

**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.

**MESA COUNTY'S RESPONSE TO PLAINTIFF'S
"VERIFIED MOTIONS 1) FOR CLARIFICATION OF THE COURT'S
1/10/14 FINAL JUDGMENT; 2) FOR A FINDING OF SPECIFIC FACTS;
AND 3) FOR COURT TO REFER THE DEFENDANTS' CRIMES
TO THE OFFICE OF THE UNITED STATES ATTORNEY FOR
COLORADO FOR INVESTIGATION" [DOC 33]**

COMES NOW "Mesa County," by and through Alan N. Hassler of The Hassler Law Firm, P.C., and responds to the Plaintiff's "Verified Motions 1) for Clarification of the Court's 1/10/14 Final Judgment; 2) for Finding of Specific Facts; and 3) for Court to Refer the Defendants' Crimes to the office of the United States Attorney for Colorado for Investigation" (Doc 33, 01/22/2014) ("Motion").

The Order challenged (Doc 30, 01/10/2014) overruled Plaintiff's Objection (Doc 29, 01/03/2014), and affirmed in part and adopted in part the Magistrate Judge's Recommendation (Doc 28, 12/17/2013). Final Judgment was entered on the Order (Doc 31, 01/10/2014).

As to the Defendant County, the Recommendation and Order are clear: There are insurmountable jurisdictional problems demonstrated on the face of the First Amended Complaint (Doc 14, 07/10/13). The facts demonstrating the problem appear in the First Amended Complaint. The Court's consideration of these facts and the proper application of law are set forth in the Recommendation and Order.

The request for referral to the United States Attorney for Colorado for investigation is not raised in the prayers for relief in the First Amended Complaint (Doc 14, 07/10/13), is not raised by motion, is not relief that implicates this Defendant, and is relief that cannot be had against this Defendant. As new matter raised for the first time, no response by the Defendant County is required or can be made.

I. The Underlying Order and Recommendation Are Clear and Specific, With Full Support on the Record.

The Recommendation and adopting Order did not overlook the matters raised in the present Motion. The Recommendation (Doc 28, p.2, 12/17/13) recites that the Court considered the "the Motions, the Responses, the Replies, the entire docket, and the applicable law and is sufficiently advised in the premises." The Order adopting the recommendation (Doc 30, p. 2, 01/10/14) shows the Court looked past Plaintiff's failure to properly object, and "conducted a *de novo* review of this matter, including reviewing all relevant pleadings, the Recommendation, and Plaintiff's Objection thereto."

"Mesa County's" Motions to Dismiss (Doc 17, 07/25/2013) fully identified pleading problems in the FAC, by direct reference to statements in the document. The

“Mesa County” Motions to Dismiss also directed the Court to materials appended to the first complaint and referenced in the FAC. See, e.g., Motions to Dismiss ¶¶ 32–34.

The Recommendation and Order do not show any failure by the Court to give due weight to the allegations. In fact, the grounds for dismissal are directly stated in the materials submitted by Plaintiff. In the course of these proceedings, the Court considered all materials before it. The Court has not overlooked Plaintiff’s allegations of some sort of criminal wrongdoing.

Motion ¶¶ 1 - 6 assert lack of consideration of facts, and do not challenge the law recited and applied in the Recommendation. The operative facts about the County which the Recommendation relied upon are straight-forward: there is no properly identified county-related defendant before the Court, which demonstrates a lack of jurisdiction on which the action should have been dismissed. Recommendation, p. 9. None-the-less, the Recommendation considers the other grounds for dismissal.

The Plaintiff did not meet his burden to establish a later accrual date, and to overcome the statute of limitations bar demonstrated on the face of the Complaint. Recommendation, p.11. “[E]very action in the First Amended Complaint that could be construed as being asserted against Defendant County occurred between 1997 and 2003.” Recommendation, p. 12. The Recommendation also found that there was a lack of standing on which the First Amended Complaint could go forward against any County-related defendant. Recommendation, p. 14.

The Recommendation and Order clearly lay out the specific facts supporting the decision, and there are no grounds to provide the relief requested for a finding of specific facts.

II. The Motion is Procedurally Defective, and Must Be Denied.

The Motion's title summarizes the motion as seeking clarification of the January 10, 2014 final judgment, seeking specific findings of fact, and including a request to make a referral to the U.S. Attorney's Office. The document does not comply with any recognized post-ruling mode of proceeding under Fed.R.Civ.P. 59(e) or Fed.R.Civ.P. 60(b). "These two rules are distinct; they serve different purposes and produce different consequences. *Van Skiver v. U.S.*, 952 F.2d 1241, 1243 (10th Cir. 1991). Post-ruling motions are not appropriate vehicles to reargue an issue previously addressed by the Court when the motion merely advances new argument, or supporting facts which were available at the time of the original motion. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

A motion that "alleges no more than legal error and merely reiterates the arguments contained in the complaint' is a Rule 59(e) motion." *Van Skiver V. U.S.*, 952 F.2d at 1244, citing Bud Brooks Trucking, Inc. V. Bill Hodges Trucking Company, 909 F.2d 1437, 1440 (10th Cir. 1990). Motions filed within 10 days of the rendition of the

judgment generally fall under Rule 59(e).¹ Motions served after that time fall under Rule 60(b). *Ibid.*

Since the final judgment (Doc. 31) entered on January 10, 2014, and this filing was not made until January 22, 2014, Rule 60(b) applies. Claims that a district court 'misconceived the character of the causes of action alleged in Plaintiff's original Complaint' does not come within the ambit of Rule 60(b). *Van Skiver* citing Swam V. United States, 327 F.2d 431, (7th Cir.), *cert. denied*, 379 U.S. 852 (1964). The Motion does nothing more than claim the Court did not understand the facts (hence, the causes of action) and does not provide grounds to invoke the extraordinary relief of Rule 60(b).

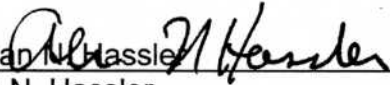
Relief under Rule 60(b) is confined to six categories specified in the rule. Subparagraphs (b)(1) and (b)(2) provide relief against the complaining litigant's acts or omission, not the Court's acts or omissions. Subparagraph (b)(3) Involves fraud by the opposing party, and Subparagraph (b)(4) relates to void judgments and (b)(5) to termination of judgment effects. Plaintiff's only avenue to relief would be under

¹ If the Court were to consider the Motion under Rule 59, it does not meet the basic requirements. "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. See Brumark Corp. v. Sampson Resources Corp., 57 F.3d 941, 948 (10th Cir. 1995). Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. *Cf.* Fed.R.App.P. 40(a)(2) (grounds for rehearing). It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing. See, Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991). Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000).

subparagraph (b)(6), "any other reason that justifies relief." To the extent that the Motion alleges only legal error, and reiterates arguments contained in the Complaint, only Rule 59(e) would provide relief, and then only if the Motion were timely filed.

Wherefore, "Mesa County" respectfully requests that the Court deny the relief requested in the Motion.

RESPECTFULLY SUBMITTED this 11th day of February, 2014.


s/ Alan N. Hassler
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CERTIFICATE OF SERVICE

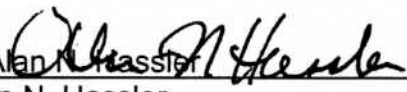
I hereby certify that on the 11th day of February, 2014, I electronically filed the foregoing **MESA COUNTY'S RESPONSE TO PLAINTIFF'S "VERIFIED MOTIONS 1) FOR CLARIFICATION OF THE COURT'S 1/10/14 FINAL JUDGMENT; 2) FOR A FINDING OF SPECIFIC FACTS; AND 3) FOR COURT TO REFER THE DEFENDANTS' CRIMES TO THE OFFICE OF THE UNITED STATES ATTORNEY FOR COLORADO FOR INVESTIGATION"** [DOC 33], with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

Ffred.haines@state.co.us

and I hereby certify that I have mailed or served the document or paper to the following on non-CM/EMF participants in the following manner (mail, hand-delivery, etc.) indicated by the non-participant's name:

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(U.S. First Class Mail, First Class Postage Prepaid)


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