UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2744
Summary Calendar

MARK A. METZGER,

Plaintiff-Appellant,

versus

JUDY METZGER SEBEK, ET AL.,

Defendants,

DAVID J. WEST, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas
(CA H 92 3216)

(October 25, 1994)

Before GARWOOD, BARKSDALE and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant Mark A. Metzger (Metzger) brought this suit pursuant to 42 U.S.C. § 1983 alleging a conspiracy to deprive him of his right to counsel of choice. He appeals the district

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

court's order granting all defendants' motions for dismissal for failure to state a claim on which relief may be granted. We find no error and therefore affirm.

Facts and Proceedings Below

The present appeal has a convoluted history that begins with Metzger's divorce several years ago. Metzger sought to modify the divorce court's custody order to increase his visitation rights with his children. During the course of that proceeding, allegations of child sexual abuse were raised against Metzger.

Metzger subsequently brought an action in federal district court against various participants in the state custody action, including his ex-wife, Judy Metzger Sebek, her attorneys, Baylor College of Medicine, Harris County Protective Services, and various child psychologists. Seeking relief under 42 U.S.C. § 1983, Metzger alleged that the defendants had conspired to extort him into an unfair property settlement, take his children away from him, and maliciously prosecute him for child abuse. Metzger was represented in that action by attorneys L.T. Bradt (Bradt) and Joe Alfred Izen, Jr. (Izen).

The federal district court declined to exercise jurisdiction in the case, however, based on the domestic relations exception to federal jurisdiction. Metzger then refiled essentially the same suit in the 269th District Court of Harris County, Texas. The case came to trial before Judge David West (Judge West). After six weeks of testimony, Judge West granted a directed verdict in favor of all the defendants. He also sanctioned Metzger, Bradt, and Izen in the amount of $994,000 for filing a frivolous lawsuit. The

verdict and sanctions are currently on appeal in the Texas state courts.

During the trial, Judge West held attorney Bradt in contempt of court for repeatedly referring to previously excluded evidence in the presence of the jury. A hearing on those charges was postponed until after the conclusion of the principal suit, and Bradt was released on his own recognizance pending such hearing. He was not then, nor has he ever been, jailed in connection with the contempt charges.

Following the directed verdict, Metzger filed a motion seeking to recuse Judge West from handling any post-judgment matters in the case. Judge West refused to recuse himself and assigned the recusal motion to a disinterested judge for resolution. While the recusal motion was still pending, Judge West signed an order directing Bradt to appear before a disinterested judge to show cause why he should not be cited for contempt in connection with his actions during the trial. After two days of testimony, the State elected to abandon the contempt charges, and the judge dismissed the case.

The current suit arises from the contempt charges and proceedings instituted against Bradt (who is not a party to the current suit) in state court. Metzger claims that Judge West's action in drafting the show cause order while the motion to recuse was still pending was taken in the absence of all jurisdiction and was therefore void. Moreover, Metzger claims that Judge West conspired, in violation of 42 U.S.C. § 1983, with Nancy J. Locke, William R. Pakalka, and the law firm of Fulbright & Jaworski

(collectively the Fulbright defendants)[1] in drafting the allegedly void show cause order.[2] He further alleges that the Harris County Assistant District Attorney assigned to prosecute the contempt charges, William J. Delmore, III (Delmore), became part of the conspiracy when he prosecuted on the basis of a show cause order that Delmore knew or should have known was issued by a judge without authority to do so. Metzger contends that the object of this alleged conspiracy was to deprive him of his right to counsel of choice during the pendency of his appeal on the state court conspiracy claims. He sought monetary damages, equitable relief, and court costs.[3]

This action was originally filed in the state district court of Fort Bend County, Texas, under the same cause number as Metzger's divorce action.[4] Defendants filed notice of removal pursuant to 28 U.S.C. § 1441(c). Metzger sought to remand, asserting that the domestic relations exception precluded federal jurisdiction and that the prior federal court's determination that the exception applied constituted the law of the case. The district court held that the domestic relations exception and the

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[1] The Fulbright defendants represented Baylor College of Medicine in the state court conspiracy action.

[2] Metzger's evidence of the conspiracy between Judge West and the Fulbright defendants comes in the form of a note written by Nancy Locke to Judge West. Bradt evidently came across the note while perusing a prosecution file that he had picked up (allegedly by inadvertence) during the contempt hearing.

[3] By agreement of the parties, other defendants originally sued in this case were dismissed without prejudice.

[4] The divorce action had been transferred from Harris County.

law of the case doctrine were inapplicable to the claims before it and denied the motion to remand.

Concurrently, all defendants moved to dismiss the charges against them for failure to state a claim. In addition, Judge West and Delmore moved for dismissal on the basis of absolute immunity. The district court granted all defendants' motions, denied Metzger's claims for injunctive relief, and awarded attorneys' fees to Judge West and Delmore. Metzger now appeals the district court's decision.

Discussion

I. Motions to Dismiss for Failure to State a Claim

A. Standard of Review

Under Rule 12(b)(6), a district court may, on motion, dismiss on the pleadings if they do not state a claim on which relief may be granted. FED. R. CIV. P. 12(b)(6). Our review of the district court's decision to dismiss is *de novo*. *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 618 (5th Cir. 1992).

In reviewing the propriety of dismissal, the allegations of the plaintiff's complaint must be taken as true. *McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338, 1343 (5th Cir. 1988). Wholly conclusory allegations of conspiracy, however, are insufficient to withstand a motion to dismiss; specifically, to state a cause of action for conspiracy under 42 U.S.C. § 1983, the plaintiff must allege specific, material facts tending to show a conspiracy. *Hale v. Harney*, 786 F.2d 688, 690 (5th Cir. 1986). Dismissal is proper if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would

entitle him to relief." *McCormack*, 845 F.2d at 1343 (footnote and citation omitted).

B. Judicial Immunity

It is clear that Judge West acted under the protection of his absolute judicial immunity in this case and therefore could not be subject to a civil suit for damages. We therefore affirm the district court's order granting Judge West's motion to dismiss under Rule 12(b)(6).

Judges enjoy absolute immunity from civil suits for damages for their judicial acts, "`even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.'" *Stump v. Sparkman*, 98 S.Ct. 1099, 1104 (1978) (quoting *Bradley v. Fisher*, 13 Wall. 335, 351 (1872)) (footnote omitted); *see also Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir.), *cert. denied*, 109 S.Ct. 3250 (1989). The doctrine applies to suits for damages brought under 42 U.S.C. § 1983. *Stump*, 98 S.Ct. at 1104 (citing *Pierson v. Ray*, 87 S.Ct. 1213 (1967)). Jurisdiction is to be broadly construed in this context, and a judge loses his immunity only if he acts in the clear absence of all jurisdiction. *Id.* at 1105.

Metzger contends that Judge West lost his immunity because he violated Texas law.[5] We find Metzger's argument in this regard contrived. The Supreme Court has clearly rejected such reasoning:

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[5] Under Texas Rule of Civil Procedure 18a, a motion to recuse deprives the affected judge of authority to act further, unless good cause is shown, until the motion is decided. *See Lamberti v. Tschoepe*, 776 S.W.2d 651, 652 (Tex. App.SQDallas 1989, writ denied).

"A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Id.* at 1106. Judicial immunity insulates the judge from suit even when he acts in excess of his jurisdiction. That immunity is broad enough to cover whatever errors may have been committed in this case.

Moreover, the show cause order was related to a contempt proceeding that had absolutely nothing to do with the merits of Metzger's case. *See* TEX. R. CIV. P. 18a(d) ("Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action *in the case* after filing of the motion [to recuse] and prior to a hearing on the motion.") (emphasis added). Any lack of jurisdiction in the ability to decide post-judgment matters in the underlying action did not affect Judge West's jurisdiction to pursue contempt charges arising from the trial of that case.

C. Prosecutorial Immunity

It is similarly well settled that a prosecutor is absolutely immune from damage suits under section 1983 for acts that are functionally "an `integral part of the judicial process.'" *Imbler v. Patchman*, 96 S.Ct. 984, 995 (1976) (citation omitted). Initiating a prosecution and presenting the state's case are quintessential prosecutorial acts. *Id.* Bad motives do not abrogate the prosecutor's immunity. *Morrison v. City of Baton Rouge*, 761 F.2d 242, 248 (5th Cir. 1985); *see Imbler*, 96 S.Ct. at 993-94 (creating an exception to prosecutorial immunity for malicious or dishonest acts "would prevent the vigorous and

fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system" (footnote omitted)).

Metzger's arguments to the contrary are patently meritless. Metzger asks this Court to hold that the prosecution of a "void" charging instrument strips the prosecutor of absolute immunity. There being no basis in law for this argument, we reject it. As noted above, the test of prosecutorial immunity is a functional one. The acts of which Metzger complains all clearly come within the ambit of Delmore's duties as an advocate for the state.

D. Liability of the Private Defendants

Metzger is correct in pointing out that a party who conspires to deprive another of his constitutionally protected rights is not protected by any immunity his co-conspirators may enjoy. *Wyatt v. Cole*, 112 S.Ct. 1827, 1832 (1992). This observation is of little help to him, however, since his pleadings fail to establish that the Fulbright defendants violated section 1983.

Section 1983 protects citizens from acts taken under color of law that intentionally deprive them of their rights under federal law. The Fourteenth Amendment does guarantee a right, although not an absolute one, to counsel of choice in civil matters. *Texas Catastrophe Property Insurance Ass'n v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1815 (1993). In addition, we have recognized that conspiracy claims are viable under section 1983. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990). It is clearly the law of this Circuit, however, that a conspiracy alone is not enough to state a cause of

action under section 1983; Metzger must also show that the conspiracy caused an *actual deprivation* of his constitutional right to counsel of choice. *Id.*

This Metzger has utterly failed to do. Nothing in the pleadings shows that MetzgersQat any time or in any proceedingsQwas ever deprived of Bradt's services as a result of the contempt charges. Bradt was never jailed in connection with the contempt charges; those charges have since been dismissed. Bradt continues to represent Metzger in his currently pending appeal from Judge West's directed verdict. Metzger was also represented in that case by Izen, who continues to represent him there and in this action. In short, Metzger has not shown that the alleged conspiracy to deprive him of Bradt's services caused an actual deprivation of his right to counsel of choice.[6] Since the pleadings reveal no set of facts that would entitle Metzger to relief, the district court was correct in granting the Fulbright defendants' motion to dismiss.

E. Claims for Injunctive Relief

Metzger's claims for injunctive relief are similarly unavailing. Even if we assume *arguendo* that Metzger's remedy at law is inadequate, he "must demonstrate either continuing harm or

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[6] Metzger contends that the "unlawful prosecution of void charges" is a constitutional harm that sustains his cause of action under section 1983. However apt the characterization, the harm of which Metzger complains occurred, if at all, to Bradt. Metzger has no standing to assert a claim based on injury to his lawyer. *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236. 242 (5th Cir. 1993). Indeed, we find it curious that Metzger advances this argument. He has strenuously argued, in opposition to the district court's determination that he lacked standing to challenge the charges brought against Bradt, that he has standing based on the denial of his right to counsel of choice. But he was not denied that right.

a real and immediate threat of repeated injury in the future" to be entitled to an injunction. *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir.), *cert. denied*, 113 S.Ct. 191 (1992). There is nothing in the record to suggest that such a threat exists; "`[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief.'" *City of Los Angeles v. Lyons*, 103 S.Ct. 1660, 1665 (1983) (citation omitted). It therefore was not error to dismiss Metzger's claim for injunctive relief.

II. Motion to Remand

As noted above, Metzger filed this lawsuit under the same cause number as his divorce proceeding. Therefore, when the defendants removed the case on the basis of the section 1983 claims against them, the unrelated state law divorce matters were also transferred to federal court. Metzger argues that the district court should have remanded the case pursuant to the domestic relations exception to federal jurisdiction. Alternatively, he asserts that the previous decision by a federal court to abstain under that exception in another matter in which Metzger was involved constitutes the law of the case and therefore precluded the district court from exercising jurisdiction in this matter.

Neither of these arguments is persuasive. The domestic relations exception to federal jurisdiction has been narrowly construed. *Ankenbrandt v. Richards*, 112 S.Ct. 2206, 2215 (1992); *Rykers v. Alford*, 832, F.2d 895, 900 (5th Cir. 1987). The district court was not called on to resolve any issues of divorce, alimony, or child custody. *Ankenbrandt*, 112 S.Ct. at 2215. The fact that

matters of this nature were included under the same cause number is irrelevant. A case must be removed in its entirety; only then can the district court exercise its discretion to remand those claims in which state law predominates.[7] 28 U.S.C. § 1441(c).

The law of the case doctrine is similarly inapplicable. Law of the case protects the integrity of legal determinations made in a single lawsuit. *DFW Metro Line Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601, 604 (5th Cir.), *cert. denied*, 114 S.Ct. 183 (1993). It has no application *between* cases. The prior case and this case both included section 1983 conspiracy claims, but there the similarity ends. None of the current defendants was a party to the prior lawsuit.[8] The resolution of this case turns on completely separate issues. There was no error in refusing the motion to remand.

III. Attorneys' Fees

The district court awarded attorneys' fees to both Judge West and Delmore pursuant to 42 U.S.C. § 1988 but has not yet determined the specific amount to be awarded. Claims based on the award of attorneys' fees are collateral to the merits of the case and not part of the final judgment. *Budinich v. Becton Dickinson and Co.*, 108 S.Ct. 1717, 1720-21 (1988); *Deus v. Allstate Insurance Co.*, 15 F.3d 506, 521 (5th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3065 (U.S. July 5, 1994) (No. 94-32). An award of

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[7] We fully expect that the district court will in due course remand those aspects of the case in which state law predominates.

[8] The only party common to both suits, Judy Metzger Sebek, was voluntarily dismissed from this suit.

attorneys' fees is not final until a specific amount has been determined. *Williams v. Ezell*, 531 F.2d 1261, 1263 (5th Cir. 1976). Any claim based on these awards is therefore premature and is not now before us.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.