APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 22-12513

ANTHONY ITALO PROVITOLA,

Plaintiff-Appellant,

versus

DENNIS L. COMER, FRANK A. FORD, JR.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida
D.C. Docket No. 6:20-cv-00862-PGB-DCI

Order of the Court
May 8, 2024

Before JORDAN, JILL PRYOR, and GRANT,
Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant Anthony Provitola is DENIED .

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Appendix B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12513

ANTHONY I. PROV1TOLA,

Plaintiff-Appellant

vs

DENNIS L. COMER and FRANK A. FORD, JR.,

Defendants-Appellees.

Appeal of the Order Dismissing the Amended Complaint
With Prejudice The Endorsed Order on the Mandate
Striking the Second Amended Complaint,
of the United States District Court for the Middle District
of Florida Case No. 6:20-cv-00862 _

APPELLANT'S PETITION FOR REHEARING

Anthony I. Provitola, *pro se*
Post Office Box 2855
DeLand, FL 32721-2855
TEL: (386) 734-5502
FAX: (386) 736-3177

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INTRODUCTION

The election of this Court to avoid the other issues raised by the dismissal in the court below of the Amended Complaint – the Second Amended Complaint being impermissible and stricken – especially in view of the position taken in favor of makes it imperative for the Appellant to address those issues in this Petition.

ARGUMENT

The panel decision regarding point I of this Argument conflicts with a decision of the United States Supreme Court in Dennis v. Sparks, 449 U.S. 24 (1980); and reconsideration by this court is therefore necessary to secure and maintain authority for the court's decisions. Reconsideration of the footnote to the panel decision at the end of the Opinion is necessary because the reference therein to Rooker-Feldman conflicts with the decision of the United States Supreme Court in Exxon Mobil Corp. v, Saudi Basic Industries Corp., 544 U.S. 280 (2005) dispensing with such meaningless labeling of preclusion doctrine. Similarly, if the panel decision ultimately progresses to Point III of this Argument, and is adverse to the Appellant, it would conflict with a decision of the United States Supreme Court in Martinez v. California, 444 U.S. 277 (1980); and reconsideration by the court is therefore also necessary to secure and maintain authority for the court's decisions.

I. UNDER COLOR OF STATE LAW

The Appellant's Amended Complaint includes allegations of the unconstitutional actions under color of law of the State Courts' judges in the State Action, and, with the irrefutable documentation of the State Action, the nature of the joint engagement of those judges with the Appellees in unavoidable knowledge of judicial corruption . In Dennis v. Sparks, 449 U.S. 24 (1980) the United States Supreme Court allowed a § 1983 action against private parties who acted in concert with a state official, a judge. To avoid the doctrine of Dennis in this case the Appellees argued that they are not "state actors" based on the authority of Harvey v. Harvey, 949 F.2d 1127 (11th Circuit 1992). However, the allegations of the Harvey complaint did not charge a judge with such knowledge as would have rendered his conduct to be corrupt, as in the present case. In the present case, the Appellees are charged with joint engagement with the judges involved in corrupt conduct, which is the determinative factor in identifying the Appellees as having acted under color of law. Point IV of the Initial Brief of Appellant presents the Supreme Court's criteria announced in Dennis so covering the Appellees, criteria that this Court appears to address with sarcasm while omitting any mention of the controlling authority of Dennis.

II. ROOKER-FELDMAN DOCTRINE

With respect to the Court's footnote at the end of the present Opinion, it appears that the Panel decision is based on some vague and undefined Behr remains of the Rooker-Feldman doctrine in this

Circuit, invoking the law of the case doctrine to avoid any exposure of its error in its improper reliance on the meaningless label of Rooker-Feldman. In the first appeal this Court held (at page 6) that "the district court correctly dismissed Provitola's amended complaint for lack of subject matter jurisdiction", and that "such a dismissal for lack of subject matter jurisdiction must, however, be entered without prejudice because it is not a judgment on the merits." Thus this Court has in a footnote at the end of its current opinion (at page 5) invoked the discredited Rooker-Feldman, previously applied without prejudice in the first opinion, in which it claimed to lack subject matter jurisdiction, as decisive under the doctrine of law of the case where the "district court's orders did not rely on collateral estoppel [or] res adjudicata", ("Provitola's argument concerning the court's use of the Rooker–Feldman doctrine is precluded by the law of the case doctrine.") without reference to any decision of fact or law except as improperly circularly applied to avoid jurisdiction of subject matter.

III. IMMUNITY FROM A § 1983 ACTION.

This Court, in Huls v. Llabona (11th Cir. 2011), Case No. 10-13610 (unpublished), an appeal from the United States District Court for the Middle District of Florida, Docket No. 6:10-cv-00538-GAP-GJK, held to the authority of Howlett v. Rose, 110 S.Ct. 2430, 2442-43 (1990) (providing that "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law."). Therefore under the doctrine of the Supreme Court in Howlett v. Rose no litigation privilege immunity exists for cases involving the deprivation of constitutional rights

under § 1983. Otherwise it would be within the power of the States to selectively nullify by judicial decision federal statutory law that enforces federal constitutional rights.

CONCLUSION

The misreading of Exxon Mobil in Behr has led the panel in this case to the erroneous assumption that the fiction of Rooker-Feldman doctrine was still available to deny subject matter jurisdiction. The application of that erroneous assumption in this case has resulted in a distortion of the law even as corrected by the Supreme Court in Exxon Mobil. For these reasons, Appellant respectfully requests that this Petition be granted and the decision in this case corrected in his favor.

/s/Anthony I. Provitola
Anthony I. Provitola, pro se
Post Office Box 2855
DeLand, FL 32721-2855
TEL: (386) 734-5502
FAX: (386) 736-3177
Email: aprovitola@cfl.rr.com

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
[DO NOT PUBLISH]

No. 22-12513
Non-Argument Calendar

ANTHONY ITALO PROVITOLA,
Plaintiff-Appellant,

versus

DENNIS L. COMER, FRANK A. FORD, JR.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida
D.C. Docket No. 6:20-cv-00862-PGB-DCI 2

Opinion of the Court

Before JORDAN, JILL PRYOR, and GRANT, Circuit Judges. PER CURIAM:

Anthony Provitola, a Florida attorney proceeding pro se, filed suit against his neighbor, Dennis Comer, and his neighbor's attorney, Frank Ford, Jr. The district court struck Provitola's second amended complaint, denied him leave to amend his complaint, and declined to reconsider those two decisions. We affirm.

Provitola brought six counts under 42 U.S.C. § 1983, each alleging a violation of the Fourteenth Amendment's guarantee of due process. The district court dismissed the original complaint without prejudice as a shotgun pleading. After Provitola filed an amended complaint, the court dismissed that complaint with prejudice for lack of subject-matter jurisdiction and for failing to state a claim. This Court affirmed the dismissal for lack of subjectmatter jurisdiction and remanded for the limited purpose of correcting the judgment to reflect a dismissal without prejudice. Provitola v. Comer, No. 21-10878, 2022 WL 823582 (11th Cir. Mar. 18, 2022).

Before the district court could correct the disposition, Provitola filed a second amended complaint. The district court struck that complaint for violating both Federal Rule of Civil Procedure 15(a)(2) and the

court's case management and scheduling order. It then followed this Court's direction and dismissed the first amended complaint without prejudice. Provitola moved the court to reconsider that order, or in the alternative, for leave to replead and file the second amended complaint. The district court denied the motion, noting that any amendment to the complaint would be futile for the same reasons that had been evident for the first amended complaint. Provitola appealed.1

Provitola now argues that the district court failed to obey our mandate from the prior appeal when it struck the second amended complaint and denied Provitola leave to amend. We disagree; the district court complied with the mandate by correcting the appealed judgment to reflect a dismissal without prejudice. Although a district court may not deviate from a mandate issued by this Court, or grant any further relief or review, it may still address any issues not disposed of on appeal. Piambino v. Bailey, 757 F.2d 1112, 1119 (11th Cir. 1985). Thus, because our opinion was silent on whether Provitola was entitled to amend his complaint, the district court was free to address that issue. The district court likewise did not err by striking the (attempted) second amended complaint—a decision we review for abuse of discretion. Corsello v. Lincare, Inc., 428 F.3d 1008, 1012

1 Comer and Ford argue that we lack jurisdiction to entertain this appeal, a question that we consider de novo. Nationwide Mut. Ins. v. Barrow, 29 F.4th1299, 1301 (11th Cir. 2022). That is incorrect. We have jurisdiction here because the denial of leave to amend is a final order if it follows the dismissal of the action for lack of subject-matter jurisdiction. Czeremcha v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, 724 F.2d 1552, 1555 (11th Ci r. 1984).

A plaintiff who has amended his complaint once may amend again only with either the defendants' written consent or the court's leave. Fed. R. Civ. P. 15(a). Here, Provitola had already amended his complaint once and sought neither the defendants' consent nor the court's leave before filing yet another amended complaint. Striking the improperly attempted amendment was thus appropriate. The constraints on successive amendments are not lessened after a successful appeal. See Wagner v. Daewoo Heavy Indus. Am. Corp., 314 F.3d 541, 542–44 (11th Cir. 2002) (en banc).

Finally, the district court did not abuse its discretion by denying Provitola leave to amend his complaint. A district court may deny leave to amend if the complaint as amended would still be subject to dismissal. Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1262–63 (11th Cir. 2004). Here, Provitola's second amended complaint would still be subject to dismissal. Provitola's § 1983 claims—even as amended—rest entirely on the conclusory allegation that the defendants jointly engaged" with the state

court judges. This" naked assertion fails to plausibly allege that the defendants acted under color of state law, a statutory requirement. See Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992). Because Provitola's second amended complaint would still be subject to dismissal for failure to plead a claim, amendment would be futile, and the district court properly denied leave to amend.

AFFIRMED.

2 Provitola argues that the district court improperly relied on the Rooker–Feldman doctrine, that none of the issues raised in this case are precluded bycollateral estoppel or res judicata, and that his § 1983 action is "personal" tohim. Provitola's argument concerning the court's use of the Rooker–Feldmandoctrine is precluded by the law of the case doctrine. See Luckey v. Miller, 929 F.2d 618, 621 (11th Cir. 1991). And his other arguments are not properlybefore us because the district court's orders did not rely on collateral estoppel, res judicata, or whether Provitola's action is "personal" to him. See Clark v.Coats & Clark, Inc., 929 F.2d 604, 609 (11th Cir. 1991).

3 We DENY Comer and Ford's motion for sanctions.

Appendix D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No: 6:20-cv-862-PGB-DCI

ANTHONY I. PROVITOLA,
Plaintiff,
v.

DENNIS L. COMER and
FRANK A. FORD, JR.,
Defendants.

ORDER

This cause comes before the Court on Plaintiff's Motion to Vacate the Court's Order Striking the Second Amended Complaint or Motion for Leave to File a Second Amended Complaint (Doc. 54 (the "Motion") and Defendants' response thereto (Doc. 55). Upon consideration, the Motion is due to be denied.

I. BACKGROUND

This action centers around a legal dispute in Florida state court (the "State Action") between Plaintiff Anthony Provitola and Defendant Dennis

Comer. Defendant Frank Ford represented Defendant Comer in the State Action. (Doc. 25, ¶ 9).

In 1968, Plaintiff purchased a parcel of land for his homeplace in Volusia County, Florida, which included Ridgewood Avenue—a public road—along its western end. (Id.). In 1993, Defendant Comer purchased a parcel of land to the north of Plaintiff's homeplace, which also ran along Ridgewood Avenue. (Id.). In 2014, Defendant Comer allegedly obstructed Plaintiff's passage on Ridgewood Avenue by installing an electrically operated gate. (Id.).

In the regular course of the State Action, Plaintiff timely filed and served a motion for summary judgment and a hearing was set for May 31, 2016. (Id.). In response to an amended complaint, the Defendants filed a second motion to dismiss the State Action, and a hearing was set for May 27, 2016. (Id. ¶ 10). On April 28, 2016, Defendants filed and served a motion for attorney fees and crossnoticed that motion for hearing at the same time as Plaintiff's motion for summary judgment on May 31. (Id. ¶ 11).

At the May 27 hearing, a state circuit court Judge (hereinafter "Judge 1") allegedly did not hear Plaintiff's motion to strike Defendant Comer's second motion to dismiss but instead granted Defendant Comer's motion to dismiss, dismissing Plaintiff's complaint without prejudice. (Id. ¶ 12). Judge 1 declared that the motion for summary judgment hearing was cancelled "as a result of the conversation [they] had here." (Id.).

At the May 31 hearing, Judge 1 declared that Plaintiff's motion for summary judgment "was without support" and heard Defendants' motion for attorney fees. (Id. ¶ 13). Judge 1 ruled on Defendants' motion, citing the fact that Plaintiff "was discourteous to the counsel for the defense in failing to withdraw the motion for summary judgment, and that such discourtesy was adequate grounds for the motion for attorney fees." (Id. ¶ 14). Plaintiff informed Judge 1 that he would move to have her disqualified. (Id. ¶ 15). Judge 1 nevertheless granted Defendants'motion for fees. (Id.). On June 22, 20216, Judge 1 entered an order of recusal. (Id. ¶ 16).

On June 16, 2016, Plaintiff filed a second amended complaint to which Defendants responded with a motion to dismiss. (Id. ¶ 21). Following a hearing on July 27, 2016, another state circuit judge (hereinafter "Judge 2") dismissed the case with prejudice stating that Plaintiff did not have standing to sue. (Id. ¶ 22). Plaintiff appealed Judge 2's order of dismissal to the Fifth District Court of Appeals (the "Fifth DCA"). (Id. ¶ 29). The Fifth DCA heard the appeal on July 25, 2017, and per curiam affirmed Judge 2's dismissal order. (Id. ¶ 30).

On October 10, 2017, Plaintiff filed a motion to vacate Judge 1's order granting attorney's fees with Judge 2. (Id. ¶ 34). At a January 24, 2018 hearing, Judge 2 denied Plaintiff's motion and awarded attorney's fees to Defendants. (Id. ¶¶ 36, 38). Judge 2 also found Plaintiff's initial motion for summary judgment to be "without support." (Id. ¶ 37). Plaintiff again appealed to the Fifth DCA. The

appeals court also per curiam affirmed Judge 2's order awarding attorney's fees. (Id. ¶ 44). The Florida Supreme Court denied Plaintiff's petition for
review of the 5th DCA opinion and awarded Defendant Comer $2500.00 in appellate attorneys' fees. (Doc. 28, p. 15).

In short, Plaintiff brought two unsuccessful state court actions, including two state appeals (both resulting in per curiam affirmances) and a failed attempt at obtaining review by the Florida Supreme Court. In addition, Florida courts imposed sanctions on Plaintiff. Plaintiff then filed a six-count Complaint against Defendants in this Court asserting claims under 42 U.S.C. § 1983 and 28 U.S.C. § 1367. (Doc. 1). This Court dismissed the original Complaint without prejudice as a shotgun pleading, providing Plaintiff opportunity to amend. (Doc. 24). On September 6, 2020, Plaintiff filed a First Amended Complaint (Doc. 25 (the "First Amended Complaint")), asserting claims for relief due to Defendants' "continuing deprivation, under color of authority of statute, policy, custom, practice or usage, of the rights and privileges secured to the Plaintiff by the Fourteenth Amendment to the United States Constitution and the Constitution and laws of the State of Florida that occurred during a civil action by the Plaintiff in the Courts of Florida; and [] declaratory judgment under 28 U.S.C. § 2201." (Id. ¶ 1). On March 4, 2021, the Court dismissed the First Amended Complaint with prejudice, noting that granting leave to replead "would be futile" because: 1) Plaintiff's claims would be barred by Florida's litigation privilege; 2) the Defendants do not qualify

as state actors; and 3) the Court lacked jurisdiction under the Rooker-Feldman doctrine. (Doc. 33, pp. 7–11). Plaintiff appealed the Court's dismissal to the Eleventh Circuit. (Doc. 34).

The Eleventh Circuit affirmed the Court's substantive holding that it lacked jurisdiction under the Rooker-Feldman doctrine but remanded with the limited purpose that the Court dismiss the case without prejudice rather than with prejudice because "[a] dismissal for lack of subject matter jurisdiction must . . . be entered without prejudice because it is not a judgment on the merits." (Doc. 50, p.6; Doc. 51) (citing Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc., 524 F.3d 1229, 1232 (11th Cir. 2008)). Without leave of the Court on June 30, 2022, Plaintiff filed a Second Amended Complaint which alleges the exact same six causes of action with almost identical alleged facts. (Compare Doc. 52 (the "Second Amended Complaint") with Doc. 25). After amending its dismissal to one without prejudice, the Court struck the Second Amended Complaint for lack of compliance with Federal Rule of Civil Procedure 15(a)(2) and the Court's Case Management Scheduling Order (Doc. 22) as Plaintiff had not requested leave of Court or obtained consent from Defendants to amend. (Doc. 53). Plaintiff now requests in the Motion for the Court to vacate its order striking the second amended complaint or, in the alternative, to grant leave for Plaintiff to replead and file the second amended complaint (Doc. 54).1 After Defendants' response (Doc. 55), this matter is ripe for review.

II. DISCUSSION

The Court addresses, first, Plaintiff's request for leave to file an amended complaint and, second, Plaintiff's request to vacate the Court's order striking the same. Ultimately, the Court denies both requests.

A. Leave to Replead

Except for in limited circumstances inapplicable here, under Federal Rule of Civil Procedure 15(a)(2) "a party may amend its pleading only with the opposing

1 Before the Court ruled on the Motion, Plaintiff filed a notice of appeal as to the Court's Order striking the second amended complaint. (Docs. 52, 56).

party's written consent or the court's leave. The Court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2). "Leave to amend should be freely given, but a district court can deny leave to amend the complaint when amendment would be futile." Wade v. Daniels, 36 F.4th 1318, 1328 (11th Cir. 2022) (citing Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1262–63 (11th Cir. 2004)). Leave to amend is futile if "the complaint as amended is still subject to dismissal." Wade, 36 F.4th at 1328 (quoting Hall, 3267 F.3d at 1263); Walters v. Sec'y, Fla. Dep't of Corr., 743 Fed. App'x 401, 403 (11th Cir. 2018) (noting leave to replead need not be granted even to a pro se party when such leave would be futile).

The Court dismissed the First Amended Complaint for three reasons: 1) the claims against Defendants were barred by Florida's litigation privilege; 2) the Defendants are not state actors as required; and 3) the Court lacked jurisdiction under the Rooker-

Feldman doctrine. (Doc. 33, pp. 7–11). In so doing, the Court noted that "it is abundantly clear that granting leave to amend would be futile." (Id. at p. 7). Plaintiff nevertheless argues that the Eleventh Circuit's mandate that the Court dismiss the case without prejudice entails an opportunity to replead. (Doc. 54, pp. 1, 3). The Court disagrees for two reasons. First, the Court disagrees because dismissing a claim without prejudice for lack of subject matter jurisdiction leaves open the possibility that a plaintiff can file its claims before a court that could exercise subject matter jurisdiction. In this case, Plaintiff could potentially challenge his state court loss by adhering to the applicable appellate rules of procedure and filing a petition for writ of certiorari before the United States Supreme Court after the Florida Supreme Court denied him relief.2 Second, even if Plaintiff amended his complaint to cure its jurisdictional defects with respect to the Rooker-Feldman doctrine,3 Plaintiff has not cured his pleading with respect to the state action doctrine and Florida's litigation privilege. In other words, Plaintiff does not address why granting him leave to amend would not be futile for these alternative reasons. Plaintiff's stricken Second Amended Complaint does not change the calculus. At the outset, the Court notes that the proposed Second Amended Complaint alleges six identical causes of action with an almost identical set of alleged facts when compared with the First Amended Complaint. (Compare Doc. 25 with Doc. 52). Even if the Court were to assume for the sake of argument that the proposed Second Amended Complaint cures the jurisdictional defects under the Rooker-Feldman doctrine, granting leave to replead

would still be futile because the claims of the Second Amended Complaint would still be barred by at least the state action doctrine. (Doc. 25, p. 11; see Doc. 33, pp. 5–8; Doc. 52, p. 11). Moreover, as the Court previously explained, any of Plaintiff's claims brought under Florida law would be barred by Florida's litigation privilege. (See Doc. 33, pp. 5–7).

2 The Court takes no position on whether the relevant appellate rules would bar Plaintiff's claims at this time, for example, due to timeliness.

3 Plaintiff explains he has removed the requests for relief cited by the Eleventh Circuit as violating the Rooker-Feldman doctrine. (Doc. 54, p. 2).

As for the federal claims, a successful 42 U.S.C. § 1983 action requires a showing that the conduct complained of (1) was committed by a person acting under color of state law and (2) deprived the complainant of rights, privileges, or immunities secured by the Constitution or laws of the United States. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 156–57, (1978). The defendants here are private parties, and "[o]nly in rare circumstances can a private party be viewed as a 'state actor' for section 1983 purposes." Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). "The Eleventh Circuit recognizes three tests for establishing state action by what is otherwise a private person or entity: the public function test, the state compulsion test, and the nexus/joint action test." Harvey, 949 F.2d at 1130 (citing NBC v. Commc'n Workers of Am., AFL–CIO, 860 F.2d 1022, 1026 (11th Cir. 1988)). Here, Plaintiff again defectively alleges only that

Defendants—both of whom are private parties—"jointly engaged" with Judge 1 and Judge 2 in the State Action in a way that deprived Plaintiff of his rights. (Doc. 52, ¶¶ 18, 26, 31, 40, 45). As the Court noted previously in ruling in the alternative when dismissing the First Amended Complaint, however, Plaintiff's conclusory allegations are insufficient to meet any of the required state action tests. (See Doc. 33, pp. 7–8). As such, the Court denies Plaintiff leave to replead because to do so would be futile.

B. Motion to Vacate

In the alternative, Plaintiff moves the Court to vacate its prior order striking the Second Amended Complaint. (Doc. 54). The Court construes this request as a motion for reconsideration of its order striking the Second Amended Complaint. Reconsideration is an extraordinary remedy which will only be granted upon a showing of one of the following: (1) an intervening change in law, (2) the discovery of new evidence which was not available at the time the Court rendered its decision, or (3) the need to correct clear error or manifest injustice. Fla. Coll. of Osteopathic Med., Inc. v. Dean Witter Reynolds, Inc., 12 F. Supp. 2d 1306, 1308 (M.D. Fla. 1998). "A motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949, 957 (11th Cir. 2009) (internal quotation marks omitted). It is wholly inappropriate in a motion for reconsideration to relitigate the merits of the case or to "vent dissatisfaction with the Court's reasoning." Madura v. BAC Home Loans Servicing L.P., No. 8:11-cv-2511, 2013 WL 4055851,

at *2 (M.D. Fla. Aug. 12, 2013) (citation omitted). Instead, the moving party must set forth "strongly convincing" reasons for the Court to change its prior decision. Id. at *1. Here, the Court finds Plaintiff has set forth no such "strongly convincing" reason. Plaintiff's only provided reasons for the Court to reconsider its order are those the Court addressed and rejected above in denying Plaintiff leave to amend. (See Doc. 54, pp. 1–4). The Court denies Plaintiff's request for reconsideration for the additional reason that, even if leave was due to be granted, Plaintiff did not obtain leave from the Court before filing the Second Amended Complaint as required by the plain text of Rule 15. While the Court appreciates that ordinarily dismissing a claim without prejudice would imply a right to replead, at bottom, the Court denies Plaintiff such leave here because to do so would be futile.4

III. CONCLUSION

Accordingly, it is ORDERED and ADJUDGED that Plaintiff's Motion (Doc. 54) is DENIED.

DONE AND ORDERED in Orlando, Florida on August 16, 2022.

Copies furnished to:
Counsel of Record Unrepresented Parties

Appendix E

UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT
[DO NOT PUBLISH]

No. 21-10878
Non-Argument Calendar

ANTHONY I. PROVITOLA,

Plaintiff-Appellant,

versus

DENNIS L. COMER, FRANK A. FORD, JR.,

Defendants-Appellees.

Appeal from the United States District Court for
the Middle District of Florida
D.C. Docket No. 6:20-cv-00862-PGB-DCI

Opinion of the Court 21-10878

Before WILSON, JILL PRYOR, and LUCK, Circuit
Judges. PER CURIAM:

After unsuccessfully litigating a property dispute in state court, Anthony Provitola sued his state court adversary, Dennis Comer, and Comer's attorney, Frank Ford, in federal court for violating his Fourteenth Amendment due process rights. The district court dismissed Provitola's amended complaint with prejudice because his claims were barred under Florida's litigation privilege and the Rooker-Feldman doctrine,1 and because they failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). After thorough review, we affirm but remand the case to the district court for the limited purpose of correcting the judgment to reflect that the amended complaint is dismissed without prejudice.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Provitola, a Florida attorney, sued Comer in Florida state court after Comer obstructed Provitola's passage on a public road with a gate. Ford represented Comer in the state court lawsuit. Florida Circuit Judge Sandra Upchurch dismissed Provitola's claims without prejudice, found Provitola's motion for summary judgment to be "without support," and granted Comer's motion for attorney's fees. Judge Upchurch then recused herself. After the case was assigned to Florida Circuit Judge Randell Rowe, Provitola filed an amended complaint. Judge Rowe dismissed Provitola's amended complaint with prejudice.

1Rooker v. Fid. Tr. Co., 263 U.S. 413 (1923); D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983).

Provitola appealed Judge Upchurch's attorney's fees award and Judge Rowe's dismissal order to Florida's Fifth District Court of Appeal. A three-judge panel affirmed the dismissal order and dismissed the appeal of the attorney's fees award. On remand, Judge Rowe denied Provitola's motion to vacate the attorney's fees award, ruled that his motion for summary judgment was "without support," and entered final judgment awarding attorney's fees to Comer. Provitola appealed Judge Rowe's fee judgment to the Fifth District Court of Appeal. A different three-judge panel affirmed.

After losing in state court, Provitola sued Comer and Ford in the district court. Provitola's amended complaint alleged claims "under 42 U.S.C. section 1983 and 28 U.S.C. section 1367." The amended complaint alleged that Comer and Ford violated Provitola's due process rights when they acted "as private persons jointly engaged with" and "with the cooperation of and in concert with the corruption of" Judge Upchurch, Judge Rowe, and both Fifth District Court of Appeal panels to "illegally" rule against him. More specifically, the amended complaint alleged that Provitola was injured by: (1) Judge Upchurch's "illegal granting" of Comer's motion for attorney's fees and "illegally facilitating the Defendants' avoidance of the hearing of [Provitola's] motion for summary judgment"; (2) Judge Rowe's "illegal granting" of Comer's motion to 4 dismiss and motion for attorney's fees, "illegal denial" of Provitola's motion to vacate, and "illegally facilitating the Defendants' avoidance of [Provitola's] motion for summary judgment"; (3) the Fifth District Court of Appeal's "illegal affirmance" of Judge Rowe's dismissal order; and (4) the Fifth District Court of Appeal's "illegal affirmance" of Judge Rowe's

attorney's fees award. The amended complaint also requested judgment "declaring all of the unconstitutional actions of the courts in the [state lawsuit] to be null and void" and "providing the relief requested in the [state lawsuit] that was denied as a result of the unconstitutional action of the [s]tate courts in the [state lawsuit]."

Comer and Ford moved to dismiss the amended complaint. The district court granted the motion and dismissed the amended complaint with prejudice on three grounds. First, the district court concluded that Florida's litigation privilege provided Comer and Ford absolute immunity because their actions occurred during the regular course of litigation. Second, the district court concluded that Provitola's claims failed because he had not alleged that Comer and Ford were state actors under section 1983. And third, the district court concluded that it lacked jurisdiction over Provitola's claims under the Rooker-Feldman doctrine because they were "a thinly veiled attempt to re-litigate his state court action." Provitola timely appealed.

II.STANDARDS OF REVIEW

We review de novo a district court's order granting a motion to dismiss with prejudice, applying the same standards the district court used. Young Apartments, Inc. v. Town of Jupiter, 529 F.3d 1027, 1037 (11th Cir. 2008). We also review de novo a district court's dismissal for lack of subject matter jurisdiction under the Rooker-Feldman doctrine. Nicholson v. Shafe, 558 F.3d 1266, 1270 (11th Cir. 2009).

III. DISCUSSION

The district court correctly concluded that it lacked jurisdiction over Provitola's claims under the Rooker-Feldman doctrine. The doctrine prohibits appellate review of state court decisions in federal district courts "[o]nly when a losing state court litigant calls on a district court to modify or 'overturn an injurious state-court judgment.'" Behr v. Campbell, 8 F.4th 1206, 1210 (11th Cir. 2021) (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 293 (2005)). To determine whether a claim falls into the small class of claims barred by Rooker-Feldman, we look to the relief sought. See id. at 1213–14 ("The question . . . [is] whether resolution of each individual claim requires review and rejection of a state court judgment. . . . [T]he claim for relief does matter."). "[C]laims that seek only damages for constitutional violations of third parties—not relief from the judgment of the state court—are permitted." Id. at 1214. "[C]laims that invite a district court's 'review and rejection' of a state court judgment" are not. Id. Provitola's claims fall within Rooker-Feldman's limited scope. Although labeled as constitutional violations by Comer and Ford, Provitola's allegations make plain that his injuries were caused by the state court judgment. See id. at 1212 ("The injury must be caused by the judgment itself."). And the amended complaint's prayer for relief—requesting judgment "declaring all of the unconstitutional actions of the courts in the [state lawsuit] to be null and void" and "providing the relief requested in the [state lawsuit] that was denied as a result of the unconstitutional action of the [s]tate courts in the [state lawsuit]"—demonstrates that Provitola's claims are in reality direct challenges to his state court losses

"cloak[ed] . . . in the cloth of a different claim." See id. at 1211 (quoting May v. Morgan County Ga., 878 F.3d 1001, 1005 (11th Cir. 2017)). In other words, the purpose of Provitola's constitutional claims against Comer and Ford was not to determine whether he was entitled to damages for constitutional violations; rather, their purpose was to undo the state court judgment. "That," we have explained, is "a violation of Rooker-Feldman." Id. at 1213.

Because the district court correctly dismissed Provitola's amended complaint for lack of subject matter jurisdiction, we do not reach Provitola's argument that the district court erred in concluding that Comer and Ford were entitled to absolute immunity and that he had not alleged that Comer and Ford were state actors under section 1983. A dismissal for lack of subject matter jurisdiction must, however, be entered without prejudice because it is not a judgment on the merits. Stalley ex rel. U.S. v. Orlando Reg' Healthcare Sys., Inc. 524 F.3d 1229, 1232 (11th Cir. 2008). Therefore, we remand with instructions to correct the judgment.

IV CONCLUSION

We AFFIRM the dismissal of Provitola's amended complaint under the Rooker-Feldman doctrine. But we REMAND for the limited purpose of having the district court correct the judgment to reflect dismissal without prejudice.2

2 We DENY Comer and Ford's motion for sanctions.

Appendix F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA ORLANDO
DIVISION

Case No: 6:20-cv-862-PGB-DCI

ANTHONY I. PROVITOLA,

Plaintiff,

v.

DENNIS L. COMER and
FRANK A. FORD, JR. ,

Defendants.

ORDER

This cause comes before the Court on Defendants' Motion to Dismiss (Doc. 25 (the "Motion")) and Plaintiff's Response in Opposition (Doc. 29). For the reasons set forth herein, the Motion is due to be granted.

I. BACKGROUND[1]

This action centers around a legal dispute (the "State Action") between Plaintiff Anthony Provitola and Defendant Dennis Comer.

Defendant Frank Ford represented Defendant Comer in the State Action. (Doc. 25, ¶ 9).

In 1968 Plaintiff purchased a parcel of land for his homeplace in Volusia County, Florida, which included Ridgewood Avenue—a public road—along its western end. (Id.). In 1993, Defendant Comer purchased a parcel of land to the

1 This account of the facts comes from the Amended Complaint. (Doc. 25). The Court accepts these factual allegations as true when considering motions to dismiss. See Williams v. Bd. of Regents, 477 F.3d 1282, 1291 (11th Cir. 2007).

north of Plaintiff's homeplace, which also ran along Ridgewood Avenue. (Id.). in 2014, Defendant Comer obstructed Plaintiff's passage on Ridgewood Avenue by installing an electrically operated gate. (Id.).

In the regular course of the State Action, Plaintiff timely filed and served a motion for summary judgment and a hearing was set for May 31, 2016. (Id.). In response to an amended complaint, the Defendants filed a second motion to dismiss in the State Action, and a hearing was set for May 27, 2016. (Id. ¶ 10). On April 28, 2016, Defendants filed and served a motion for attorney fees and crossnoticed that motion for

hearing at the same time as Plaintiff's motion for summary judgment on May 31. (Id. ¶ 11).

At the May 27 hearing, a state circuit court Judge (hereinafter "Judge 1") did not hear Plaintiff's motion to strike Defendant Comer's second motion to dismiss and granted Comer's motion to dismiss, dismissing Plaintiff's Complaint without prejudice. (Id. ¶ 12). Judge 1 declared that the motion for summary judgment hearing was cancelled "as a result of the conversation [they] had here." (Id.).

At the May 31 hearing, Judge 1 declared that Plaintiff's motion for summary judgment "was without support" and heard Defendants' motion for attorney fees. (Id. ¶ 13). Judge 1 ruled on Defendants' motion, citing the fact that Plaintiff "was discourteous to the counsel for the defense in failing to withdraw the motion for summary judgment, and that such discourtesy was adequate ground for the motion for attorney fees; and impugned the Plaintiff's ethics on that account." (Id. ¶ 14).

Plaintiff informed Judge 1 that he would move to have her disqualified. (Id. ¶ 15). Judge 1 then granted Defendants' motion for fees. (Id.). On June 22, 20216, Judge 1 entered an order of recusal. (Id. ¶ 16).

On June 16, 2016, Plaintiff filed a second amended complaint to which Defendants

responded with a motion to dismiss. (Id. ¶ 21). Following a hearing on July 27, 2016, another state circuit judge (hereinafter "Judge 2"), dismissed the case with prejudice stating that Plaintiff did not have standing to sue. (Id. ¶ 22). Plaintiff appealed Judge 2's order of dismissal to the Fifth District Court of Appeals (the "Fifth DCA"). (Id. ¶ 29). The Fifth DCA heard the appeal on July 25, 2017 and affirmed Judge 2's order of dismissal "per curiam." (Id. ¶ 30).

On October 10, 2017, Plaintiff filed a motion to vacate Judge 1's order granting attorney's fees with Judge 2. (Id. ¶ 34). At a January 24, 2018 hearing, Judge 2 denied Plaintiff's Motion and awarded attorney's fees to Defendants. (Id. ¶¶ 36, 38). Judge 2 also found Plaintiff's motion for summary judgment to be "without support." (Id. ¶ 37). Plaintiff again appealed to the Fifth DCA. This appeal "per curiam" affirmed Judge 2's order awarding attorney's fees. (Id. ¶ 44).

Consequently, On May 20, 2020, Plaintiff initiated suit against Defendants Comer and Ford in this Court, asserting claims under 42 U.S.C. § 1983 and 28 U.S.C. § 1367. (Doc. 1). On September 6, 2020, Plaintiff filed an Amended Complaint (Doc. 25 (the "Amended Complaint")), asserting claims for relief due to Defendants' "continuing deprivation, under color of authority of statute, policy, custom, practice or usage, of the rights and privileges secured to the Plaintiff by the Fourteenth Amendment to the United States Constitution and the Constitution and laws of the State of Florida that occurred during a civil action by the Plaintiff in the Courts of Florida;

and [] declaratory judgment under 28 U.S.C. § 2201." (Id. ¶ 1). On September 21, 2020, Defendants moved to dismiss the entire complaint (Doc. 28), and Plaintiff responded in opposition (Doc. 29).

II. LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(1). Thus, in order to survive a motion to dismiss made pursuant to Rule 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible on its face when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Courts are generally limited to the four corners of a complaint, see St. George v. Pinellas Cnty., 285 F.3d 1334, 1337 (11th Cir. 2002), but they may also consider attached exhibits and documents referred to in the complaint that are central to the claim, see Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949, 959 (11th Cir. 2009). Though a complaint need not contain detailed factual allegations, mere legal conclusions or recitation of the elements of a claim are not enough. Twombly, 550 U.S. at 555. Moreover, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 556 U.S. at

679. Courts must also view the complaint in the light most favorable to the plaintiff and must resolve any doubts as to the sufficiency of the complaint in the plaintiff's favor. Hunnings v. Texaco, Inc., 29 F.3d 1480, 1483 (11th Cir. 1994) (per curiam).

In sum, courts must (1) ignore conclusory allegations, bald legal assertions, and formulaic recitations of the elements of a claim; (2) accept well-pled factual allegations as true; and (3) view well-pled allegations in the light most favorable to the plaintiff. Iqbal, 556 U.S. at 67.

III. DISCUSSION

A. Absolute Immunity

Defendants first argue that Plaintiff's claims are barred by Florida's litigation privilege. (Doc. 28, pp. 8–12). It is undisputed that "[a]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding." Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 383 (Fla. 2007) (citations omitted). While the litigation privilege is asserted as an affirmative defense, "it can be adjudicated on a motion to dismiss if the applicability of the privilege can be clearly discerned from the face of the complaint." LatAm Invs., LLC v. Holland & Knight, LLP, 88 So. 3d 240, 245 (Fla. 3d DCA 2011).

The scope of the litigation privilege is broad. In Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins., 639 So. 2d 606, 607 (Fla. 1994), the Court held "defamatory

statements made in the course of a judicial proceedings [are] absolutely privileged, no matter how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry." (citation omitted). The immunity extends as well to "events taking place outside the courtroom during discovery or settlement discussions." Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1276 (11th Cir. 2004).

Plaintiff obfuscates the issue, stating that Defendants do not enjoy judicial immunity. (Doc. 29, p. 2–4). Plaintiff also argues that the litigation privilege "has no application to the conduct of Defendants in deprivation of constitutional rights." (Id. pp. 2–3).

In the Amended Complaint, Plaintiff states that the events leading up to this action "occurred during a civil action." (Doc. 25, ¶ 1). Plaintiff allegations include: that Defendants "filed a served a motion for attorney [sic] fees improperly" (Id. ¶ 10); "jointly engaged with Judge 1st . . . in the illegal granting of the improper motion for attorney [sic] fees and in illegally facilitating the Defendants' avoidance of the hearing of the Plaintiff's motion for summary judgment" (Id.¶ 18); "jointly engaged with Judge 2nd as a state official as above alleged [sic] were effected under color of state law with the cooperation of and in concert with the corruption of Judge 2nd in the illegal granting of [Defendant Comer's] motion to dismiss" (Id. ¶ 26); "jointly engaged with the First [DCA] Panel as state officials as above alleged [sic] were effected under color of state law with the corruption of the Judges of the First Panel in the illegal affirmance of the final judgment" (Id. ¶ 31).2

Based on these allegations, Defendants' acts clearly occurred during the regular course of litigation and therefore are barred by Florida's litigation privilege. It is abundantly clear that granting leave to amend would be futile. Accordingly, the entire Amended Complaint is due to be dismissed with prejudice.

B. Defendants Are Not State Actors

Although the Court finds that Plaintiff's claims are barred by Florida's litigation privilege, it finds it necessary to discuss the remainder of Defendants' Motion due to the exceptionally frivolous nature of Plaintiff's claims.

It seems that each count in Plaintiff's Amended Complaint is brought against Defendants under 28 U.S.C. § 1983. Plaintiff alleges that Defendants "under color of authority of statute, policy, custom, practice or usage, of the rights and privileges secured to Plaintiff," violated the Fourteenth Amendment and the Constitution of the State of Florida "during a civil action" in the state courts of Florida. (Id. ¶ 1). Defendants argue that Plaintiff "fails to plausibly allege deprivation of a federal

2 The Court uses these excerpts from the Amended Complaint as examples of Plaintiff's allegations. The entire Amended Complaint sounds in the same type of allegations stemming from the State Action.

The Court notes that the Amended Complaint only alleges mere conclusory allegations that Defendants somehow "jointly

engaged" with two state circuit court judges and six DCA judges to deprive him of his constitutional rights to "access to court" and "due process." Simply stating that the Defendants filed motions that eight state judges agreed with does not amount to any conspiracy or joint action on behalf of the Defendants and the state judges. See Dennis v. Sparks, 449 U.S. 24, 25–27 (1980) ("Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge.").

right, fails to plausibly allege deprivation under color of state law, and fails to establish Defendants are state actors." (Doc. 28, p. 13).

It is true that an essential element of every § 1983 claim is that the defendant must have acted under color of state law. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978). "Only in rare circumstances can a private party be viewed as a 'state actor' for section 1983 purposes." Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992). Although Plaintiff is less than clear in his Amended Complaint how Defendants are state actors for purposes of § 1983, he argues in his response to Defendants' Motion that Dennis v. Sparks, "allow[s] application of § 1983 against private parties who act in concert with a state official, a judge . . . ." (Doc. 29, p. 4).

In Dennis v. Sparks, the Supreme Court stated that § 1983 "does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." 449 U.S. at 27–29. However, Plaintiff fails to mention to the Court that the Complaint in Dennis alleged that the

Defendant bribed the judge in that action. Here, we have no more than mere conclusory allegations that simply state that the Defendants "jointly engaged" with the state court judges. Thus, the Court finds that Plaintiff has not—and cannot—allege that Defendants acted "under color of state law" and are state actors for purposes of § 1983.

C. The Court Lacks Jurisdiction

Plaintiff's Amended Complaint is a thinly veiled attempt to re-litigate his state court action. The Amended Complaint requests judgment (a) declaring all of the actions of the courts in the State Action hereinabove alleged to have been caused by the Defendants; (b) declaring all of the actions of the courts in the State Action caused by the Defendants to be unconstitutional deprivations of the Plaintiff's right to due process under the Constitution of the United States; (c) declaring all of the unconstitutional actions of the courts in the State Action to be null and void; (d) providing the relief requested in the State Action that was denied as a result of the unconstitutional action of the State courts in the State Action . . .(Doc. 25, p. 11). This list of requested relief is a poorly crafted attempt to achieve the same declaratory relief that more than eight state court judges have previously denied to Plaintiff.3

There are several rules governing the jurisdiction of federal courts that restrict a federal court from interfering with the judgment of state courts. According to the Rooker-Feldman doctrine, federal district courts lack jurisdiction to review final judgments of state courts. The doctrine takes its name from two U.S. Supreme Court cases in which it

was applied. See Rooker v. Fid. Tr. Co., 263 U.S. 413 (1923); DC Ct. App. v. Feldman, 460 U.S. 462 (1983). In Rooker, the plaintiffs brought suit in federal district court seeking to have a state court judgment, which had been affirmed by the state's highest court, "declared null and void" on the

3 Plaintiff has exhausted all available state court remedies. Plaintiff's second amended state court complaint was dismissed with prejudice. (Doc. 25, ¶ 22). The order dismissing the second amended complaint with prejudice was affirmed by the 5th DCA. (Id. ¶ 29–30). The Florida Supreme Court denied Plaintiff's petition for review of the 5th DCA opinion and awarded Defendant Comer $2500.00 in appellate attorneys' fees. (Doc. 28, p. 15).

grounds that it violated the United States Constitution. 263 U.S. at 414–15. The district court dismissed the suit for lack of jurisdiction and, on appeal, the Supreme Court affirmed. Id. at 415. The Supreme Court emphasized that the jurisdiction of federal district courts is strictly original. Id. at 416. To allow a district court to "reverse or modify the judgment" of a state court would be an exercise of appellate jurisdiction, thus exceeding the powers of the district courts. Id. The Supreme Court held that the suit, which was "merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of [the state courts'] jurisdiction," was not within the "strictly original" jurisdiction of federal district courts. Id.

The Rooker-Feldman doctrine "extends not only to constitutional claims presented or adjudicated by a state court, but also to claims that are 'inextricably intertwined' with a state court

judgment." Siegel v. LePore, 234 F.3d 1163, 1172 (11th Cir. 2000) (quoting Feldman, 460 U.S. at 482 n.16). A claim is "inextricable intertwined" with a state court order "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring). In the Eleventh Circuit, the doctrine has been applied to § 1983 actions even where the relief sought is limited to damages and does not directly seek to prevent the enforcement of a state court order. See e.g., Goodman ex rel. Goodman v. Sipos, 259 F.3d 1327, 1333 (11th
Cir. 2001) (finding the Rooker-Feldman doctrine barred the plaintiff's § 1983 action for damages in a child-custody proceeding)

In this case, Plaintiff is directly requesting this Court to reverse course and to grant him every action purposefully denied by the state courts. Defendants are correct that "Plaintiff cannot avoid Rooker-Feldman's bar by cleverly cloaking his pleadings in the cloth of a different claim, including one brough under 42 U.S.C. § 1983." (Doc. 28, p. 17). The claims raised in Plaintiff's Amended Complaint are inextricably intertwined with the state court proceedings. Accordingly, the RookerFeldman doctrine deprives this Court of the Jurisdiction to grant any relief requested by Plaintiff in his Amended Complaint.

D. Rule 11 Sanctions

Under Federal Rule of Civil Procedure 11, a court has discretion to award sanctions:
(1) when a party files a pleading that has no reasonable factual basis; (2) when the party files a

pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; or (3) when the party files a pleading in bad faith for an improper purpose. Worldwide Primates, Inc. v. McGreal, 87 F.3d 1252, 1254 (11th Cir. 1996). The seminal case on Rule 11 in the Eleventh Circuit provides the standard and a twostep inquiry for courts to utilize in determining whether sanctions are appropriate:

> The objective standard for testing conduct under Rule 11 is "reasonableness under the circumstances" and "what was reasonable to believe at the time" the pleading standard was submitted. This court requires a two-step inquiry as to (1) whether the party's claims are objectively frivolous; and (2) whether the person who signed the pleadings should have been aware that they were frivolous. . .

Baker v. Alderman, 158 F.3d 516, 524 (11th Cir. 1998) (internal citations omitted).

In granting Defendants' Motion, the Court believes that Plaintiff—as counsel for himself—may have violated the Federal Rules.4 Plaintiff's Amended Complaint is objectively frivolous. As the Court found above, Plaintiff's claims are simply an attempt to re-litigate the underlying state court action—which the Court does not have jurisdiction to do. Plaintiff's Amended Complaint merely serves to harass the Defendants with the continued threat of litigation. Further, Defendants enjoy absolute immunity under the litigation privilege, and Plaintiff cannot assert a required element of a § 1983 claim—that Defendants are state actors, or are acting under "color of law."5 Plaintiff, a Florida-barred attorney acting as his own

counsel, should have been aware that his claims were frivolous when the Amended Complaint was filed. A court may, on its own initiative, "order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)." FED. R. CIV. P. 11©)(3).

4 "Representations to Court. By presenting to the Court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry
reasonable under the circumstances . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2).

5 The Court found it unnecessary to address Defendants' remaining arguments regarding collateral estoppel, res judicata, whether Plaintiff lacked standing to bring this suit, whether the Amended Complaint is a shotgun pleading, and whether the Amended Complaint fails to join an indispensable party. The Court believes that the frivolous nature of the Amended Complaint is evident after a detailed explanation of Florida's litigation privilege, why Defendants are not state actors, and the Rooker-Feldman doctrine.

IV. CONCLUSION

For the aforementioned reasons, it is ORDERED AND ADJUDGED as follows:

1. Defendants' Motion to Dismiss (Doc. 28) is GRANTED;

2. Plaintiff's Amended Complaint is DISMISSED WITH PREJUDICE;

3. On or before March 18, 2021, Anthony I.Provitola, Esq., is DIRECTED to show cause whether he has violated Rule 11(b)(2), and what sanctions, if any, should be imposed. Specifically, Mr. Provitola shall show cause whether he conducted an "inquiry reasonable under the circumstances" that the claims he asserted against Defendants were "warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Plaintiff is warned

that the Court will not look favorably upon anyattempt to re-litigate the merits of Defendants' Motion.

4. On or Before March 26, 2021, Defendants may file a consolidated response.

DONE AND ORDERED in Orlando, Florida on March 4, 2021.

Copies furnished to:

Appendix G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ANTHONY I. PROVITOLA,

Plaintiff,

vs.

DENNIS L. COMER, and FRANK A. FORD, JR. .

Defendants.

Case No. 6:20 cv-00862-PGB-DCI

INJUNCTIVE RELIEF AND JURY TRIAL REQUESTED

AMENDED COMPLAINT

The Plaintiff, ANTHONY I. PROVITOLA, sues the Defendants, DENNIS L. COMER, and FRANK A. FORD, JR., and says:

INTRODUCTORY STATEMENT

1. This is an action under 42 U.S.C. §1983 and 28 U.S.C. §1367 against the Defendants and each of them to redress continuing deprivation, under color of authority of statute, policy, custom, practice or usage, of the rights and privileges secured to the Plaintiff by the Fourteenth Amendment to the United States Constitution and the Constitution and laws of the State of Florida that occurred during a civil action by the Plaintiff in the Courts of Florida ("State Action"), and for declaratory judgment under 28 U.S.C. §2201```

JURISDICTION

2. The Court has jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1367.

PARTIES

3. The Plaintiff, Anthony I. Provitola, is a resident of Volusia County, Florida.

4. The Defendant, Dennis L. Comer ("COMER") is a resident of Volusia County, Florida.

5. The Defendant, Frank A. Ford, Jr. ("FORD"), is a resident of Volusia County, Florida, and was at all times pertinent hereto an attorney licensed to practice law in the State of Florida, employed by COMER as attorney and counselor, and acted within the scope of his representation of COMER before and in the State Action.

6. At all time pertinent hereto COMER and FORD (collectively "Defendants") acted in concert.

7. Any reference to either COMER or FORD alone specifies that party alone and not the Defendants collectively.

8. The Florida State Judicial Officers who were involved in the State Action are not parties in this proceeding because they enjoy judicial immunity therefor, and shall be referred to in their chronological position in the allegations: "Judge 1st", "Judge 2nd", , , , etc.

BACKGROUND

9. About 50 years ago in 1968 the Plaintiff with his wife purchased a parcel of land in Volusia County, Florida for their homeplace which that included on its western end a roadway known as Ridgewood Avenue. In 1993, about 25 years after the commencement of the Plaintiff's use of the roadway, COMER, represented by FORD, purchased a parcel of land (Comer's Parcel) to the north of the Plaintiff's homeplace over which Ridgewood Avenue also ran. FORD did not inform COMER at the time of the purchase by COMER of Comer's Parcel of the existence of Ridgewood Avenue as a public road on Comer's Parcel. About 20 years thereafter, in 2014, COMER obstructed the Plaintiff's passage on Ridgewood Avneue with an electricallyoperated gate, without any permission to act for any public body or governmental authority with respect to the use, traffic upon, or obstruction off Ridgewood Avenue.

The Plaintiff objecting to the obstruction sued COMER for declaration of the fact that Ridgewood Avenue was a public road, and that the obstruction was illegal. FORD represented COMER in defense of that action. On March 22, 2016 the Plaintiff timely filed and served a motion for summary judgment in the State Action in accordancewith Rule 1.510, Fla.R.Civ.P. with extensive evidentiarysupport demonstrating his right to judgment. COMER did not file any relevant evidence in opposition to the Plaintiff's motion, but filed an Affidavit In Opposition to Plaintiff's Motion for Partial Summary Judgment in which he admitted to having engaged in "cooperation and/or agreement" with the "financial assistance" of other persons owning property along the roadway, and "purchased and installed a new gate" that enabled the obstruction to the Plaintiff. The Plaintiff's motion was set for hearing on May 31, 2016.

COUNT I : Disregard for due process. (Against COMER and FORD)

10. On April 6, 2016, in response to an amended complaint in the State Action, the Defendants caused to be served a second motion to dismiss that did not present as grounds any defect with respect to the statement of a cause of action under Section 86.011, Florida Statutes for a declaration of fact regarding Ridgewood Avenue as a public road, and set a hearing thereon to be heard before Judge 1st on May 27, 2016

11. On April 28, 2016 the Defendants filed and served a motion for attorney fees improperly asserting

Section 57.105(1), Florida Statutes that did not on its face allege any required statutory ground, did not allege that any claim or defense was frivolous, but
only alleged that the Plaintiff would not yield to their demand that the Plaintiff's motion for summary judgment be withdrawn; and cross-noticed that motion for hearing at the same time and date as the hearing scheduled for the Plaintiff's motion for summary judgment on May 31, 2016.

12. At the hearing set for May 27, 2016 Judge 1st, upon the extemporaneous urging of FORD as COMER's counsel, changed the hearing order on the pending motions to avoid hearing the Plaintiff's Motion to Strike the COMER's second motion to dismiss, without any such action having been scheduled prior thereto and without allowing the Plaintiff to be heard in opposition; granted COMER's second motion to dismiss without prejudice, with admonition to the Plaintiff to provide "magic words" in an amendment in order to avoid a dismissal with prejudice; and sua sponte declared that the hearing on the Plaintiff's motion for summary judgment had "been cancelled as a result of the conversation we had here".

13. On May 31, 2016 at the hearing for which the Plaintiff's motion for summary judgment was scheduled Judge 1st declared that the Plaintiff's motion for summary judgment was without support, and proceeded to hear the Defendants' motion for attorney fees.

14. In proceeding on the Defendants' motion for attorney fees Judge 1st first heard their argument, which was not directed to any statutory requirement

of Section 57.105(1), Florida Statutes, and then argument of the Plaintiff concerning the deficiencies of the Defendants' motion and argument. Judge 1st thereupon settled upon as her basis for ruling that the Defendants' motion was that the Plaintiff was discourteous to the counsel for the defense in failing to withdraw the motion for summary judgment, that such discourtesy was adequate ground for the motion for attorney fees; and impugned the Plaintiff's ethics on that account.

15. The Plaintiff then informed Judge 1st that he would move to have her disqualified: Judge 1st then entered an order of "entitlement" granting the Defendants' motion at that hearing, a copy of which is attached hereto as Exhibit "A"; that order being improper on its face without any supporting finding of fact; and reserving jurisdiction for a later determination of the amount of attorney fees to be awarded.

16. Judge 1st was then disqualified and recused, but did not enter the order of recusal until June 22, 2016, more that three (3) weeks after the hearing on the Defendants' motion for attorney fees, or vacate the order of "entitlement" within the time contemplated by Rule 2.330(h), Fla.R.Jud.Admin.

17. On June 27, 2016, the Chief Judge assigned the case to Judge 2nd, a colleague of Judge 1st, the only other circuit judge in the civil division of the DeLand office of the Seventh Judicial Circuit.

18. The Defendants' actions as private persons jointly engaged with Judge 1st as a state official as above alleged were effected under color of state law with the

cooperation of and in concert with the corruption of Judge 1st in the illegal granting of the improper motion for attorney fees and in illegally facilitating the Defendants' avoidance of the hearing of the Plaintiff's motion for summary judgment.

19. As a result of the above alleged Defendants' actions the Plaintiff has been deprived of the right to due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution, and has thus been directly and proximately caused to suffer injury and damage

20. The conduct of the Defendants was reckless and carried out with callous indifference to the rights of the Plaintiff; and each of them was malicious and in reckless and conscious disregard for the rights of the Plaintiff, and the Plaintiff is entitled to punitive damages in accord with constitutionally permitted limits.

COUNT II: Denial of access to court with misapplication of law. (Against COMER and FORD)

21. On June 16, 2016 the Plaintiff filed and served the second amended complaint, a copy of which is attached hereto as Exhibit "B" (without exhibits referred to therein), that again alleged the same facts pertaining to the property rights of the parties and their relationships and actions that gave rise to the need for the declaration of fact regarding the status of Ridgewood Avenue that were alleged in the original complaint; to which COMER responded with a motion to dismiss that for the first time added the

ground that the Plaintiff did not have standing to sue.

22. Following a hearing held on July 27, 2016 Judge 2nd granted the motion to dismiss with prejudice in an order, a copy of which is attached hereto as Exhibit "C", finding that the Plaintiff did not have standing to sue, but acknowledging the existence of the cause of action for declaratory judgment from the same allegations that had been pled in the original complaint.

23. Judge 2nd's finding was based upon an obvious misapplication of the case law cited in the motion to dismiss that only applies to the circumstance in which a defendant had acted as authorized by a public governmental body.

24. Judge 2nd failed to accept the facts pled in the second amended complaint as true for the purpose of the motion to dismiss pertaining to the loss of the subdivision exemption as special injury, finding to the contrary against those facts without notice or hearing thereon.

25. As a result the Plaintiff has and will in the future suffer loss of and injury to the Plaintiff's long-established property interest in the use of Ridgewood Avenue; loss of his property interest in the use of the Plaintiffs'parcel as an abutting land owner; and the loss of the property interest in the subdivision exemption using Ridgewood Avenue; and has thus been directly and proximately caused to suffer injury and damage.

26, The Defendants' actions as private persons jointly engaged with Judge 2nd as a state official as above alleged were effected under color of state law with the cooperation of and in concert with the corruption of Judge 2nd in the illegal granting of COMER's motion to dismiss.

27. As a result of the above alleged Defendants' actions the Plaintiff has been deprived of the right to due process of law as guaranteed by the Fourteenth Amendent of the United States Constitution, of the right to have a declaration adjudication under Chapter 86, Florida Statutes, and of the right to access to courts under the Florida Constitution, Article I, Section 21; and has thus been directly and proximately caused to suffer injury and damage.

28. The conduct of the Defendants was reckless and carried out with callous indifference to the rights of the Plaintiff; and each of them was malicious and in reckless and conscious disregard for the rights of the Plaintiff, and the Plaintiff is entitled to punitive damages in accord with constitutionally permitted limits.

COUNT III: Appellate acceptance of disregard for due process. (Against COMER and FORD)

29. The Plaintiff appealed the order of dismissal with prejudice entered by Judge 2nd to the Fifth District Court of Appeal of Florida, which was heard on July

25, 2017 by a panel comprised of two District Judges of that court ("Judge 3rd", and "Judge 4th") joined by a County Judge ("Judge 5th") sitting on the panel ("First Panel") by invitation.

30. The First Panel decided the appeal in favor of COMER with affirmance "per curiam" without opinion of the order of dismissal with prejudice, a copy of which is attached hereto as Exhibit "D", but with citation of the case law that was the basis of the order of dismissal; and dismissed the Plaintiff's appeal of the order of "entitlement", which the Panel deemed to be non-final on the authority of Adlow, Inc. v. Mauda, Inc. 632 So.2d 714 (Fla. 5th DCA 1994).

31. The Defendants' actions as private persons jointly engaged with the First Panel as state officials as above alleged were effected under color of state law with the cooperation of and in concert with the corruption of the Judges of the First Panel in the illegal affirmance of the final judgment.

32. As a result of the above alleged Defendants' actions the Plaintiff has been deprived of the right to due process of law as guaranteed by the Fourteenth Amendent of the United States Constitution, and has thus been directly and proximately caused to suffer injury and damage.

33. The conduct of the Defendants was reckless and carried out with callous indifference to the rights of the Plaintiff; and each of them was malicious and in reckless and conscious disregard for the rights of the Plaintiff, and the Plaintiff is entitled to punitive damages in accord with constitutionally permitted limits.

COUNT IV: Appellate failure to follow its own expresssly applied precedent in Adlow, Inc. v. Mauda, Inc. (Against COMER and FORD)
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34. On October 10, 2017 the Plaintiff applied to Judge 2nd with a motion to vacate the nonfinal order of "entitlement" improperly entered by Judge 1st, a copy of which is attached hereto as Exhibit "E".

35. On October 26, 2017 a hearing was set by the Defendants before Judge 2nd for January 24, 2018 on the Plaintiff's motion to vacate and the Defendants' "Motion for Defendant's Attorney's Fees and Costs Pursuant to Section 105(1), Florida Statutes (amounts only - evidentiary hearing)", a copy of the notice for which is attached hereto as Exhibit "F".

36. At the hearing held on January 24, 2018 Judge 2nd denied the Plaintiff's motion to vacate the order of entitlement, which was opposed by the Defendants without presentation of any evidence or law to cure the defects in the order of "entitlement"; and entered an order to that effect, (on January 31, 2018), a copy of which is attached hereto as Exhibit "G", that again failed to make any findings of fact to satisfy the requirements of Section 57.105(1) or other legal basis therefor.

37. Also at the hearing held on January 24, 2018 Judge 2nd ruled, without notice to the Plaintiff, on the propriety of the Plaintiff's motion for summary judgment, finding the Plaintiff's motion for summary judgment to be without support; but finding that the purpose of COMER'S motion for attorney fees was

made for the purpose of avoiding a hearing on the Plaintiff's motion for summary judgment.

38. At the hearing of January 24, 2018 Judge 2nd further proceeded to enter final judgment awarding attorney fees to COMER and his counsel, a copy of which is attached hereto as Exhibi "H", but again without making any finding of fact in support of the "entitlement" to an award of attorney fees as required by the case law of Florida, including Adlow, Inc. v. Mauda, Inc. 632 So.2d 714, cited in the "per curiam" affirmance by the First Panel.

39. Such an award of attorney fees thus caused by the motion therefor by the Defendants was known to be illegal by Judge 2nd acting under the mandate of the First Panel's express reference to Adlow, Inc. v. Mauda, Inc.

40. The Defendants' actions as private persons jointly engaged with Judge 2nd as a state official as above alleged were effected under color of state law with the cooperation of and in concert with the corruption of Judge 2nd in the illegal denial the Plaintiff's motion to vacate the illegal order of "entitlement" entered by Judge 1st; in the illegal granting of the improper motion for attorney fees; and in illegally facilitating the Defendants' avoidance of the Plaintiff's motion for summary judgment.

41. As a result of the above alleged Defendants' actions the Plaintiff has been deprived of the right to due process of law as guaranteed by the Fourteenth Amendent of the United States Constitution, and has

thus been directly and proximately caused to suffer injury and damage.

42. The conduct of the Defendants was reckless and carried out with callous indifference to the rights of the Plaintiff; and each of them was malicious and in reckless and conscious disregard for the rights of the Plaintiff, and the Plaintiff is entitled to punitive damages in accord with constitutionally permitted limits.

COUNT V: Persuasion to avoid the Appellate Court's own precedent. (Against COMER and FORD)

43. The Plaintiff took a second appeal to the Fifth District Court of Appeal of Florida from the final judgment entered by Judge 2nd which was decided by a second by a panel comprised of three District Judges of that Court ("Judge 6th", the presiding judge, "Judge 7th"and "Judge 8th") ("Second Panel") on May 7, 2019.

44. The Second Panel decided that appeal in favor of the Defendants with affirmance of the final judgment "per curiam" without opinion or citation of authority, thereby rejecting the Plaintiff's appeal of the order of "entitlement", and failing to apply the authority of Adlow cited in the first "per curiam" affirmance by the First Panel.

45. The affirmance of the final judgment by the Judges of the Second Panel was illegally made by the Second Panel with the knowledge that the Final

Judgment was entered contrary to the existing law announced by the Fifth District in Adlow, Inc. v. Mauda, Inc.

46. The Defendants' actions as private persons jointly engaged with the Second Panel as state officials as above alleged were effected under color of state law with the cooperation of and in concert with the corruption of the Judges of the Second Panel in the illegal affirmance of the final judgment.

47. As a result of the above alleged Defendants' actions the Plaintiff has been deprived of the right to due process of law as guaranteed by the Fourteenth Amendent of the United States Constitution, and has thus been directly and proximately caused to suffer injury and damage.

48. The conduct of the Defendants was reckless and carried out with callous indifference to the rights of the Plaintiff; and each of them was malicious and in reckless and conscious disregard for the rights of the Plaintiff, and the Plaintiff is entitled to punitive damages in accord with constitutionally permitted limits.

COUNT VI: Denial of access to adjudication. (Against COMER and FORD)

50. The conduct of the Defendants taken as a whole with the approval, concerted action , and the corruption of Judges in the State Action as alleged herein combined to form a denial of the Plaintiff's access to adjudication under the law of Section 86.011, Florida Statutes and his rights under the

Florida Constitution, Article I, Section 21, and thereby to deprive the Plaintiff the right to due process under the Fourteenth Amendment to the United States Constitution.

51. As a result of the above alleged Defendants' actions the Plaintiff has been deprived of the right to due process of law as guaranteed by the Fourteenth Amendent of the United States Constitution, and has thus been directly and proximately caused to suffer injury and damage.

52. The conduct of the Defendants was reckless and carried out with callous indifference to the rights of the Plaintiff; and each of them was malicious and in reckless and conscious disregard for the rights of the Plaintiff, and the Plaintiff is entitled to punitive damages in accord with constitutionally permitted limits.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff demands judgment as follows:

(a) declaring all of the actions of the courts in the State Action hereinabove alleged to have been caused by the Defendants;

(b) declaring all of the actions of the courts in the State Action caused by the Defendants to be unconstitutional deprivations of the Plaintiff's right to due process under the Constitution of the United States;

(c) declaring all of the unconstitutional actions of the courts in the State Action to be null and void;

(d) providing the relief requested in the State Action that was denied as a result of the unconstitutional action of the State courts in the State Action;

(e) injunctive relief prohibiting the Defendants, and each of them from violating his rights under the Fourteenth Amendment to the United States Constitution and under Florida Constitution, Article I, Section 21;

(f) an award of attorney fees and costs pursuant to 42 U.S.C. §1988, and all other relief that is just and proper;

(g) return of all monies paid to the Defendants as attorney fees in the State Action, plus interest from the date of payment to the present.

JURY DEMAND

The Plaintiff demands a trial by jury on all issues triable of right by a jury, including damages in an amount to be established at trial.
Dated: September 6, 2020.

ANTHONY I. PROVITOLA, P. A.
By: /s/Anthony I.Provitola
Anthony I. Provitola
Attorney for Plaintiff
Florida Bar No. 95290

Post Office Box 2855
DeLand, Florida 32721
Tel: (386) 734-5502
Fax: (386) 736-3177
aprovitola@cfl.rr.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed using CM/ECF for service of an electronic copy on Michael G. Moore, Esq., Moore Lex, P.A., 206 Wellisford Way, DeLand, Florida 32724, michael@morelex.com, and Lindsay R. Rich, Esq.. First American Law Group, 7650 W Courtney Campbell Cswy. Suite 1150, Tampa, Florida 33607, lirich@firstam.com this 6th day of September, 2020.

/s/Anthony I.Provitola
Anthony I. Provitola
Attorney for Plaintiff

Appendix H

Relevant Constitutional Provisions, & Statutes

U.S. Constitution. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 .

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law