UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BONNIE R. FOWLER,

Plaintiff – Appellant,

v. No. 18-4091

STATE OF UTAH; ROYAL I. HANSEN; MARK R. MCDOUGAL DON R. SCHOW: BRENT K. WAMSLEY: DOUGLAS C. MCDOUGAL; MARK R. MCDOUGAL & ASSOCIATES, (D.C. No 2:17-CV-00285- CW) (D. Utah)

Defendants –Appellees.

ORDER AND JUDGEMENT

Before BACHARACH, MURPHY, and MORITZ, Circuit Judges.

Proceeding pro-se, Bonnie Fowler appeals the district court's order dismissing her complaint. 1 For the reasons explained below, we affirm under Utah state law, the duration of alimony payments can't exceed the length of the marriage.

*After examining the briefs and appellate record, this panel has determined

In 2013, a Utah state court granted Fowler's ex-husband's motion to terminate his alimony payments. It did so because See Utah Code Ann. §30-3-5(8)(j). Following the termination of alimony, Fowler alleged in a separate state court action that her former divorce lawyers and their law firm committed malpractice and other torts by failing to recognize this statutory limit on alimony, But when the lawyers presented a document from the divorce proceeding in which Fowler admitted that her lawyers told her about the alimony limitation, the state court granted the lawyers' motion for summary judgment. The Utah Court of Appeals affirmed, and the Utah Supreme Court denied review. See Fowler v. Mark McDougal & Associated., 357 P.3d 5, 7 (Utah Ct. App.2015).

Fowler then filed a federal civil-rights lawsuit---though not

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unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App.34(a)(2); 10th Cir. 34.1(G). The case is therefore ordered submitted without oral argument. This orderand judgement is not binding precedent, except under the doctrines

the one at issue in this appeal---against her former divorce lawyers and their law firm. The magistrate judge in that case recommended dismissing the complaint for failure to state a claim. Among other conclusions, he determined that (1) Fowler's 42 U.S.C. §1983 claim failed because the lawyers weren't state actors, nor did Fowler sufficiently allege that they conspired with state actors; (2) Fowlers §1985(2) claim failed because she didn't sufficiently allege facts supporting the existence of a conspiracy; and (3) Fowler's §1986 claim failed because it couldn't exist independently from the§1985 claim. The district court adopted the magistrate judge's report and recommendation in its entirety. Fowler didn't appeal.

Instead three months later, she filed this case. The defendants each moved to dismiss. They alleged in part that

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of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. See Fed. R. App. P. 32.1; 10th Cir.R. 32.1. 1We liberally construe pro se pleadings, but we won't act as Fowler's advocate. See James v. Wadas, 724 F.3d 1312, 1315 (10th Cir. 2013)

fowler's claims were barred by claim preclusion, which prevents a party from relitigating claims already decided in a prior case. 2 See Lenox MacLaren surgical Corp. v. Medtronic, Inc., 847F.3d 1221, 1239 (10th Cir. 2017). The magistrate judge assigned to the case agreed. She noted that Fowler named the same lawyers and law firm as defendants3 and asserted the same claims under §§1983, 1985, and 1986. The magistrate judge further noted the prior dismissal of these claims for failure to state a claim. As such, the magistrate judge recommended dismissing Fowler's complaint based on claim preclusion. See id. (explaining that claim preclusion requires identical parties, identical claims, and final judgement on the merits in an earlier action). Additionally, the magistrate

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2 Claim preclusion is typically an affirmative defense that arises in a defendant's answer or at summary judgement, but district courts have the discretion to consider it at the motion to dismiss stage. See Fernandez v. Clean House, LLC, 883F.3d 12961299 (10th Cir. 2018)

judge adopted the reasoning of the district court in Fowler's prior federal case as alternative grounds for dismissing the complaint.

After a hearing and over Fowler's timely objections, the district court adopted the magistrate judge's report and recommendation in full. Fowler appeals. Our review is de novo. See id. At 1230 (noting that application of preclusion principles to undisputed facts is a question of law reviewed de novo).

Fowler argues that the district court erred in ruling that claim preclusion barred her claims against the lawyers and their firm. She doesn't dispute that the parties and the claims in both this case and the prior federal case are identical. Instead, she contends that the third element of claim preclusion isn't met because the order dismissing her prior

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(noting that "it is proper to dismiss a claim on the pleadings based on an affirmative defense . . . when the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements")

complaint wasn't a "judgment on the merits" Id.at 1239. In support, she cites Ruiz v. Snohomish County Public Utility District No. 1, 824 F.3d 1161 (9th Cir. 2016). But that case narrowly held a prior order dismissing a case for both lack of personal jurisdiction and untimeliness wasn't a prior judgement on the merits because one of those grounds (lack of personal jurisdiction) wasn't a merits based rationale. See Ruiz, 824 F.3d at 1165. In contrast, the prior dismissal in this case was for failure to state a claim, which is a decision on the merits. See Stan Lee Media, Inc. v. Walt Disney Co., 774 F.3d1292, 1298 (10)Cir. 2014) (noting that "dismissal for

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3 Fowler also added as defendants both the state of Utah and the state-court judge who dismissed her malpractice and tort claims. But she conceded below that the magistrate judge correctly concluded that (1) the state couldn't be a defendant in a §1983 action and (2) the state court judge was entitled to absolute judicial immunity. On Appeal, she likewise admits that these two defendants were properly dismissed. As such, we consider these two defendants properly dismissed and don't discuss them further.

failure to plead a viable cause of action is a decision on the merits"). So Fowler's argument against claim preclusion doesn't succeed.

Accordingly, because claim preclusion bars Fowler's claims, we affirm the district court's order dismissing her complaint.[4]

Entered for the Court

No signature/
Nancy Moritz
Circuit Judge

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4 Because we affirm based solely on claim preclusion, we do not reach Fowler's challenge to the district court's alternative ruling that the lawyers aren't state actors and can't be liable under§1983.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Bonnie R. Fowler Pro-se Plaintiff/Petitioner - Appellant, v. State of Utah Judge Royal Hansen Mark R McDougal & Associates Mark R. McDougal Don R. Schow Brent K Wamsley Douglas C. McDougal Defendant/Respondent - Appellee.	Case No. 18-4091 Appellant/Petitioner's PETITION FOR REHEARING/ RECONSIDERATION

PETITION FOR REHEARING

Plaintiff/ Petitioner Bonnie R Fowler hereby submit this PETITION FOR REHEARING and/or RECONSIDERATION to the Tenth Circuit Court of Appeals based on the following and pursuant with Fed. R. App. P. 40. I believe this is referred

to as a petition for rehearing en banc.

With all due respect to the Court, I Bonnie R. Fowler believe that the court has misunderstood the cause of action based on their ruling using res judicata, and now collateral estoppel (that must be pleaded by the Defendants, not the court) which by all appearances seems to be in advocacy of only the Defendants by the court to deny truth and justice.

When the Plaintiff has proven case No. 2:17-cv-00285-CW)(D. Utah) on the merits and all of the elements required for 42 U.S.C. § 1983, § 1985, § 1986, and collusion/coercion, it is an obstruction and miscarriage of justice for the Court to interject res-judicata and collateral estoppel for the following reasons:

POINTS OF LAW AND SUPPORTING ARGUMENT

1. The Plaintiff has repeatedly said and has clearly proven that Case No.2:16CV00163 DAK and Case No. 2:17-cv-00285-CW) (D. Utah) are not identical on

numerous counts! (a) Paid the court fee of $400.00 to not have this new case dismissed on the 28 U.S.C. § 1915 (IFP Statute) screening provision again. (b) The State of Utah was a named as a Defendant (c) Judge Royal Hansen was named as a Defendant (d) Violation VI: Coercion was new as to prove the state court bias with these new parties. (e) This case further clarified and proved that the Attorney Defendants were "State Actors" (The Attorney Defendants, by rule of law were state actors and colluded with Judge Hansen by submitting a Motion to deny fee waivers of which the Judge acted on and denied the plaintiff this constitutional right.) an element required to survive the (12)(b)(6) defense, which in the first case Magistrate Judge Pead denied as "Moot". And (f) The damages were changed as the defendants malice further harmed the Plaintiff after the first case was filed.

2. Case No. 2:17-cv-00285-CW)(D. Utah) on Appeal to the

Tenth Circuit Court is **not** about the legal malpractice case the court wants to claim now as collateral estoppel. Federal Court Jurisdiction as proven, pertains only to the following with the supporting facts Count I: Federal Question Jurisdiction 42 U.S. Code § 1983 / Count II: Violation of Due Process and Equal Protection of the Laws 42 U.S. Code § 1983 / Count III: Violation of Due Process and Equal Protection of the Laws 42 U.S. Code § 1983 / Count IV Conspiracy to interfere with Civil Rights 42 U.S. Code § 1985 / Count V: Felony For Failure to Prevent Such Violations / Count VI COERCION /(COLLUSION of which the court has called it).

Count VI of the complaint holds the Attorney defendants accountable for their coercion which led to the False Candor submitted in the Legal Malpractice case of which the Court dismissed the entire case on (A bald face lie the Court Interpreted as the truth) This

became an actionable federal issue as they did it under the color of law and it violates the Due Process clause of the Constitution.

3. When res-judicata is barred by the rule of law due to the screening provisions of a case that was never fully adjudicated, not identical as to content or named parties, and contradicts the de-novo principle that the affirmative defenses of (12)(b)(6) of which was denied as Mute and 28 U.S.C. § 1915 (IFP Statute) is now considered as a dismissal on the merits, when it clearly was not, is now obstructing justice.

4. The Plaintiffs only recourse to a case dismissed on these provisions was to reserve the right to file a new case, as I did. To say the Plaintiff didn't object to this ruling is false, and it was not dismissed with prejudice leaving the door open to a new case at that particular time. The Federal District Court doesn't allow a Plaintiff to appeal a case that was not adjudicated on the merits, the old

adages of "damned if you do, damned if you don't" and "Houston we have a problem", clearly apply here.

5. The case at hand proved that the Attorney Defendants are state actors and proved that they conspired with state actors. (Proving that they were state actors by also submitting into evidence their own motion to deny fee waivers of court costs and transcripts, of which Judge Hansen clearly acted upon as only he had the final authority to decide and deny.) Now sufficiently alleged facts to support a conspiracy and by their own admission that they threatened and intimidated the plaintiff, and that they didn't stop the owner of the law firm from doing this. Therefore the Plaintiff made certain in the new complaint that the Complaint could not fail for insufficiency of the evidence, IFP or (12)(b)(6).
6. This civil rights complaint is clearly not an extension or a second bite at the apple of the Legal Malpractice Claim. Yet the Constitution clearly states that it is a

remedy to what was lost due to the intentional and malicious violations the Attorney (State actors) denied and inflicted on the Plaintiff.

The Case at hand 18-4091 on Appeal to the Tenth Circuit Court of Appeals from the (D.C. No.2:17-cv-00285-CW)(D. Utah) should have been addressed as an original federal case on the merits. Therefore the doctrines of law the court has now adopted as binding precedent of res-judicata and collateral estoppel fail on the merits and the case should have proceeded to discovery and a jury trial as the complaint demanded.

Conclusion

The Plaintiff Bonnie R. Fowler in good faith pleads with this Honorable Court to overturn the Ruling and Order in dismissing this case. The merits still have not been addressed due to the obstruction of justice in the courts unfounded assertion of res-judicata and collateral estoppel.

The rule of law barring these matters apparently doesn't matter. The Court has denied any adjudication of this case, one of which at best could be considered as a minor procedural or technical error in how the pro-se Plaintiff went about presenting this case. It appears that the Plaintiff got it 99.9% right this time, and the court refuses to even consider it on the merits.

The Ruling and Order dismissing this case will send a clear message to the citizens of this country that the Federal Courts have condoned and set no precedent in deterrence for the violations of our Constitutional Rights, violations of Due Process, and that it is permissible by the court for Attorney Defendants to blatantly deny you a constitutional Right of the waiver of fees (state actors), that they conspired to threaten and intimidate the plaintiff to deter her from testifying, coercion and collusion, not to leave out blatant and

obvious perjury. These are the merits of this case.

I believed that justice would prevail in the federal legal system and that the Constitution in the way it was written would hold these defendants accountable for the serious and irreversible harm they have caused, on all counts.

The violations of the Plaintiff's Constitutional Rights are a very serious and actionable claim. It is not frivolous or vexatious in any way, and cannot be swept under the carpet simply because the plaintiff was dismissed due to screening provisions, and at the time could not pay. This in itself is so wrong and an injustice to all.

If it takes going public with this miscarriage of justice and or appealing this to the Supreme Court of the United States to hold these men accountable, then this leaves me no choice. The people would be better served if the court would reverse the Ruling on the

actual merits and stop the legal abuse games.

December 13, 2018

___"s/".___
Date
Signature

Bonnie R. Fowler
Appellant Pro-se

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BONNIE R. FOWLER,

Plaintiff – Appellant,

v. No. 18-4091

STATE OF UTAH, et al.,
Defendants –Appellees.

ORDER

Before BACHARACH, MURPHY, and MORITZ, Circuit Judges.

This matter comes on for consideration of the appellant's "Petition for Rehearing." The court construed this as a petition for both panel rehearing and rehearing en banc, and, so construed the petitions are denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Filed December 21. 2018

Entered for the Court
/s/
Elisabeth A. Shumaker, Clerk.

8. DOCKET TEXT ORDER (ECF Order No.29) dated 09/06/2016 Case No. 2:16CV00163 DAK-DBP finding as moot 10 Motion to Dismiss Party; finding as moot 13 Motion to Dismiss; finding as moot 23 Motion to Dismiss for failure to state a claim; finding as moot 26 Motion to Strike. , Signed by Magistrate Judge Dustin B. Pead on 09/06/2016. (Docket Text Order, No attached document)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BONNIE R. FOWLER,

Plaintiff,

v.

STATE OF UTAH c/o SEAN REYES, JUDGE ROYAL I. HANSEN, MARK R. MCDOUGAL, DON R. SCHOW, BRENT K. WAMSLEY, DOUGLAS C. MCDOUGAL, and MARK R. MCDOUGAL & ASSOCIATES,

Defendant.

REPORT AND RECOMMENDATION TO DISMISS CASE

Case No. 2:17-cv-285-CW-BCW

Pro Se Plaintiff Bonnie R. Fowler ("Plaintiff") filed the Complaint in this case on April 12, 2017, against Defendants State of Utah c/o Sean Reyes ("State of Utah"), Judge Royal Hansen ("Judge Hansen"), Mark R. McDougal, Don R. Schow, Brent K. Wamsley, Douglas C. McDougal, and Mark R. McDougal & Associates ("McDougal & Associates").1 District Judge

Clark Waddoups referred this case to Magistrate Judge Brooke Wells pursuant to 28 U.S.C. § 636(b)(1)(B).2

Before the Court are the following motions: Defendants State of Utah's and Judge Hansen's Motion to Dismiss and Memorandum of Law in Support,3 Defendant Douglas McDougal's Motion to Dismiss,4 Defendant Don Schow's Motion to Dismiss and Memorandum

1 Docket no. 1. 2 Docket no. 26. 3 Docket no. 7. 4 Docket no.8

in Support,5 Defendant Brent Wamsley's Motion to Dismiss,6 and Defendants Mark McDougal's and Mark R. McDougal & Associates' Motion to Dismiss.7 Plaintiff has filed oppositions to each of the Motions to Dismiss.8 The State of Utah and Judge Hansen filed a reply in support of their Motion to Dismiss.9 Time for briefing has expired with respect to these pending motions, and this Court has determined that oral argument is unnecessary and decides the case based on

the record before it. Accordingly, this Report and Recommendation will resolve all pending motions before this Court.

BACKGROUND10 In October 1995, Plaintiff was a party to a divorce action in Utah state court.11 The Decree of Divorce was entered April 8, 1996.12 On October 1, 2012, Plaintiff's ex-husband filed a motion to terminate alimony.13 On March 5, 2013, Judge Royal Hansen found that the alimony payments Plaintiff had been receiving ceased as a matter of law as of August 2012 because the law limiting the duration of alimony to the length of the marriage was in effect prior to the Decree of Divorce being entered.

Docket no. 9 and 10. 6 Docket no. 16. 7 Docket no. 18. 8 Docket nos. 11, 19, 24, 25 and 28. 9 Docket no. 20. 10 The facts included in this section were taken from the briefs and exhibits filed in conjunction with the pending motions. The Court also takes judicial notice of other court decisions. 11 See Docket no. 7-1 (State docket of Fowler v. Fowler, No. 954904168 (Oct. 10, 1995)). 12 Id. 13 Id. 14

Thereafter, in November 2013, Plaintiff filed a civil lawsuit in Utah state court against McDougal & Associates, Brent Wamsley (and his firm), Mark McDougal, Don Schow, and Douglas McDougal (collectively hereafter "Attorney Defendants").15 In a Ruling and Order issued April 13, 2015, Judge Hansen dismissed Plaintiff's claims of defamation, intentional infliction of emotional distress, and legal malpractice against the Attorney Defendants.16

Plaintiff appealed this decision to the Utah Court of Appeals, and Judge Hansen's Ruling and Order was affirmed in a per curiam decision.17

On March 3, 2016, Plaintiff filed a Complaint in this Court against the Attorney Defendants under 42 U.S.C. §§ 1983, 1985 and 1986.18 After she filed an amended complaint, the Attorney Defendants filed motions to dismiss the complaint. On December 14, 2016, Magistrate Judge Dustin Pead entered his Report and Recommendation.19 In his decision, Judge Pead made the following findings in

recommending dismissal of Plaintiff's amended complaint:

• That Plaintiff's amended complaint failed to comply with FRCP 8 as it did not provide Attorney Defendants with fair notice of the claims and the grounds upon which they rest.

• That Plaintiff's § 1983 claim failed for a number of reasons: (1) private conduct may not be redressed by a § 1983 claim unless the private party acted as a willful participant in a conspiracy with the State or its agents; (2) Plaintiff failed to allege an agreement or concerted action between the Attorney Defendants and the unnamed jurist or tribunal; and (3) Plaintiff failed to identify a rule or official policy of the law firm that would cause the constitutional violations claimed, thus failing to establish a § 1983 claim against the firm.

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15 Docket no. 7-3 (State docket of Fowler v. Mark McDougal & Associates, No. 130907844 (filed Nov. 15, 2013)). 16 Docket no. 7-4 (Ruling and Order). 17 Docket no. 7-5 (Fowler v. Mark McDougal & Associates, 2015 UT App 194). 18 Fowler v. McDougal, et al, 2:16cv163-DAK-DBP (Mar. 3, 2016). 19 Id. at Docket no. 40 (Dec. 22, 2016).

• That Plaintiff's § 1985(2) claim failed because Plaintiff failed to set forth any specific allegations to support the existence of a conspiracy, and failed to allege that the statements made by certain Defendants were to deter her testimony by force or intimidation (to the contrary she specifically states that the statements were not made in any way for the purpose of deterring Plaintiff from testifying).

• Finally, Plaintiff's § 1986 claim could not exist independent of her § 1985 claim, thus because she failed to state a valid § 1985 claim, her § 1986 claim fails.

Based on the foregoing findings, Judge Pead recommended that Plaintiff's amended complaint be dismissed under the screening provision of 28 U.S.C. § 1915 and FRCP 12(b)(6).

District Judge Dale Kimball, after review of the case de novo, adopted and affirmed the Report and Recommendation of Judge Pead.20 Less than three months later, Plaintiff filed the Complaint in this action.21 Plaintiff has named the same Attorney Defendants in this action and added two new

defendants Judge Royal Hansen and the State of Utah.

ANALYSIS

This Court will consider the motions to dismiss in two steps: first, it will consider the motion to dismiss filed against the State of Utah and Judge Hansen as those Defendants were not named in the prior lawsuit before this Court; and second, it will consider the motions to dismiss filed by the Attorney Defendants.

When considering a motion for dismissal a court should "assume the factual allegations are true and ask whether it is plausible that the Plaintiff is entitled to relief."22 A claim must be dismissed if the complaint does not contain enough facts to make the claim "plausible on its

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20 Id. at Docket no. 45 (Jan. 20, 2017). 21 Docket no. 1 (April 12, 2017). 22 Gallagher v. Shelton, 587 F.3d 1063, 1068 (10th Cir. 2009) (citation omitted)

. face."23 "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."24 A court may only consider the facts actually alleged and should disregard conclusory allegations made without supporting factual averments.25 At a minimum, the complaint is required to "give the defendant fair notice of what the claim is and the grounds upon which it rests."26 "Generally when a district court considers matters outside the complaint, the court should treat a motion to dismiss as a motion for summary judgment."27 However, "the Court may take judicial notice of court files and records—whether federal or state—as well as facts which are a matter of public record."28 "However, [t]he documents may only be considered to show their contents, not to prove the truth of matters asserted therein."29

Plaintiff proceeds pro se. As a pro se litigant, the court must

construe her pleadings liberally and hold them "to a less stringent standard than formal pleadings drafted by lawyers."30

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23 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). 24 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). 25 Moya v. Schollenbarger, 465 F.3d 444, 455-57 (10th Cir. 2006); Bryan v. Stillwater Bd. Of Realtors, 578 F.2d 1319, 1321 (10th Cir. 1977) ("allegations of conclusions or of opinions" are not sufficient absent facts); Twombly, 550 U.S. at 554 (complaint must contain "more than labels and conclusions" and "raise a right to relief above the speculative level."). 26 Moya, 465 F.3d at 457 (quotations and citations omitted) (alteration in original) (emphasis added). 27 Merswin v. Williams Companies, Inc., 364 F. App'x 438, 441(10th Cir. 2010) (citing Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991)). 28 Dale v. Bank of Am., N.A., 2016 WL 4245493, at *2 (D. Kan. Aug. 2016) (See Tal v. Hogan, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) (saying a court's own files and records as well as facts which are a matter of public record can be considered under the judicial notice exception); Rose v. Utah State Bar, 471 F. App'x 818, 820 (10th Cir. 2012) (saying that filings from state-court disciplinary proceedings can be

considered under the judicial notice exception)). 29 Tal, 453 F.3d at 1264

n.24 (citation omitted). 30 Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991); see also Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam); Van Deelen v. Johnson, 497 F.3d 1151, 1153 n. 1 (10th Cir. 2007).

Even under a less stringent standard, the court may not "supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf."31 1) State of Utah's and Judge Hansen's Motion to Dismiss a) Judge Royal Hansen Plaintiff's complaint alleges, in violation of § 1983, Judge Hansen acted with improper bias in her State court proceedings and was coerced into "turn[ing] a blind eye to Defendants bald faced lies, slander, threats and intimidation and excus[ed] them as judicial proceeding privileges."32 Further, Plaintiff claims that she was denied due process rights by not being allowed to proceed to trial in her State court proceedings. All of the allegations in the complaint related to Judge Hansen are in the context of Judge Hansen acting in his official judicial capacity and not in

his personal capacity. In essence, all Plaintiff's claims against Judge Hansen are based on her disagreement with his decisions in her State court proceedings. This is exactly what judicial immunity protects against. "Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages."33 "Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial."34 Immunity is only waived in two circumstances: (1) "a judge is not immune from liability for non-judicial actions, i.e. actions not taken in the judge's judicial capacity,

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31 Whitney v. State of New Mexico, 113 F.3d 1170, 1175 (10th Cir. 1997).

32 Docket no. 1 (Complaint). 33 Mireles v. Waco, 502 U.S. 9, 11 (1991) (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). 34 Mireles, 502 U.S. at 11 (citing Pierson v. Ray, 386 U.S. 547, 554 (1967)).

"35 and (2) "a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction."36 Judge Hansen was the judge assigned to determine the motion to terminate Plaintiff's alimony and Plaintiff's malpractice action, in both matters he was acting within his judicial capacity. Thus, Judge Hansen was "performing judicial acts and [was] therefore clothed with absolute judicial immunity."37 Further, even taking the Plaintiff's allegations as true,38 judicial immunity still applies even where there are allegations of conspiracy.39

Based on the foregoing, this Court recommends that Judge Hansen be DISMISSED with prejudice based on judicial immunity. b) State of Utah Plaintiff's complaint only mentions the State of Utah in relation to the allegations that the State of Utah is responsible for the regulation and licensing of attorneys and judges and claims that it is therefore liable under § 1983 and § 1985.

The Supreme Court has determined that "a State is not a 'person' within the meaning of § 1983" as § 1983 "does not provide a federal forum for litigants who seek a remedy against a

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35 Mireles, 502 U.S. at 11 (citing Forrester v. White, 484 U.S. 219, 227-29 (1988)). 36 Mireles, 502 U.S. at 12 (citing Stump v. Sparkman, 435 U.S. 349, 356-57 (1978)). 37 Hunt v. Bennett, 17 F.3d 1263, 1266 (10th Cir. 1994). 38 This Court notes that Plaintiff's allegations involving Judge Hanson appear to be somewhat contradictory in that on one hand she claims Judge Hansen was biased and somehow involved in a conspiracy with Attorney Defendants, but on the other hand states that the Attorney Defendants coerced Judge Hansen into such decisions. 39 Hunt, 17 F.3d at 1267 (citing Dennis v. Sparks, 449 U.S. 24, 27 (1980)) ("[J]udges enjoy absolute immunity from liability under §1983—even when the judge allegedly conspires with private parties.")

State for alleged deprivations of civil liberties."40 Thus, the State of Utah is not a proper defendant in a § 1983 action.

Further, "[s]ection 1983 is not a vicarious liability provision . . . . In any § 1983 action, the plaintiff must demonstrate the liability of each . . . official against whom a claim is made," and "the burden is on the plaintiff to develop facts that show the defendant's responsibility for a constitutional violation."41 Here, Plaintiff does not claim that the State of Utah itself did anything to violate Plaintiff's constitutional rights, but is alleging respondeat superior liability because allegedly it didn't properly supervise the attorneys licensed in the State. However, as stated above vicarious liability or respondeat superior liability under §1983 is not a viable cause of action. Accordingly, this Court recommends that the State of Utah be DISMISSED from this action.

2) Attorney Defendants' Motions to Dismiss

The Court finds that the Complaint in this action and the Amended Complaint42 in the prior action are nearly identical other than a few minor insignificant changes and the naming of Judge Royal Hansen and the State of Utah as defendants.

Further, this Court finds that Plaintiff did not make the substantive changes identified by Judge Pead in the prior action, and instead filed a Complaint that is nearly identical to the amended complaint that was dismissed in the

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40 Will v. Michigan Dept. of State Police, 491 U.S. 58, 65-66 (1989). 41 Serna v. Colo. Dept. of Corrections, 455 F.3d 1146, 1155 (10 Cir. 2006). 42 Fowler v. McDougal, 2:16cv163-DAK-DBP, Docket no. 30.

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prior action.43 Based on this review, this Court will review the claims against the Attorney Defendants under the doctrines of res judicata and claim preclusion.

"Claim preclusion is usually raised as an affirmative defense in the answer to complaint, or on motion for summary judgment."44 "However, 'where the substantive rights of parties are not endangered, a district court may in its discretion consider res judicata issues raised by motion to dismiss, rather than by the more usual form of an answer to a complaint."45 "The preclusive effect of a judgment is defined by claim

preclusion and issue preclusion, which are collectively referred to as 'res judicata.'"46 "Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'"47 "Issue preclusion, in contrast, bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim."48 "By 'preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate,' these two doctrines protect against 'the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on 43 For instance, Judge Pead previously explained, "Plaintiff must set forth 'specific facts showing an agreement and concerted action amongst the defendants . . . . Conclusory allegations of conspiracy are insufficient to state a valid §

1983 claim." Plaintiff has not remedied this issue in her new

Complaint.

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44 Kay v. Bemis, 2009 WL 347427 *3 (D. Utah 2009) (citing 18 Moore's Federal Practice § 131.50[1]-[3] (3d ed.2002)). 45 Id. (citations omitted). 46 Taylor v. Sturgell, 553 U.S. 880, 892 (2008). 47 Id. (citing New Hampshire v. Maine, 532 U.S. 742, 748 (2001)). 48 Id. (citing New Hampshire, 532 U.S. at 748–749). judicial action by minimizing the possibility of inconsistent decisions.'"49 "'Stated alternatively', under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action."50

Three elements must be met before claim preclusion can be applied. Those elements are

"(1) a [final] judgment on the merits in an earlier action; (2) identity of the parties or privies in the two suits; and (3) identity of the cause of action in both suits."51

Here, the prior amended complaint was dismissed for failure to state a claim under the screening provision of 28 U.S.C. § 1915 AND for failure to state a claim based on Attorney Defendants' motions to dismiss (i.e. 12(b)(6)). "[I]t

is well-settled that a dismissal for failure to state a claim under Rule 12(b)(6)—which speaks to the legal insufficiency of the claim at issue—is an adjudication on the merits."52 Here, in the prior action the Court found that the amended complaint did not state any grounds for which relief could be granted and was dismissed pursuant to FRCP 12(b)(6). Accordingly, there was a final judgment on the merits of the earlier action, meeting the first element for claim preclusion.

With regard to the second element, Plaintiff has named all of the same Attorney Defendants in both actions. In this action Plaintiff named two additional defendants Judge Royal Hansen and the State of Utah, however the Court has addressed these claims against the new defendants above. Accordingly, the second element of claim preclusion has been met.

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49 Id. (citing Montana v. United States, 440 U.S. 147, 153–154 (1979)). 50 Clark v. Haas Grp., Inc., 953 F.2d 1235, 1238 (10th Cir. 1992) (citing 53 May v. Parker–Abbott Transfer and Storage, Inc., 899 F.2d 1007, 1009

(10th Cir.1990), quoting Petromanagement Corp. v. Acme–Thomas Joint Venture, 835 F.2d 1329, 1335 (10th Cir.1988), quoting, Brown v. Felsen, 442 U.S. 127, 131 (1979)). 51 Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F3d 1221, 1239 (10th Cir. 2017) (citing King v. Union Oil Co. of Cal., 117 F.3d 443, 445 (10th Cir. 1997)). 52 Goings v. Sumner County Dist. Attorney's Office, 571 F. App'x. 634, 640 (10th Cir. 2014) (citation omitted).

Finally, the Court needs to determine whether this action stems from the single cause of action that the prior action was based on. The Tenth Circuit has applied the transactional approach to determine what constitutes a single cause of action. The Tenth Circuit "evaluate[s] a 'transaction' or 'series of connected transactions' 'pragmatically[,] considering whether the facts are related in time, space, origin, or motivation, and whether they form a convenient trial unit.'"53 "Under [the transactional] approach, a cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence."54 The claims Plaintiff brings in this action are

identical to the claims that she brought against the Attorney Defendants in the prior action. They all arise from the same series of transactions (i.e. the decisions by Judge Hansen and the alleged malpractice by the Attorney Defendants). The claims in this case are duplicative of the claims resolved in the prior case, satisfying the third element of claim preclusion. Accordingly, this Court recommends that the claims against the Attorney Defendants be barred under res judicata and this Court recommends DISMISSAL of all Plaintiff's claims against the Attorney Defendants.

In the alternative, if the reviewing Court disagrees with this Court's determination that res judicata applies, this Court adopts the reasoning and adjudication in favor of the Attorney Defendants set forth in the Report and Recommendation55 issued by Judge Pead and adopted and affirmed by Judge Kimball56 in the prior action as that reasoning still applies to the nearly identical Complaint filed in this action.

53 Melot v. Roberson, 653 F. App'x. 570, 576 (10th Cir. 2016) (quoting Lowell Staats Min. Co., Inc. v. Philadelphia Elec. Co., 878 F.2d 1271, 1274 (10th Cir. 1989)). 54 Id. (Nwosun v. Gen. Mills Rests., Inc., 124 F.3d 1255, 1257 (10th Cir. 1997)). 55 Fowler v. McDougal, 2:16cv163-DAK-DBP, Docket no. 40.

RECOMMENDATION

For the foregoing reasons, this Court hereby RECOMMENDS that the claims against Judge Hansen and the State of Utah be DISMISSED with prejudice, and FURTHER RECOMMENDS that the claims against the Attorney Defendants be DISMISSED based on res judicata and claim preclusion.

DATED this 1 February 2018. /s/ Brooke C. Wells / United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

BONNIE R. FOWLER,
Plaintiff,
v.
STATE OF UTAH; ROYAL I. HANSEN; MARK R. McDOUGAL; DON R. SCHOW; BRENT K. WAMSLEY; DOUGLAS C. McDOUGAL; MARK R McDOUGAL & ASSOCIATES,
Defendants.

Case No. 2:17-cv-285-CW
District Judge Clark Waddoups

ORDER

This case was assigned to United States District Court Judge Clark Waddoups, who then referred it to United States Magistrate Judge Brooke C. Wells under 28 U.S.C. § 636(b)(1)(B).

On February 1, 2018, Judge Wells issued a Report and Recommendation, recommending that the court dismiss this action. Plaintiff Bonnie R. Fowler objected to the Report and Recommendation on February 15, 2018, and she filed a

Motion to Correct Deterrence Issue and Memorandum on April 18, 2018. After having reviewed the file de novo, and for the reasons stated on the record, the court hereby ADOPTS AND AFFIRMS Judge Wells's Report and Recommendation in its entirety and DISMISSES Ms. Fowler's claim of coercion. Accordingly, all pending motions are terminated and this case is DISMISSED with prejudice.

DATED this 15th day of May, 2018.

BY THE COURT:

/s/

Clark Waddoups

United States District Judge

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street Denver, Colorado 80257
(303) 844-3157
January 2, 2019

Chris Wolpert Chief Deputy Clerk Mr. D. Mark Jones United States District Court for the District of Utah Office of the Clerk 351 South West Temple Salt Lake City, UT 84101 RE: 18-4091, Fowler v. Stateof Utah, et al Dist/Ag docket: 2:17-CV-00285-CW

Dear Clerk: Please be advised that the mandate for this case has issued today. Please file accordingly in the records of your court. Please contact this office if you have questions. Sincerely

,

Elisabeth A. Shumaker

/s/

Clerk of the Court