The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Brian P. Carr,

Plaintiff,

v.

Sam Reed, in his official capacity as Secretary of the State of Washington, Wanda Briggs in her official capacity as Chair of the State of Washington Commission of Judicial Conduct, and Rob McKenna, in his official capacity as Attorney General of the State of Washington and, separately, as private individuals the Honorable Robert L. Harris, John F. Nichols, Barbara D. Johnson, Kenneth Eisland, Rich Melnick, John Hagensen, Kelli E. Osler, Joel Penoyar, (J.)C.C. Bridgewater, J. Robin Hunt, Gerry L. Alexander, Barbara Madsen, Mary E. Fairhurst, Susan Owens and James M. Johnson as well as other currently unnamed parties as determined by the Court,

Defendants.

NO. C07-5260RJB

STATE DEFENDANTS' REPLY IN SUPPORT OF SUMMARY JUDGMENT AND DISMISSAL

HEARING DATE:
September 28, 2007

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INTRODUCTION

Plaintiff opposes the State Defendant's Motion for Summary Judgment by raising the same factual and/or legal arguments that he argued unsuccessfully in underlying state court proceedings. None of the facts alleged or legal arguments presented are sufficient to defeat the Motion as it pertains to the defendant state judges: the *Rooker-Feldman*, res judicata and absolute immunity defenses all constitute alternative bases for dismissal of all claims against these defendants in Counts 1 through VI.

The opposition to dismissal of Count VII—the claim that state law requirements for judicial office candidates are unconstitutional—is predicated on a change in legal theories by plaintiff. He now contends that Art. IV, § 17's mandate that judicial candidates be admitted to practice is fine on its face, but is capable of unconstitutional application because the Washington Supreme Court is entrusted (as are the Supreme Courts of all 50 states) with supervision over rules that admit lawyers to practice. Similarly, he now confines his challenge to RCW 29A.24.091 (requiring a filing fee or, for indigents, a number of voter endorsements) to a desire that wealthy people qualify for indigent treatment, with the option to mix-and-match the fee and endorsements. Neither argument is correct and neither presents a countervailing interest that trumps valid provisions of state law.

FACTS PERTINENT TO REPLY

The majority of plaintiff's Opposition pleading is devoted to rehashing the arguments about the state trial court's jurisdiction, its conduct of domestic violence proceedings, alleged (but unproven) sexual bias in those proceedings and his claim that he was denied the opportunity to appeal the state court decisions. He also repeatedly accuses the judges of "knowing concealment" or "attempts to conceal" factual matters. The Court should strike or ignore these latter accusations, because they are simply that: unfounded allegations and illogical inferences drawn from the fact that plaintiff lost the contested state law matters that are "inextricably interwoven" with his federal claims.

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The following erroneous and/or irrelevant contentions made by plaintiff will be addressed in connection with the legal grounds for dismissal to which they pertain:

***Rooker-Feldman* Doctrine and Res Judicata**

1. Plaintiff's Brief, p. 2: The relief requested in the Amended Complaint (¶¶ 1 through 16 of the Prayer for Relief) is "consistent" with state law.

2. Plaintiff's Brief, pp. 3, 5: Issues raised by plaintiff were not specifically addressed by state courts.

Res Judicata

3. Plaintiff's Brief, p. 6: Issues of fact and law decided by state courts are not required to award relief in this case.

4. Plaintiff's Brief, p. 6: "Identity of parties" requirement means defendants in federal case must have been parties to prior state case.

Absolute Judicial Immunity

5. Plaintiff's Brief, pp. 7, 10, 11: District Courts, the Court of Appeals and Supreme Court are courts "of limited jurisdiction" and their judges are not entitled to absolute immunity.

6. Plaintiff's Brief, p. 12: A claim that his right to pursue appeals in state court was interfered with precludes judicial immunity.

7. Plaintiff's Brief, pp. 10, 11: The decisions of the Court of Appeals and Supreme Court in plaintiff's state court matters were administrative, not judicial, acts.

State Law Qualifications for Judicial Office

8. Plaintiff's Brief, p. 13: Washington's Supreme Court has statutory responsibility for admission to practice and, thereby, control who runs for judicial office.

9. Plaintiff's Brief, p. 13: The state constitution provides that lawyers admitted while Washington was a Territory (i.e., before 1889) can run for judge, but the state statute does not.

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10. Plaintiff's Brief, pp. 14-15: Washington's statute, requiring a filing fee or, upon demonstration of indigency, a number of qualified voter endorsements, should be available to wealthy people and allow a combination of fee and endorsements, as opposed to one or the other.

ARGUMENT

Plaintiff has the obligation to resist summary judgment by setting forth facts contained in sworn affidavits or otherwise admissible evidence. Fed. R. Civ. P. 56.[1] Instead, he repeats the unsworn allegations in his Amended Complaint, makes unsubstantiated charges of judicial misconduct and confirms once again that his claims in federal court were either litigated fully and reduced to final judgment in state court (Counts I through VI) or are issues of constitutional law that have been resolved in favor of the state's interest in having serious and qualified candidates for state judicial office (Count VII). The claims against the State Defendants must be dismissed with prejudice.

A. The *Rooker-Feldman* Doctrine Applies and this Court Lacks Jurisdiction Over Counts I through VI.

Plaintiff erroneously contends that the *Rooker-Feldman* bar to federal district court jurisdiction over matters previously determined and reduced to final state-court judgments does not apply if the sought after federal relief is "consistent" and does not "conflict" with state law. He also incorrectly argues that the alleged failure of the state courts to mention, discuss and specifically dispose of every contention a party has made precludes application of *Rooker-Feldman*. To that end, plaintiff portrays 16 of 19 paragraphs in his exhaustive Prayer for Relief as "consistent" with the Washington constitution, laws and prior court decisions.

Consistency and lack of conflict with existing state law, however, do not vest this Court with subject matter jurisdiction over plaintiff's claims. *Rooker-Feldman* deprives a

[1] Indeed, plaintiff must make a *prima facie* showing as to each element of his federal cause of action. *Celotex Corp. v. Catrett*, 417 U.S. 317 (1986). Plaintiff cannot defeat this Motion by mere allegations or denials. *See First Nat'l Bank v. Cities Service Co.*, 39, U.S. 253, 289 (1968).

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federal court of jurisdiction over cases which are nothing short of a request that the federal court review, modify or reverse a prior state court decision. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291-92 (2005) (*Rooker-Feldman* precludes "losing party" in state court from litigating same claims raised in state court and precludes federal district courts from exercising appellate jurisdiction over state-court judgments).

There is no dispute over the fact that the claims asserted in Counts I through VI were raised and decided in a final state court judgment adverse to plaintiff. He admits this in paragraphs 12, 14 and 15 of the Amended Complaint. Thus, plaintiff is the arch-typical state-court loser who now improperly wants a federal court to review and render an opinion on the validity of a final state-court judgment.

Nor can he avoid *Rooker-Feldman* by claiming that issues he admittedly raised in the state courts were not specifically rejected by the appellate courts. As a matter of law, federal claims that are "inextricably intertwined" with issues submitted to the state court, are beyond a federal court's jurisdiction. *Doe & Assoc. Law Officers v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001). Claims in federal court need not have even been raised in state court to be barred by *Rooker-Feldman*. *Samuel v. Michaud*, 980 F. Supp. 1381, 1411 (D. Idaho 1996). Indeed, plaintiff recognizes that principle controls the outcome of this Motion when he agrees (Plaintiff's Brief, p. 6) that *Rooker-Feldman* applies whenever "the district court must hold the state court was wrong in order to find in favor of the plaintiff." *Napolitano, supra*, 252 F.3d at 1030. Overturning the trial court, Court of Appeals and the State Supreme Court decisions rendered against him is the central objective of Counts I through VI.[2] *Rooker-Feldman* mandates their dismissal.

[2] Indeed, plaintiff concedes his desire to overturn the state court rulings when he states that "It may be that the relief requested would invalidate the [state trial court's] decisions of October 27, 2005 (in case 04-2-008824-4 [and] on November 12, 2004 and January 19, 2005 in case 04-2-008908-9." Plaintiff's Brief, p. 2.

B. Res Judicata Also Mandates Dismissal of Counts I through VI.

Plaintiff attempts to raise a number of factual issues that pertain to the proceedings conducted by, and arguments raised before, the Clark County Superior Court and the Court of Appeals. (Plaintiff's Brief, pp. 2-5). In his brief, he admits that the relief requested in paragraphs 1 through 16 of his Prayer for Relief pertain to claims he raised before the state trial and/or appellate courts. Plaintiff's Brief, pp 2-6.

Despite these admissions, plaintiff claims that res judicata is no obstacle to his federal claims because the state courts did not specifically address or account for all the issues he raised in state court. He further claims res judicata does not apply because the State Defendants were not parties to the underlying state cases. Plaintiff is wrong on both counts.

First, res judicata requires identity of claims/subject matter between plaintiff's state court and federal court lawsuits. *Gallagher v. Frye*, 631 F.2d 127, 129 (9th Cir. 1980); *Pederson v. Potter*, 103 Wn. App. 62, 67 (2000). Res judicata bars whatever was raised by a party and also bars claims that could have been raised by a party. *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 336 fn.16 (2005). Thus, plaintiff's admission in paragraphs 12,14, and 15 of the Amended Complaint and on pages 2 through 5 of Plaintiff's Brief that the issues framed in Counts I through VI were raised by him in state court means this element of res judicata is satisfied.

As for identity of parties, plaintiff mistakenly assumes this means that the State Defendants had to be parties to his state court proceedings. However, because the party against whom res judicata is asserted (plaintiff Carr) was a party to the prior case (plaintiff Carr), res judicata applies. *Concordia v. Bendekovic*, 693 F.2d 1073, 1076 (5th Cir. 1982); *accord*, *Moore v. Brewster*, 96 F.3d 1240, 1244 (9th Cir. 1996) (Res judicata can be asserted against a party to a prior case by a stranger to such judgment). Thus, the State Defendants can invoke this defense even though they were not parties to the state cases. Plaintiff was a party to the prior state court proceedings. That makes res judicata fatal to Count I through VI.

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C. Absolute Judicial Immunity Bars Claims Against State Judicial Officers.

Plaintiff tries to avoid the alternative defense of absolute judicial immunity by carving out exceptions for when judges incorrectly conclude they have jurisdiction, by claiming that the trial court, appellate and supreme court judges had "limited jurisdiction" and exercised "administrative functions," not judicial ones, in deciding the state court matters against him. None of these contentions is correct or even relevant to application of absolute judicial immunity.

First, the correctness of a decision to exercise jurisdiction does not determine judicial immunity. For example, in *Stump v. Starkman*, 435 U.S. 349 (1978), the Supreme Court upheld immunity for a state court judge who had ordered the sterilization of a minor at the petition of her mother. There was a serious issue about the authority of the judge to make such an order. The Supreme Court held that "jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority." *Id.* at 1105. Moreover, "where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are…for his determination." *Id.* (emphasis added). If Washington's trial courts have jurisdiction to issue and enforce domestic violence rulings, and its appellate courts have authority to hear appeals therefrom, absolute immunity applies.

Next, plaintiff is wrong when he claims that limitations on the subject matter jurisdiction of state district and appellate courts deprive their judges of absolute immunity. Contrary to plaintiff's contention, by statute, the Washington District, Family and Superior Courts all have jurisdiction to hear Domestic Violence matters. RCW 26.50.010(3) and .202(1). These statutes confirm that the trial court judicial defendants possessed jurisdiction over plaintiff's no-contact motions practice and are absolutely immune from lawsuits over their rulings on that issue.

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The jurisdiction of the Court of Appeals also is prescribed by statute, with "exclusive appellate jurisdiction in all cases."[3] RCW 2.06.030. Similarly, supreme court appellate jurisdiction is plenary under RCW 2.04.010. Finally, Exhibit A to Plaintiff's Brief—his Notice of Appeal to Division II, Court of Appeals—confirms that he invoked that court's appellate jurisdiction; while he admits (in Amended Complaint ¶ 66) that he invoked discretionary appellate review by the Supreme Court. Plaintiff cannot now challenge the jurisdiction of courts and judges that he freely invoked. Similarly, he cannot claim his right to appeal was infringed when plaintiff, in fact, filed appeals before both the Court of Appeals and Supreme Court.

Nor can plaintiff seriously claim that the actions of the appellate courts were "administrative" as opposed to "judicial." Whether his brief and positions at the Court of Appeals or Supreme Court were challenged no more deprives the judges who heard his appeals of immunity than it entitled plaintiff to prevail on the merits of his appeals. The appellate judges decided his appeals lacked merit—exactly the type of judicial act that supports immunity.

D. Washington's Qualifications for Judicial Office Are Constitutional.

Recognizing that federal courts have routinely rejected constitutional challenges to requiring that judicial office candidates be lawyers admitted to practice, plaintiff modifies his claims to assert some infirmity due to the fact that the Supreme Court is statutorily empowered to provide and enforce rules for admission to practice. Plaintiff assumes that creates a constitutional issue and he boldly states that the Supreme Court has a "record of ignoring the constitution and statutes and [of] supporting people who do likewise." Plaintiff's Brief, pp 13-14. There are no facts alleged (or sworn to) to support this claim. They should be stricken from the record. Moreover, an allegation that those governing admission to the bar may have a conflict of interest is no reason to invalidate the State's constitutionally

[3] There are specific exceptions to general appellate jurisdiction that do not apply here.

permitted restrictions on who may run for statewide office.[4] Constitutionally valid reasons for those restrictions were upheld in *O'Connor v. State of Nevada*, 27 F.3d 357, 362 (9th Cir. 1994).

Plaintiff's other perceived deficiency—that Washington's indigency exception to the filing fee requirement discriminates against wealthy people—displays ignorance of why the U.S. Supreme Court required an "indigency" exception in *Lubin v. Parrish*, 415 U.S. 709 (1974). "Indigency" is a suspect classification for equal protection analysis. Having sufficient economic means—being non-indigent—is not. Allowing people who can pay a filing fee to avoid one would be tantamount to ruling that people who can afford legal counsel have the constitutional right to court-appointed counsel. The exception both swallows the rule and creates a suspect classification for equal protection purposes that does not (and should not) exist.

The same holds true for plaintiff's complaint that anybody should be allowed to pay a filing fee, to obtain the required, alternative number of voter endorsements or to do a combination of both. The State is not constitutionally required to put into law whatever is convenient for plaintiff; particularly when such qualifications for candidates reflect the State's valid interest in securing only serious and qualified candidates for judgeships. Changing state law to accommodate plaintiff would undermine those valid state interests by allowing a candidate for office who has neither the education, skills nor temperament necessary to do the job and who is running for office solely because he harbors a grudge against his ex-spouse and the judges who ruled against him.

[4] The same is true for the curious claim that state statutes do not allow candidates admitted to practice "in the Territory of Washington." The Territory of Washington—which included parts of Idaho and Montana—ceased to exist when Washington was admitted to statehood in 1889. Nobody admitted to practice in or before 1889 is alive today.

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Finally, plaintiff could not qualify as a judicial candidate, even if the fee/petition requirement were changed. Article IV, Section 17 of the state constitution renders him unqualified.

CONCLUSION

Counts I through VI must be dismissed because this Court lacks jurisdiction over them and because they are also barred by res judicata and judicial immunity. Count VII must be dismissed because Washington's qualifications for candidates for judicial office have been upheld by federal courts. The Court should award summary judgment to the State Defendants and dismiss Counts I through VII with prejudice.

DATED this 27th day of September, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2007, I electronically filed the foregoing **State Defendants' Reply in Support of Summary Judgment and Dismissal** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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