APPENDIX A

Appellate Case: 18-4066 Document: 010110129806
Date Filed: 02/22/2019 Page: 1

FILED: United States Court of
Appeals Tenth Circuit
February 22, 2019
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DR. MILOS JIRICKO,
Plaintiff - Appellant,

v.

FRANKENBURG JENSEN LAW FIRM; CAROLYN STEVENS JENSEN, lawyer; JENNIFER BRENNAN, lawyer; KEITH KELLY, State Judge in his official and personal capacity; HEATHER BRERETON, Judge in her official and personal capacity,
Defendants – Appellees

No. 18-4066
(D.C. No. 2:16-CV-00132-DB)
(D. Utah)

ORDER AND JUDGMENT*

---

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App.

Before MORITZ, BALDOCK, and O'BRIEN, Circuit Judges.

Dr. Milos Jiricko, appearing pro se, appeals from the dismissal of his complaint asserting federal and state-law claims against opposing counsel and two judges who were involved in his unsuccessful personal injury suit brought in Utah

state court. He also appeals from the denial of his motion to reopen the judgment under Fed. R. Civ. P. 59 and 60(b). We affirm.[1]

BACKGROUND

In October 2013, Jiricko, appearing pro se, filed suit in Utah state court against an ophthalmologist and the doctor's employer for personal injuries he claimed to have suffered as a result of a surgical procedure ("State Court Suit"). Carolyn Stevens Jensen and Jennifer M. Brennan and their law firm, rankenburg Jensen, (collectively "the Frankenburg Defendants") represented the medical defendants in the suit. Judge Keith Kelly and later Judge Heather Brereton (collectively "the Judicial Defendants") presided over the case. Accepting the Frankenburg Defendants' arguments on behalf of their clients, Judge Kelly decided the Utah Health Care Malpractice Act, Utah Code Ann. §§ 78B-3-401 to 78B-3-426

P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Our jurisdiction derives from 28 U.S.C. § 1291.

("the Act"), and its requirements applied to Jiricko's claims. Judge Brereton subsequently dismissed Jiricko's suit as a result of his failure to designate a qualified expert witness as required by the Act. The Utah Court of Appeals affirmed.

While his State Court Suit appeal was pending, Jiricko filed this action against the Frankenburg and Judicial Defendants, alleging they had conspired to deprive him of his constitutional rights and otherwise harm him by applying the Act to his claims. He further alleged the Act was unconstitutional on its face and as applied in the State Court Suit, and asserted claims against the Defendants under 42 U.S.C. § 1983 and state law.

He sought damages, a judgment declaring the Act to be unconstitutional, and an injunction barring its application to his claims in the State Court Suit.

Both sets of defendants filed motions to dismiss the claims. The district judge referred the motions to a magistrate judge, who recommended: 1) the claims against the Judicial Defendants be dismissed on judicial immunity and other grounds, and 2) the § 1983 claims against the Frankenburg Defendants be dismissed because they were not state actors and the state-law claims against them (except the claim of fraud on the state court) be dismissed since those claims were barred by Utah's judicial-proceedings privilege. The district judge adopted the magistrate's recommendations over Jiricko's objections.

In response, Jiricko filed a petition for a writ of mandamus in this court, seeking to disqualify the district and magistrate judges for failing to decide what he deemed to be the central issue in this action–his challenges to the constitutionality of the

Act. In his mandamus petition, he also asked this court to decide the constitutional issues. Exercising jurisdiction under 28 U.S.C. § 1651(a), we denied his petition. See *In re Jiricko*, No. 17-4094, slip op. at 4 (10th Cir. June 26, 2017) (unpublished order).

Meanwhile, the Frankenburg Defendants moved for summary judgment on the only remaining claim, fraud on the state court. The magistrate recommended a summary judgment dismissing the state law claim because the district court lacked jurisdiction to decide it and, in any event, should decline to exercise supplemental jurisdiction. Jiricko did not file objections within fourteen days of this recommendation as required or seek an extension to do so, but he did file objections approximately two weeks after the deadline.

The district judge nevertheless considered the untimely objections, adopted the magistrate's recommendation, dismissed the fraud on the state court claim for lack of jurisdiction, and entered judgment dismissing this action.[2] He also denied Jiricko's motion to reopen the judgment under Fed. R. Civ. P. 59 and 60(b). This appeal followed.

DISCUSSION

A. Utah Health Care Malpractice Act

---

[2] As a result of Jiricko's failure to timely object to the magistrate's recommendation regarding this claim, we ordered Jiricko to show cause why he had not waived his right to appellate review of the district court's adoption of this recommendation under our firm waiver rule regarding untimely objections. We discuss this rule and Jiricko's response to our order later in this decision.

Though Jiricko raises a number of issues on appeal, his primary argument relates to the dismissal of his case without deciding whether the Utah Health Care Malpractice Act is unconstitutional on its face or as applied by the Judicial Defendants in the State Court. Jiricko is mistaken in assuming a decision on these issues is necessary simply because he asserted § 1983 and state-law claims. As we informed him in denying his petition for mandamus, the failure of the judges to rule on the constitutionality of the Act at that point in the case was "the natural consequence of rulings based on other dispositive deficiencies in his claims." In re Jiricko, No. 17-4094, slip op. at 3. The immunity, privilege and other grounds on which the district court had dismissed Jiricko's claims against the Judicial Defendants and most of his claims against the Frankenburg Defendants made it unnecessary for the district court to resolve his constitutional challenges. We suggested an appeal from the merits of these dismissals if he objected to

them. *Id.* at 2-3. He has done so to some extent in this appeal, as we discuss in the following sections, but there is no merit to his renewed contention that the district court erred in failing to address the Act's constitutionality.

B. Dismissal of Claims Against the Judicial Defendants

Jiricko's claims against the Judicial Defendants were dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a decision we review de novo. See *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012). To state a claim, a complaint must

contain sufficient facts "to state a claim to relief that is plausible on its face," taking all well-pleaded facts, but not conclusory allegations, as true and construing them in the light most favorable to the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); see *Acosta v. Jani-King of Okla., Inc.*, 905 F.3d 1156, 1158 (10th Cir. 2018). "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." *Iqbal*, 556 U.S. at 678. Because Jiricko is acting pro se, we construe his filings liberally, but do not act as his advocate. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

1. Claims for damages

We agree with the district judge, Jiricko failed to state a plausible claim for damages against the Judicial Defendants because the claims are barred by judicial immunity. A judge is immune from damage suits unless (1) the act in question "is not taken in the judge's judicial capacity," or (2) "the act, though judicial in nature, is taken in the complete absence of all jurisdiction." *Stein v. Disciplinary Bd. of Supreme Court*

of N.M., 520 F.3d 1183, 1195 (10th Cir. 2008) (internal alterations and quotation marks omitted). Jiricko contends his claims fall within these exceptions because the state judges improperly ruled his State Court Suit was subject to the Act. But disagreement with a ruling does not touch upon the court's jurisdiction or judicial capacity. His claims failed to state

a claim because they are barred by judicial immunity.

2. Claims for declaratory and injunctive relief

The district judge dismissed Jiricko's claims for declaratory and injunctive relief against the Judicial Defendants on alternative grounds: 1) they failed to state a claim because they were barred by the *Younger* abstention doctrine,[3] and 2) the Judicial Defendants, as adjudicators, were not proper parties to defend the constitutionality of the Utah statute. Jiricko disputes the judge's reliance on the Younger doctrine but does not challenge his holding that the Judicial defendants were not proper parties. "When a district court dismisses a claim on two or more independent grounds, the appellant must challenge each of those grounds." *Lebahn v. Nat'l Farmers Union Unif. Pension Plan*, 828 F.3d 1180, 1188 (10th Cir. 2016). Since Jiricko does not now challenge the "proper parties" ruling, we trust it was proper. We affirm the dismissal of the claims for declaratory and injunctive relief. *See id.*

C. Claims against Frankenburg Defendants

1. Section 1983 claims

To state a claim under § 1983, Jiricko was required to plead facts that, taken as true, establish (1) he was deprived of a right secured by the Constitution or federal law, and (2) the deprivation was caused by a person or persons acting under color of state law. See *Brokers' Choice of Am., Inc. v. NBC Universal,*

---

[3] This doctrine arises from *Younger v. Harris*, 401 U.S. 37 (1971).

Inc., 757 F.3d 1125, 1143 (10th Cir. 2014). He failed to state a § 1983 claim against the Frankenburg Defendants, the district judge concluded, because he did not sufficiently allege they acted under color of state law. Jiricko disputes this conclusion because he alleges they conspired with state actors (the Judicial Defendants) in state court to deprive him of his constitutional rights. But "[w]hen a plaintiff in a § 1983 action attempts to assert the unnecessary 'state action' by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action." *Scott v. Hern*, 216 F.3d 897, 907 (10th Cir. 2000) (internal quotation marks omitted). The mere fact that a judge agreed with one party's legal arguments is not collusion. Since Jiricko failed to offer the required specific factual allegations, he failed to state a § 1983 claim against the Frankenburg Defendants.

2. State-law claims

The district court dismissed Jiricko's state-law claims against the Frankenburg Defendants (abuse of process, conspiracy and intentional infliction of emotional distress)

because they were barred by Utah's judicial-proceeding privilege. Under Utah law, this privilege "presumptively attaches to conduct and communications made by attorneys on behalf of their clients in the course of judicial proceedings." *Moss v. Parr Waddoups Brown Gee & Loveless*, 285 P.3d 1157, 1166 (Utah 2012). Jiricko did not challenge the

privilege ruling, thereby forfeiting appellate review of it.[4] See *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue.")

Jiricko also waived appellate review of the district court's dismissal of his final claim against these Defendants (fraud on the state court); this time because he failed to timely object to the magistrate judge's February 6, 2018, recommendation to dismiss this state-law claim for lack of jurisdiction. "This court has adopted a firm waiver rule under which a party who fails to make a timely objection to the magistrate judge's findings and recommendations waives appellate review of both factual and legal questions." *Morales-Fernandez v. I.N.S.*, 418 F.3d 1116, 1119 (10th Cir. 2005). "This rule does not apply, however, when (1) a pro se litigant has not been informed of the time period for objecting and the consequences of failing to object, or when (2) the interests of justice require review." Id. (internal quotation marks omitted).

Page 9

In response to our order to show cause regarding

---

[4] Jiricko did address this privilege in his reply brief after the Frankenburg Defendants raised it in their response brief. But we do not ordinarily consider arguments raised for the first time in a reply brief. See, e.g., *White v. Chafin*, 862 F.3d 1065, 1067 (10th Cir. 2017) (holding party "waived [ ]his contention by waiting to present it for the first time in his reply brief"). Further, Jiricko's argument that the Frankenburg Defendants were not acting within the scope of the judicial-proceeding privilege in the State Court Suit is conclusory and not persuasive in any event.

his apparent waiver, Jiricko first claims the firm waiver rule does not apply because his objections to the magistrate judge's recommendation regarding his fraud on the court claim were timely under an extension he had requested and received from the court. The record shows otherwise; that extension granted Jiricko additional time to object to two other, earlier filed, recommendations made by the magistrate. His objections to the magistrate's recommendation regarding his fraud on the court claim were untimely.

He also contends the firm waiver rule is inapplicable under the exceptions to the rule. But our review of the magistrate judge's written recommendation indicates it accurately informed Jiricko he was required to file any objections to the recommendation within fourteen days and that the failure do so "may constitute waiver of objections upon subsequent review." R. Vol. II at 395. His "interests of justice" argument is also unpersuasive as it merely returns to the issue of the Act's constitutionality, and makes no argument about the judge's unexceptional decision not to exercise supplemental jurisdiction over his fraud on the state court claim once his federal and other state claims had been dismissed. Jiricko's other assorted arguments against application of the firm waiver rule are also meritless. He waived appellate review of the district court's dismissal of his fraud on the court claim.

D. Postjudgment Motion

Jiricko also appeals from the denial of his combined Rule 59 and Rule 60(b) motion to reopen the court's judgment. We review this decision for abuse of discretion.

See Butler v. Kempthorne, 532 F.3d 1108, 1110 (10th Cir. 2009). The denial was not even debatably beyond permitted discretion.[5]

CONCLUSION

AFFIRMED.

Entered for the Court

Terrence L. O'Brien
Circuit Judge

---

[5] Jiricko's contention that the district court failed to rule on a portion of this motion is not supported by the record. Nor do we see anything in the record supporting his suggestion that the district and magistrate judges were biased against him and should have been disqualified.

DOCUMENT B

Case 2:16-cv-00132-DB Document 139 Filed 03/15/18
Page 1 of 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

DR. MILOS JIRICKO, Plaintiff, v. FRANKENBURG JENSEN LAW FIRM; CAROLYN STEVENS JENSEN, lawyer; JENNIFER M. BRENNAN, lawyer; KEITH KELLY, State Judge in his official and personal capacity; HEATHER BRERETON, Judge in her official and personal capacity, Defendants.	**JUDGMENT IN A CIVIL CASE** Case No. 2:16-cv-132-DB District Judge Dee Benson

IT IS ORDERED AND ADJUDGED that the Reports and Recommendations of Judge Furse are ADOPTED and this action is DISMISSED.

DATED this 15th day of March, 2019

BY THE COURT:

s/
Dee Benson
United States District Judge

DOCUMENT C

Case 2:16-cv-00132-DB Document 133 Filed 02/06/18
Page 1 of 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

DR. MILOS JIRICKO, Plaintiff,	) REPORT AND RECOMMENDTION
v.	) REGARDING)DEFENDATS' MOTION) FOR SUMMARY
FRANKENBURG JENSEN LAWFIRM; CAROLYN STEVENS JENSEN, lawyer; JENNIFER M BRENNAN, lawyer	) JUDGMENT) Case No.) 2:16-cv-00132-DB-EJF) DISTRICT JUDGE) DEE BENSON
Defendants.	) Magistrate Judge) Evelyn J. Furse

The Frankenburg Jensen Law Firm, Jenifer M. Brennan, and Carolyn Stevens Jensen (collectively, "the Frankenburg Defendants"), move for summary judgment on the remaining claim of fraud on the court. (Frankenburg Mot. for Summ. J. "Frankenburg Mot.") 9, ECF No. 87.) The Court dismissed Dr. Jiricko's 42 U.S.C. § 1983, abuse of process, Conspiracy, and intentional infliction of emotional distress claims against the Frankenburg Defendants. (Order Adopting Feb. 23, 2017, R. & R., ECF No. 79.) Dr. Jiricko moved to amend his amended complaint in an attempt to replead the dismissed claims. (ECF No. 95.) The undersigned has recommended denying that Motion. (ECF No. 130.) Given that Recommendation, the undersigned considers whether the Court has

jurisdiction to hear Dr. Jiricko's fraud on the court claim before proceeding to consider the cross motions for summary judgment. Having carefully considered the parties' memoranda and the law, and reviewing each motion

separately and applying the appropriate burden of production to each motion, the undersigned RECOMMENDS the District Judge DISMISS Dr. Jiricko's fraud on the court claim for lack of jurisdiction.

I. FACTS

On December 19, 2011, Dr. Jiricko, a Utah citizen, visited Dr. Bradley, a licensed ophthalmologist in Utah, for an eye examination to check for cataracts. (Am. Compl. ¶¶ 5, 14, ECF No. 2.) Dr. Jiricko told Dr. Bradley before his examination that he believed he suffered from dry macular degeneration in both of his eyes. (Id.) Dr. Bradley confirmed that Dr. Jiricko had dry macular degeneration and cataracts in both of his eyes. (Id. ¶ 15.) Dr. Bradley suggested removing the cataracts to improve Dr. Jiricko's vision. (Id. ¶ 16.) Dr. Bradley informed Dr. Jiricko that his dry macular degeneration condition would not negatively affect the efficacy of the cataract surgery. (Id. ¶ 17.) Dr. Jiricko had cataract surgery, which resulted in severe permanent loss of vision in his right eye. (Id. ¶ 13.) Dr. Bradley allegedly failed to disclose prior to conducting the cataract surgery that Dr. Jiricko suffered from a chronic retinal disease in his right eye. (Id. ¶ 18.)

On September 17, 2013, Dr. Jiricko filed a Complaint against Dr. Bradley and Dr. Bradley's employer, Hoopes Vision Center, in the Third Judicial District Court in Salt Lake City, Utah,

alleging "... [m]isrepresentation, fraud, breach of fiduciary duties [,] fraud in inducement [,] fraud in omission; concealment, unlawful touching and battery..." (Id. ¶ 19.) The Frankenburg Defendants, Utah citizens, represented Dr. Bradley in that action. (Id. ¶¶ 6-8, 19, 21.) Dr. Jiricko contends the Frankenburg Defendants, through Jennifer Brennan, stated that "there is no proof anywhere in the record that Dr. Jiricko

had macular telangiectasia at the time of cataract surgery or before surgery." (Am. Compl. ¶ 57, ECF No. 2.) Dr. Jiricko alleges this statement to the state court as the basis for his fraud on the court claim. Dr. Jiricko's Complaint does not specify whether his claim for fraud on the court arises under federal or state law.

II. SUBJECT MATTER JURISDICTION

Before ruling on the merits of a case, the Court must determine whether it holds subject matter jurisdiction over the claims. See *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007) (requiring findings of subject matter and personal jurisdiction prior to reaching a case's merits). Federal district courts hold limited subject matter jurisdiction; the Constitution and acts of Congress set forth the scope of their authority. *Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1225 (10th Cir. 2004). Even when no party questions subject matter jurisdiction, a federal court holds "an independent obligation to determine whether subject-matter jurisdiction exists." *1mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006) (quoting Arbaugh v. Y & H Corp., 546 U.S.

500, 514 (2006)). "Parties cannot confer on a federal court jurisdiction which has not been granted by the Constitution and Congress, and parties cannot waive lack of subject matter jurisdiction." Henry v. Office of Thrift Supervision, 43 F.3d 507, 511 (10th Cir. 1994). In their Summary Judgment Motion, the Frankenburg Defendants state in a footnote that Dr. Jiricko "has failed to articulate any grounds for federal jurisdiction, other than supplemental jurisdiction, over this claim." (Frankenburg Mot. 2 n.1, ECF No. 87.)

Subject matter jurisdiction arises through one of two ways. First, Congress provides the federal district courts with federal question jurisdiction "over civil actions

arising under the Constitution, laws, or treaties of the United States." *Firstenberg v. City of Santa Fe,* 696 F.3d 1018, 1023 (10th Cir. 2012) (quoting 28 U.S.C. § 1331). Second, Congress grants federal district courts diversity jurisdiction "over 'all civil actions where the matter in controversy exceeds the sum or value of $75,000 ... and is between ... citizens of different States.'" *Grynberg v. Kinder Morgan Energy Partners, L.P.*, 805 F.3d 901, 905 (10th Cir. 2015), cert. denied, 578 U.S. ——, 136 S.Ct. 1714 (2016) (quoting 28 U.S.C. § 1332).

III. NO FEDERAL QUESTION JURISDICTION

The federal cases cited recognizing an independent federal cause of action for fraud on the court implicitly recognize the federal court's jurisdiction over that claim arises out of its "inherent and continuing jurisdiction over its judgments." Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1262 (10th Cir. 1995); *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir.

2002) (recognizing "court's inherent power to grant relief for fraud upon the court" where underlying case was in federal court). In this case, Dr. Jiricko alleges fraud on the state court, not the federal court. Thus the claim for fraud on the court is a state claim. See *Kartchner v. Kartchner*, 2014 UT App 195, ¶ 20, 334 P.3d 1, 7 (recognizing independent cause of action for fraud on the court under state law). Because the underlying judgment challenged in this case is a state court judgment, Dr. Jiricko alleges a state court claim for fraud on the court. As such, the Court lacks federal question jurisdiction over the claim.

IV. NO DIVERSITY JURISDICTION

To invoke diversity jurisdiction, "the citizenship of all defendants must be different from the citizenship of all plaintiffs." *McPhail v. Deere & Co.*, 529 F.3d 947, 951 (10th

Cir. 2008). Dr. Jiricko's Complaint alleges Dr. Jiricko is a citizen of Utah. (Am. Compl. ¶ 5, ECF No. 2.) The Complaint does not explicitly state that the Frankenburg Defendants are citizens of Utah, but it does allege facts that give the Court every reason to believe they are citizens of Utah. Am. Compl. ¶ 6-8, ECF No. 2.) "Since federal courts are courts of limited jurisdiction, there is a presumption against our jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." *Penteco Corp. v. Union Gas Sys. Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991); see also *Prigge v. Woods Cross Police Dept.*, No. 1:14-cv-00087-DB-PMW, 2015 WL 2451776, at *1 (D. Utah Feb. 27, 2015) (quoting same and applying principle in an IFP case), adopted by 2015 WL

2451776 (May 21, 2015). Dr. Jiricko fails to meet his burden to show diversity jurisdiction.

V. SUPPLEMENTAL JURISDICTION

"[I]n accordance with 28 U.S.C. § 1367(c)(3), a district court has the discretion to decline to exercise supplemental jurisdiction over a state-law claim if 'the district court has dismissed all claims over which it has original jurisdiction.'" *Anderson v. Kitchen,* 389 F. App'x 838, 842 841 (10th Cir. 2010). Furthermore, "[w]hen all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims." *Smith v. City of Enid ex rel. Enid City Comm'n,* 149 F.3d 1151, 1156 (10th Cir. 1998). Because the Court has dismissed all of Dr. Jiricko's federal claims, only this one state claim remains. Therefore, the undersigned RECOMMENDS the District Judge decline to exercise supplemental jurisdiction over the fraud on the court claim and DISMISS it without prejudice for lack of jurisdiction.

VI. RECOMMENDATION

For the foregoing reasons, the undersigned Magistrate Judge RECOMMENDS the District Judge decline to exercise supplemental jurisdiction over the fraud on the court claim and DISMISS it without prejudice for lack of jurisdiction.

The Court will send copies of this Report and Recommendation to the parties and hereby notifies them of their right to object to the same. The Court further notifies the parties that they must file any objection to this Report and Recommendation with the Clerk of Court, pursuant to 28 U.S.C. § 636(b)

and Fed. R. Civ. P. 72(b), within fourteen (14) days of service thereof. Failure to file objections may constitute waiver of objections upon subsequent review

DATED this 5th day of February, 2018.

BY THE COURT:

s/
EVELYN J. FURSE
United States Magistrate Judge

APPENDIX D

THE SALT LAKE TRIBUNE

Rolly: The two faces of Judge Dee Benson
By: Paul Rolly Tribune Columnist
Published February 2, 2012 4:01 pm

When Jon Huntsman still was in the Republican presidential race, his, campaign ran a TV, ad featuring a windup toy monkey that did back flips to dramatize Mitt Romney's notorious flip-flopping on major issues. That flip-flopping monkey could have a cousin named Judge Dee Benson.

Benson, a U.S. District judge for Utah, caught my attention once again this week when he sentenced former Heritage Park Director Matthew Dahl to six months in prison for stealing $ 321,000 in park funds. Prosecutors had recommended up to 33 months in prison, but Benson not Dahl, who comes, from a strong Republican, LDS family... Flip.

Bogus oil and gas lease bidder Tim DeChristopher, who does not come from a strong Republican, LDS family and who, instead became a champion of the liberals, was also a first-time offender convicted of a nonviolent crime. But Benson gave him two years in federal prison because he kept talking publicly about his environmental cause while he was awaiting sentencing... Flo.

At Dahl's sentencing, Benson said he doubted placing Dahl in prison would deter others from embezzling. "I think we have too many people in jail. And I think one ay we're going to be a little ashamed of it," Benson said... Flip.

At DeChristopher's sentencing, Benson said, "I'm not saying thee isn't a place for civil disobedience,

but it can't be the order of the day." He went on to say that what DeChristopher did "wasn't all that bad," but he had to go to prison anyway... Flop.

When Benson in 1994 sentenced former Emery County Attorney Mark Tanner, another good LDS Republican, for forging a client's name to a settlement agreement in order to personally get $ 10,000 from the U.S. justice Department that was intended for the client, the judge told the repentant Tanner not to be so hard on himself. "What you did has some inderstanable elements," he added, "if you look at the whole picture." Benson sentenced Tanner to probation... Flip.

Benson sentenced Dewey McHay, the physician convicted of illegally dispensing drugs to addicts, to 20 years. But he complained about it, saying his hands were tied because of sentencing guidelines and, during the sentencing hearing, placed much of the blame on the addicts. McKay had support from a congressman, a legislator and leaders in his LDS community... Flop.

Benson last fall sentenced former Morgan County manager Garth Day, who pleaded guilty to embezzling nearly $1 million, to 48 months in federal prison · seven months longer than prosecutors had recommended. "From my limited vantage point, I see an individual who has been misrepresenting himself for his adult professional life," Benson said. "I personally wouldn't trust Mr. Day with anything important... he appears to me to be a typical con artist." ...Flip.

When attorneys for DeChristopher claimed they had it on good authority that Sen. Orrin Hatch, who was instrumental in getting Benson the judicial appointment, had discussed with Benson the proper sentence DeChristopher should get before the actual

sentencing, Hatch and Benson denied they ever had such discussions. But I wrote a few years ago about how Benson inadvertently embarrassed Hatch when Benson was on a panel at a Utah State Bar convention in Su Valley, Idaho. Benson remarked that Hatch had spoke to hime while he was hearing a case in 2004 that challenged the constitution validity of the Grand Staircase—Escalante National Monument and told the judge that he knew that he would "do the right thing." Benson told the story on the panel show his independence, because he ruled in favor of the monument's legal existence and he was under the impression that Hatch opposed it... Flop.