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.

STATE OF COLORADO'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

When Judge Richard Matsch dismissed Mr. Wilkenson's complaint against Mesa County District Court officers in Case No. 98-M-1839, he said,

> 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.

Wilkenson v. Mesa County District Court, et al., Case No. 98-M-1839, Order of Dismissal at pp.3-4 (D.Colo. filed August 29, 2000) (attached as Exhibit A to State of Colorado's Motion to Dismiss in this case, Doc. #15-1) (hereinafter referred to as "Judge Matsch's Order"). What Judge Matsch said then remains true of Mr. Wilkenson's current Amended Complaint, excepting only that the alleged conspiracy has broadened to include persons at the Colorado Court of Appeals and the United States Postal Service,

none of the alleged conspirators but only the State of Colorado and "Mesa County" are now named as defendants, and the amount of damages Mr. Wilkenson seeks has substantially escalated. It is no less true today than at the time of Judge Matsch's Order that, "[t]he 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." *Id.* at p.6 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923)). Mr. Wilkenson states that appeals from Mesa County District Court Judge Massaro's December 18, 1997, custody and parenting time order were complete before he filed his complaint in Case No. 98-M-1839. Response to State of Colorado's Motion to Dismiss, Doc. #18, ¶8, p.3. Mr. Wilkenson's complaint, then and now, is of "injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobile Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005). Under the *Rooker-Feldman* doctrine, this court has no jurisdiction to grant what is effectively appellate relief. *Id.*

The keys to application of the *Ex Parte Young* "exception"[1] to the Eleventh Amendment are 1) the claims are brought against a state official rather than the state itself and 2) that a plaintiff's lawsuit seeks exclusively prospective injunctive relief.

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[1] "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." *Elephant Butte Irrigation Dist. v. Dep't of Interior*, 160 F.3d 602, 607 (10th Cir. 1998).

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 256 (U.S. 1985) (Brennan, J., dissenting); *see Alabama v. Pugh*, 438 U.S. 781, 782 (U.S. 1978) (*per curiam*); *Edelman v. Jordan*, 415 U.S. 651, 663-64 (U.S. 1974). Mr. Wilkenson's Amended Complaint breaks both of these rules, in that he attempts to sue the State of Colorado itself, not any state official, and he seeks retroactive remedies, not exclusively prospective relief. Because the *Ex Parte Young* "exception" does not apply, his claims against the State of Colorado must be dismissed under the Eleventh Amendment to the United States Constitution.

Although Mr. Wilkenson's Amended Complaint fails to make a "short and plain statement showing that [he] is entitled to relief," Fed.R.Civ.P. 8(a)(2), giving his pleading the broad reading required by *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), necessarily requires the conclusion that he brings his claims under 42 U.S.C. § 1983, because that statute is the source of civil remedies for the injuries he alleges, subject to the defenses recognized by case law governing private actions under it. *See* Judge Matsch's Order at p.4. Mr. Wilkenson's Response to the State of Colorado's Motion to Dismiss does not address the State's argument that he has failed to plead a claim upon which relief can be granted because the State is not a "person" within the meaning of § 1983, and Mr. Wilkenson may be deemed to have confessed the State's Motion insofar as it asserts grounds under Fed.R.Civ.P. 12(b)(6). In any event, even giving a liberal construction to Mr. Wilkenson's pleading, by naming the State he has not sued a "person" answerable to claims under § 1983, and his claims must be dismissed as against

the State of Colorado. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989).

For the reasons given and on the authorities cited above and in the State of Colorado's Motion to Dismiss the Amended Complaint, Doc. #15, the State of Colorado requests that all claims against it be dismissed.

RESPECTFULLY SUBMITTED this 7th day of August 2013.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing State of Colorado's Reply in Support of its Motion to Dismiss upon all parties herein by e-filing with the CM/ECF system maintained by the court or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 7th day of August 2013, addressed as follows:

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