was denied due process, jailed for contempt and deprived of custody and parental rights by operation of a wide ranging conspiracy against him involving all of the defendants with varying motivations ranging from family disagreements to a bias based upon his political affiliation. He seeks equitable relief from the court's orders and \$2,000,000 damages.

Mr. Wilkenson contends that the defendants violated two federal criminal statutes prohibiting interference with his civil rights, 18 U.S.C. §§ 241 and 242. Those statutes do not provide for private actions and are not appropriate jurisdictional bases.

Section 241 makes criminal a conspiracy to injure or intimidate any person in the free exercise or enjoyment of rights protected by or granted by federal law and section 242 provides for criminal prosecution of officials acting under color of law who willfully subject any person to the deprivation of rights secured or protected by federal law. Civil remedies for injuries for the conduct covered by these statutes is available under 42 U.S.C. § 1983, subject to the defenses recognized by case law governing such private actions. The fatal flaws in Mr. Wilkenson's case are that his allegations of conspiracy are inadequate and the only defendants who can be said to be acting under color of law are protected by absolute or qualified immunity.

Mr. Wilkenson has identified the defendants in Section V of his amended complaint. A copy of that section is attached as Appendix A. He separately stated causes of action against the defendants. Those paragraphs in the complaint are set out in Appendix B.

The district judges, magistrates, prosecuting attorneys and court clerks are protected by absolute immunity because the actions complained of were taken in the course of judicial proceedings. *Stump v. Sparkman*, 435 U.S. 349 (1978).

The case workers and other employees of the Mesa County Department of Human Services also acted in the course of judicial proceedings and are at least within qualified immunity.

The allegations against the county commissioners are insufficient to show their personal participation in the proceedings or that any of the defendants acted pursuant to any county policy or practice established or approved by the commissioners. Individuals do not have vicarious liability under section 1983.

The defendants who provided professional consultation and evaluation services to the parties, the county and the court, do not thereby become state actors. That is true also of Catherine C. Burkey, attorney for the plaintiff's former wife and attorney Bradford L. Geiger as guardian ad litem. The family members named as defendants are not state actors.

Mr. Wilkenson seeks to avoid the limitations of coverage under 42 U.S.C. § 1983 by collecting all of the defendants together in a web of conspiracy. Such connection is necessary to establish the requisite close cooperation between public officials and private parties to establish liability for actions taken under color of law. The plaintiff's pleadings are inadequate to support a finding of a single conspiracy among all of the defendants aimed at David Wilkenson as father and husband. An essential element of such a conspiracy is interdependence among the conspirators. Interdependence exists

when each conspirator's activities links up with the conduct of all of the others to achieve the common goal or objective. *United States v. Hanzlicek*, 187 F.3d 1228, 1232 (10th Cir. 1999); *United States v. Evans*, 970 F.2d 663, 670 (10th Cir. 1992).

Those are criminal cases. The principle is not different for a civil conspiracy.

The lack of the necessary linkage is shown by the plaintiff's claims in his stated causes of action. They specifically allege separate conspiracies among some defendants and then general conspiracies with unnamed persons.

There are separate allegations of professional incompetence and defamatory reports charged against mental health professionals, counselors and consultants who were involved in the family dispute litigation, particularly in causes of action numbered seven through eighteen. In the absence of adequate allegations of conspiracy there is no subject matter jurisdiction over these claims.

Employees of the Mesa County Department of Human Services are accused of violations of state law which do not constitute constitutional claims. *Malek v. Hawn*, 26 F.3d 1013, 1016 (10th Cir. 1994); *Roy v. City of Augusta*, 712 F.2d 1517, 1522-23 (1st Cir. 1983).

The equitable relief sought by Mr. Wilkenson would, in effect, reverse the rulings of the Mesa County District Court and the Colorado Court of Appeals. This court has no jurisdiction to grant such relief. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *Facio v. Jones*, 929 F.2d 541, 543 (10th Cir. 1991).

Having determined that the plaintiff has not shown in all of the papers filed in this

