

NOT RECOMMENDED FOR PUBLICATION

No. 22-3155

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jan 8, 2024

KELLY L. STEPHENS, Clerk

ELVERT S. BRISCOE, JR.,)
Plaintiff-Appellant,)
v.)
GARY C. MOHR, ODRC Director, et al.,)
Defendants-Appellees.)
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)
ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
OHIO
)
)

ORDER

Before: CLAY, GIBBONS, and LARSEN, Circuit Judges.

Elvert S. Briscoe, Jr., a pro se Ohio prisoner, appeals the district court's judgment for the defendants on his 42 U.S.C. § 1983 civil rights complaint. Briscoe moves the court for appointment of counsel and to hear his appeal on the original record without an appendix under Federal Rule of Appellate Procedure 30(f). The defendants move to dismiss Briscoe's appeal for failure to comply with Federal Rule of Appellate Procedure 30 and Sixth Circuit Local Rule 30(a) and (b)(2)(B). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the reasons that follow, we affirm the district court's judgment, grant Briscoe's motion to appeal without filing an appendix, and deny all other pending motions.

A. Factual and Procedural Background

Briscoe worked in the prison computer laboratory at Grafton Correctional Complex (GCC). Briscoe reported that another inmate, defendant Mark Hurayt, possessed a contraband USB flash drive. Corrections officers found the flash drive when they searched Hurayt's bunk area. Hurayt claimed that he got the flash drive from Briscoe and then alleged that Briscoe and several other

inmates were planning an escape. After a hearing before the prison's Rules Infraction Board, Briscoe was found guilty of attempting and planning an escape, his security classification level was increased, and he was transferred to a maximum security prison.

Briscoe then filed a § 1983 complaint against the Director of the Ohio Department of Rehabilitation and Correction Gary C. Mohr, GCC Warden LaShann Eppinger, GCC Deputy Wardens Keith Foley and Jennifer Gillece, Institutional Investigator Steve Weishar, Rules Infraction Board Chairman Nicholaus Costello (collectively, "the State defendants"), and inmate Hurayt, bringing claims for violations of his constitutional rights under the First, Eighth, and Fourteenth Amendments. Briscoe also asserted a state law claim for intentional infliction of emotional distress (IIED). Briscoe's general theory of the case was that Hurayt falsely charged him with planning an escape because he reported Hurayt for having the flash drive, and that the other defendants knowingly prosecuted this false charge to cover up that Hurayt had misled them.

The district court sua sponte dismissed Briscoe's complaint upon initial screening under 28 U.S.C. § 1915(e)(2)(B). On appeal, we affirmed the district court's dismissal of Briscoe's substantive due process, equal protection, and excessive force claims and ruled that Briscoe had abandoned his state law IIED claim. We concluded, however, that the district court erred in dismissing Briscoe's procedural due process and retaliation claims and remanded those claims for further proceedings. *See Briscoe v. Mohr*, No. 19-3306, 2020 WL 1813660, at *2-4 (6th Cir. Mar. 16, 2020).

On remand, Director Mohr moved to dismiss Briscoe's claims against him under Federal Rule of Civil Procedure 12(b)(6). Briscoe did not respond to the motion. The district court granted the motion because Briscoe failed to allege facts demonstrating that Mohr was responsible for the allegedly unconstitutional conduct of his subordinates. The district court denied Briscoe's motion to alter or amend this order and his motion to amend his complaint to correct his allegations against Mohr.

Briscoe applied for an entry of default and moved for a default judgment against Hurayt because Hurayt failed to answer or defend the complaint. Briscoe also moved the district court for

appointment of counsel. The district court denied the latter motion because Briscoe had demonstrated sufficient ability to represent himself.

Briscoe's due process and retaliation claims proceeded to a jury trial. The district court granted the State defendants' motions in limine to preclude Briscoe from presenting evidence of certain collateral injuries and emotional distress. On the first day of trial, Briscoe moved for a 180-day continuance and the appointment of pro bono counsel. The district court denied this motion. At the close of Briscoe's case-in-chief, the district court granted judgment to Foley, Eppinger, Gillece, and Costello under Federal Rule of Civil Procedure 50. The district court submitted Briscoe's retaliation claim against Weishar to the jury. The jury found for Briscoe and awarded him \$1,000 in compensatory damages and \$2,000 in punitive damages. The district court then entered a written order that summarized all of its oral rulings during the trial, including its denial of Briscoe's motion for default judgment against Hurayt.

Briscoe filed a timely Rule 59(e) motion to alter or amend the judgment, claiming that the district court erred in denying his motion for a default judgment. According to Briscoe, the allegations in his complaint and the evidence presented at trial showed that Hurayt violated the First Amendment by conspiring with Weishar to retaliate against him for reporting Hurayt's misconduct. The district court denied the motion, ruling that there was no theory under which Hurayt, a private individual, could be held liable under § 1983 for violating Briscoe's First Amendment rights. Additionally, the court noted that we had previously ruled that Briscoe had abandoned his state law IIED claim against Hurayt.

Briscoe filed a timely notice of appeal from the district court's denial of his Rule 59(e) motion. Briscoe then moved for free transcripts of the trial and all pretrial proceedings. We denied that motion. Briscoe now moves the court to hear his appeal on the original record without filing an appendix under Federal Rule of Appellate Procedure 30(f). The State defendants move to dismiss Briscoe's appeal because his failure to file an appendix violates Federal Rule of Appellate Procedure 30(a) and (b)(2)(B) and Sixth Circuit Local Rule 30(a). Lastly, Briscoe moves the court to appoint counsel to represent him on appeal.

Briscoe's pro se appellate brief asserts 11 assignments of error, but they can be condensed as follows: (1) the district erred in ruling that Hurayt was not liable under § 1983 for First Amendment retaliation and in denying Briscoe's Rule 59(e) motion, (2) the district court erred in granting the Rule 50 motion of defendants Foley, Eppinger, Gillece, and Costello, (3) the district court erred in granting the State defendants' motions in limine, (4) the district court erred in granting Director Mohr's motion to dismiss, and (5) the district court erred in denying Briscoe a continuance and the appointment of pro bono counsel.¹

B. The Appendix on Appeal and the Defendants' Motion to Dismiss

Briscoe moves the court to decide his appeal without filing an appendix. On the other hand, the defendants move to dismiss Briscoe's appeal because he has not filed an appendix. Generally, in district court appeals, "an appendix is unnecessary and must not be filed." 6 Cir. R. 30(a). But an appendix is required if exhibits and transcripts that are not part of the district court's electronic record "are necessary for the court to understand the issues and decide the appeal." 6 Cir. R. 30(b)(2)(B).

Although we have the authority to dismiss an appeal if the appellant does not file an appendix, *cf. United States v. Kush*, 579 F.2d 394, 394 (6th Cir. 1978), we have also stated that dismissal for violating Rule 30 is a "rather harsh sanction," *Hartleip v. McNeilab, Inc.*, 83 F.3d 767, 779 (6th Cir. 1996). Here, Briscoe has not filed an appendix. Nevertheless, in view of our ultimate conclusion to affirm the district court's judgment, we decline to impose the harsh sanction of dismissal. Accordingly, to the extent that Briscoe refers to materials not contained in the district court's electronic record, we grant his motion to decide the appeal without an appendix and deny the defendants' motion to dismiss.

¹ Although Briscoe's notice of appeal specified that he was appealing only the district court's denial of his Rule 59(e) motion, we treat this as an appeal of the underlying judgment itself. *See GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 833 (6th Cir. 1999). Accordingly, we have appellate jurisdiction to review all of the issues that Briscoe raises in his appellate brief. *See Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

Having said that, however, Federal Rule of Appellate Procedure 10(b)(2) requires the appellant to file a transcript if he “intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence.” Because Briscoe has not paid for a trial transcript, we cannot review his assignments of error concerning the district court’s Rule 50 judgment in favor of Foley, Eppinger, Gillece, and Costello at the close of his case-in-chief, or its rulings on the defendants’ motions in limine. We conclude therefore that Briscoe has forfeited appellate review of those assignments of error. *See Spurling v. Allstate Indem. Co.*, 487 F. App’x 982, 983 (6th Cir. 2012) (per curiam).

C. Denial of Motions for Default Judgment and to Alter or Amend the Judgment

Briscoe argues that the district court erred in denying his motion for a default judgment against Hurayt and his subsequent motion to alter or amend that order. Briscoe contends that he alleged sufficient facts to demonstrate that Hurayt was a state actor for purposes of § 1983.²

Because the district court concluded that Briscoe failed to state a § 1983 claim against Hurayt, we treat the court’s default judgment order as a dismissal under Federal Rule of Civil Procedure 12(b)(6). We review that order *de novo*. *Bridge v. Ocwen Fed. Sav. Bank*, 681 F.3d 355, 358 (6th Cir. 2012). A complaint must be dismissed under Rule 12(b)(6) if it fails to plead

² The denial of a motion for default judgment is not a final appealable order because it does not terminate all of the issues in the litigation. *See Young v. U.S. Dep’t of Treas.—Internal Revenue Serv.*, No. 20-5094, 2020 WL 2029345, at *1 (6th Cir. Feb. 18, 2020). And we only have appellate jurisdiction to review final orders and appealable interlocutory orders. *See* 28 U.S.C. §§ 1291, 1292; *Grawey v. Drury*, 567 F.3d 302, 310 (6th Cir. 2009). At first blush, the district court’s denial of Briscoe’s motion for a default judgment against Hurayt leaves at least one unresolved claim in the district court. Were that the case, we would not have appellate jurisdiction over Briscoe’s appeal. But the district court’s Rule 59 order did not address whether Briscoe was entitled to a default judgment under the procedure we set out in *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 844 (6th Cir. 1983). Instead, the district court found that Briscoe had abandoned his state law claim against Hurayt, and it ruled that Briscoe failed to state a § 1983 claim against Hurayt because Hurayt was not a state actor. Indeed, the court specifically stated, “Plaintiff may not sue Defendant Hurayt for constitutional violations under § 1983 because Hurayt’s conduct may not be fairly attributable to the State.” In other words, the district court denied Briscoe’s claims against Hurayt on the merits. Consequently, we conclude that the district court’s Rule 59 order was intended to be, and is, a final judgment on Briscoe’s claims against Hurayt. *See Casden v. Burns*, 306 F. App’x 966, 970-71 (6th Cir. 2009). Accordingly, we have appellate jurisdiction over Briscoe’s appeal.

“enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

We review the district court’s denial of a Rule 59(e) motion for an abuse of discretion. *See GenCorp, Inc.*, 178 F.3d at 832. Under Rule 59(e), a movant can prevail on a motion to alter or amend the judgment by demonstrating “(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.” *Mich. Flyer LLC v. Wayne Cnty. Airport Auth.*, 860 F.3d 425, 431 (6th Cir. 2017).

In this case, the district court correctly dismissed Briscoe’s claims against Hurayt. As the district court found, Briscoe abandoned his IIED claim in his first appeal. Our ruling as to that claim was the law of the case. *See Samons v. Nat’l Mines Corp.*, 25 F.4th 455, 463 (6th Cir. 2022). And, as a private individual, Hurayt was not liable under § 1983 for falsely informing corrections officers that Briscoe was planning an escape. *See Gibson v. Regions Fin. Corp.*, 557 F.3d 842, 846 (8th Cir. 2009). Moreover, Briscoe failed to plausibly allege that Hurayt and Weishar conspired to retaliate against him. *See Twombly*, 550 U.S. at 556-57; *Revis v. Meldrum*, 489 F.3d 273, 287 (6th Cir. 2007).

Accordingly, the district court did not err in dismissing Briscoe’s claims against Hurayt or in denying Briscoe’s Rule 59(e) motion.

D. Dismissal of Briscoe’s Claims Against Director Mohr

Next, Briscoe contends that the district court erred in granting Director Mohr’s Rule 12(b)(6) motion. Briscoe argues the district court violated the “mandate rule” because in his first appeal we decided that he had sufficiently pleaded due process and retaliation claims against the defendants. Further, Briscoe contends that his complaint plausibly pleaded facts demonstrating that Mohr was liable for these claimed constitutional violations.

“The mandate rule binds a district court to the scope of the remand issued by the court of appeals.” *Monroe v. FTS USA, LLC*, 17 F.4th 664, 669 (6th Cir. 2021). We have explained that

[r]emands can be general or limited. General remands direct district courts to address all the matters remaining in a case, in a way that is consistent with the appellate court’s ruling. Limited remands direct district courts to address specific issues, creating “a narrow framework within which the district court must operate.”

Continental Cas. Co. v. Indian Head Ind., Inc., 941 F.3d 828, 834 (6th Cir. 2019) (quoting *United States v. Richardson*, 906 F.3d 417, 422 (2018)) (citation omitted)).

In this case, we remanded Briscoe's due process and retaliation claims "for further proceedings." *Briscoe*, 2020 WL 1813660, at *4. Because our order contained no limiting language, this was a general remand. *See United States v. Moore*, 131 F.3d 595, 598 (6th Cir. 1997). Accordingly, we did not restrict the district court's authority to address any and all matters that remained in the case.

Nor did our prior decision establish the law of the case as to Mohr's individual liability under § 1983. There, we concluded that Briscoe had sufficiently alleged that he did not receive adequate process in his disciplinary hearing and that the district court erred in ruling that the finding of guilt in that hearing blocked Briscoe's retaliation claim. *See Briscoe*, 2020 WL 1813660, at *2-3. We did not address whether Briscoe had improperly asserted respondeat superior liability against Mohr, which was the basis for Mohr's Rule 12(b)(6) motion.

Accordingly, we conclude that neither the mandate rule nor the law of the case precluded the district court from considering whether Briscoe sufficiently alleged facts demonstrating Mohr's personal liability for the alleged constitutional violations under § 1983.

As stated above, we review *de novo* a district court's dismissal of claims under Rule 12(b)(6). *See Bridge*, 681 F.3d at 358. In determining whether a complaint states a claim, a court must construe the complaint in the light most favorable to the plaintiff, accept all well pleaded factual allegations as true, and determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S at 544.

Respondeat superior liability is not available under § 1983. *See Does v. Whitmer*, 69 F.4th 300, 306 (6th Cir. 2023) ("Each government official is liable only for her own misconduct, not for that of her subordinates."). "To state a claim of supervisory liability under § 1983, plaintiffs must plausibly allege that a defendant 'authorized, approved, or knowingly acquiesced in the unconstitutional conduct of his subordinates through the execution of his job functions.'" *Id.* (quoting *Crawford v. Tilley*, 15 F.4th 752, 761 (6th Cir. 2021) (cleaned up)).

Here, Briscoe did not plausibly allege that Director Mohr authorized, approved, or knowingly acquiesced in the claimed due process and retaliation violations. Briscoe alleged that Mohr was liable for the allegedly unconstitutional conduct of his subordinates only because Mohr did not respond to a letter in which Briscoe complained to Mohr that he had been falsely charged with an attempted escape. At most, this shows merely that Mohr failed to act, which is insufficient to establish supervisory liability. *See Crawford*, 15 F.4th at 761. Otherwise, Briscoe's allegations against Mohr were conclusory and did not establish Mohr's personal liability for the claimed violations.

Accordingly, the district court did not err in granting Mohr's motion to dismiss.

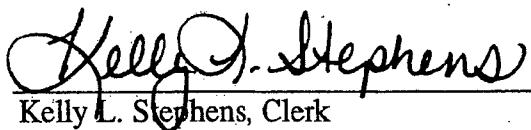
E. Motion for a Continuance and for Appointment of Counsel

Lastly, Briscoe contends that the district court erred in denying him a continuance of the trial and appointment of counsel. By waiting until the first day of trial, Briscoe was dilatory in seeking a continuance. *See Prime Rate Premium Fin. Corp. v. Larson*, 930 F.3d 759, 766-67 (6th Cir. 2019). Consequently, the district court did not abuse its discretion in refusing to continue the trial. *See id.* And Briscoe demonstrated that he had more than sufficient ability to represent himself in these proceedings. *See Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993). Accordingly, the district court did not abuse its discretion in declining to appoint counsel for Briscoe. *See id.* at 605. We deny Briscoe's motion for appointment of counsel on appeal for the same reason.

Conclusion

For the reasons stated, we **AFFIRM** the district court's judgment, **GRANT** Briscoe's motion to appeal without filing an appendix, and **DENY** all other pending motions.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 22-3155

ELVERT S. BRISCOE, JR.,

Plaintiff-Appellant,

v.

GARY C. MOHR, ODRC Director, et al.,

Defendants-Appellees.

Before: CLAY, GIBBONS, and LARSEN, Circuit Judges.

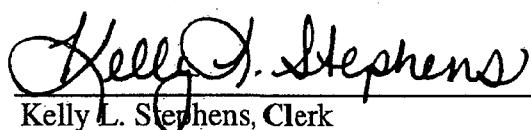
JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was submitted on the
briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court
is AFFIRMED.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ELVERT S. BRISCOE, JR.,	:	CASE NO. 1:18-cv-02417
Plaintiff,	:	OPINION & ORDER
	:	[Resolving Doc. 73]
V.	:	
GARY MOHR, et al.,	:	
Defendants.	:	

JAMES S. GWIN, UNITED STATES DISTRICT COURT JUDGE:

Plaintiff Elvert S. Briscoe, Jr., an Ohio prisoner proceeding *pro se*, filed this civil rights action under 42 U.S.C. § 1983 against multiple Ohio Department of Rehabilitation and Correction ("ODRC") officials and Mark Hurayt, a fellow incarcerated person.¹

Plaintiff Briscoe previously moved for default judgment against Defendant Hurayt.² This Court denied that motion.³

Plaintiff now moves this Court to alter or amend its judgment denying Plaintiff's motion for default judgment under Federal Rule of Civil Procedure 59.⁴ Defendant opposes.⁵

With this motion, the Court must determine whether there is a clear error of law, an intervening change in the controlling law, newly discovered evidence, or a need to prevent manifest injustice that warrants altering or amending the Court's earlier judgment.⁶

For the following reasons, the Court **DENIES** Plaintiff Briscoe's motion.

¹ Doc. 1.

² Doc. 43. *See also* Doc. 37.

³ Doc. 72.

⁴ Docs. 73; 73-1.

⁵ Doc. 75.

⁶ Fed. R. Civ. P. 59(e); *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005) (citation omitted).

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GWIN, J.

I. Background

The events leading to this case occurred while Plaintiff was incarcerated at Grafton Correctional Institution. According to Plaintiff Briscoe, Defendant Hurayt, another Grafton inmate, and prison officials conspired to implicate Plaintiff in a false escape plot in retaliation for Briscoe reporting Hurayt's false allegations and contraband to prison authorities.⁷

In an administrative hearing, Plaintiff Briscoe was found guilty of plotting to escape.⁸ Plaintiff additionally alleged that this proceeding violated his procedural due process rights.⁹ After Plaintiff Briscoe lost his administrative appeal, he brought the present suit alleging various civil rights violations.¹⁰

In March 2019, this Court dismissed Plaintiff's complaint pursuant to 28 U.S.C. § 1915(e)(2)(B).¹¹ Plaintiff appealed.¹² The United States Court of Appeals for the Sixth Circuit affirmed this Court's dismissal of Plaintiff Briscoe's equal protection and excessive force claims and vacated this Court's dismissal of Plaintiff Briscoe's procedural due process and retaliation claims.¹³ Plaintiff Briscoe did not argue to the Sixth Circuit that this Court erred in dismissing Briscoe's state law claim against Defendant Hurayt.¹⁴ The Sixth Circuit therefore found that Briscoe had abandoned that claim.¹⁵

A jury trial was held on Plaintiff's retaliation and procedural due process claims in October 2021. The Court granted Defendant's Rule 50 motion for a directed verdict on

⁷ Doc. 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Doc. 5.

¹² Doc. 7.

¹³ *Briscoe v. Mohr*, No. 19-3306, 2020 WL 1813660, at *4 (6th Cir. Mar. 16, 2020), *cert. denied sub nom. Briscoe v. Chambers-Smith*, 141 S.Ct. 911 (2020).

¹⁴ *Id.* at *1.

¹⁵ *Id.* (citing *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005)).

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GWIN, J.

Plaintiff's procedural due process claim.¹⁶ The jury returned a verdict for Plaintiff Briscoe against Defendant Steve Weishar on Plaintiff's First Amendment retaliation claim, and awarded Plaintiff \$3,000 in damages.¹⁷

Before trial, this Court denied Plaintiff Briscoe's motion for default judgment against Defendant Hurayt.¹⁸

II. Discussion

A court should grant a motion to alter or amend judgment under Rule 59 "only 'if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice.'"¹⁹ Rule 59(e) does not give a disappointed litigant an opportunity to reargue a case by restating previously considered issues or attempting to persuade the Court to reverse the judgment by offering the same arguments previously presented.²⁰ Further, a Rule 59(e) motion "is not a substitute for appeal or a vehicle for the presentation of arguments omitted before judgment."²¹

In this case, no error of law, new evidence, or intervening change in controlling law warrants an alteration or amendment of judgment under Rule 59(e).

A. Plaintiff abandoned his claim for intentional infliction of emotional distress against Defendant Hurayt by not arguing it on appeal to the Sixth Circuit.

Plaintiff sued Defendant Hurayt for intentional infliction of emotional distress.²² The Sixth Circuit held that Plaintiff abandoned this claim because he did not argue it on appeal.²³

¹⁶ Transcript of Trial, Briscoe v. Mohr et al., No. 1:18-cv-02417 (N.D. Ohio, Oct. 13, 2021).

¹⁷ Doc. 70.

¹⁸ Docs. 37; 43; 72.

¹⁹ *Keenan v. Bagley*, 262 F. Supp. 2d 826, 830 (N.D. Ohio 2003) (quoting *GenCorp, Inc. v. Am. Int'l Underwriters Co.*, 178 F.3d 804, 834 (6th Cir. 1999) (internal citations omitted)).

²⁰ See *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998) (citation omitted); *Kenneth Henes Special Projects Procurement v. Cont'l Biomass Indus., Inc.*, 86 F. Supp. 2d 721, 726 (E.D. Mich. 2000) (citation omitted).

²¹ *Pechatsko v. Comm'r of Soc. Sec.*, 369 F. Supp. 2d 909, 911 (N.D. Ohio 2004) (citation omitted).

²² Doc. 1 at 39.

²³ *Briscoe*, 2020 WL 1813660 at *1 (citation omitted).

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GWIN, J.

This Court denied Plaintiff's motion for default judgment against Defendant Hurayt on this claim because it was abandoned.²⁴ This Court now denies Plaintiff's Rule 59(e) motion to amend that decision for the same reason.

B. Plaintiff may not sue Defendant Hurayt for constitutional violations under § 1983 because Hurayt's conduct may not be fairly attributable to the State.

Plaintiff sued Defendant Hurayt under § 1983 for retaliation in violation of the First Amendment.²⁵

This Court denied Plaintiff's motion for default judgment against Defendant Hurayt on this claim because Hurayt's conduct may not be fairly attributable to Ohio.²⁶ This Court now denies Plaintiff's Rule 59(e) motion to amend that decision for the same reason.

A private individual can be held liable for constitutional violations under § 1983 when the "conduct allegedly causing the deprivation of a federal right may be fairly attributable to the State."²⁷

The Sixth Circuit recognizes three tests for determining whether a private individual's conduct is fairly attributable to the State: (1) the public function test; (2) the state compulsion test; and (3) the nexus test.²⁸ A private party's conduct may also be attributable to the state for the purposes of § 1983 if the private party has engaged in a conspiracy or concerted action with state actors.²⁹

Defendant Hurayt's conduct does not satisfy any of these tests.

²⁴ Doc. 72.

²⁵ Doc. 1 at 38.

²⁶ Doc. 72.

²⁷ *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982).

²⁸ *Memphis, Tenn. Area Loc. Am. Postal Workers Union, AFL-CIO v. City of Memphis*, 361 F.3d 898, 905 (6th Cir. 2004) (citation omitted).

²⁹ *Weser v. Goodson*, 965 F.3d 507, 516 (6th Cir. 2020); *Memphis, Tenn. Area Loc. Am. Postal Workers Union, AFL-CIO*, 361 F.3d at 905 ("Private persons may be held liable under § 1983 if they willfully participate in joint action with state agents."); *Cooper v. Parrish*, 203 F.3d 937, 952 n.2 (6th Cir. 2000) ("If a private party has conspired with state officials to violate constitutional rights, then that party qualifies as a state actor and may be held liable pursuant to § 1983.").

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GWIN, J.

a. The Public Function Test.

The public function test "requires that the private [individual] exercise powers which are traditionally exclusively reserved to the state, such as holding elections or eminent domain."³⁰ Plaintiff Briscoe does not allege that Hurayt exercised powers related to a traditionally public function.

b. The State Compulsion Test.

The state compulsion test requires proof that the state significantly encouraged or somehow coerced the private party, either overtly or covertly, to take a particular action so that the choice is really that of the state.³¹ Plaintiff Briscoe does not allege that Hurayt was coerced by prison staff to retaliate against Plaintiff.

c. The Nexus Test.

Under the nexus test, the plaintiff "must demonstrate that there is a sufficiently close nexus between the government and the private party's conduct so that the conduct may be fairly attributed to the state itself."³² "[M]ere cooperation" between state officials and private individuals, "does not rise to the level of merger required for a finding of state action."³³

Plaintiff Briscoe did not show evidence sufficient to show a sufficiently "close nexus" between the prison officials and Hurayt's conduct such that Hurayt's conduct may be attributed to the state. At most, Plaintiff alleged cooperation between Hurayt and the prison staff to retaliate against Plaintiff for reporting Hurayt's false allegations and contraband.

d. The Civil Conspiracy Test.

A civil conspiracy consists of "an agreement between two or more persons to injure

³⁰ *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (internal citations omitted).

³¹ *Id.*

³² *Weser*, 965 F.3d at 516 (quoting *Chapman v. Higbee Co.*, 319 F.3d 825, 834 (6th Cir. 2003)).

³³ *Lansing v. City of Memphis*, 202 F.3d 821, 831 (6th Cir. 2000).

Case No. 1:18-cv-02417
GWIN, J.

another by unlawful action."³⁴ To prove a civil conspiracy, one must prove: (1) a single plan existed; (2) the alleged coconspirators shared a general conspiratorial objective to deprive Plaintiff of his rights; and (3) an overt act was committed in furtherance of the conspiracy that injured the Plaintiff.³⁵

Hurayt's alleged cooperation with prison official Defendants is insufficient to prove that a civil conspiracy existed. The evidence at trial did not prove the existence of a plan nor a general conspiratorial objective shared between Hurayt and Defendant Weishar. Plaintiff says Hurayt committed two "overt acts" in furtherance of the conspiracy: (1) Hurayt's statements to prison officials regarding the escape plot; and (2) Hurayt's submission to a lie detector test regarding those statements.³⁶ Plaintiff did not present evidence, however, that those acts were taken in furtherance of a conspiracy between Hurayt and prison officials.

III. Conclusion

For the foregoing reasons, the Court **DENIES** Plaintiff Briscoe's motion to alter or amend its judgment.

IT IS SO ORDERED.

Dated: January 13, 2022

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

³⁴ *Hooks v. Hooks*, 771 F.2d 935, 943–44 (6th Cir. 1985).

³⁵ *Id.*

³⁶ Doc. 73-1 at 7.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ELVERT S. BRISCOE, JR.,	:	CASE NO. 1:18-cv-02417
Plaintiff,	:	OPINION & ORDER
v.	:	[Resolving Docs. 39; 43; 57 58; 65]
GARY MOHR, et al.,	:	
Defendants.	:	

JAMES S. GWIN, UNITED STATES DISTRICT COURT JUDGE:

Plaintiff Elvert S. Briscoe, Jr., an Ohio prisoner proceeding *pro se*, has filed this civil rights action under 42 U.S.C. § 1983 against multiple Ohio Department of Rehabilitation and Correction ("ODRC") officials and Mark Hurayt, a fellow inmate.¹

In March 2019 this Court dismissed Plaintiff's complaint pursuant to 28 U.S.C. § 1915(e)(2)(B).² This Court also dismissed Briscoe's claims against Hurayt, although with little discussion regarding the claim.

Plaintiff appealed.³ The United States Court of Appeals for the Sixth Circuit affirmed this Court's dismissal of Plaintiff Briscoe's equal protection and excessive force claims and vacated this Court's dismissal of Plaintiff Briscoe's procedural due process and retaliation claims.⁴ Plaintiff Briscoe did not argue to the Sixth Circuit that this Court erred in dismissing Briscoe's state law claim against Defendant Hurayt.⁵

¹ Doc. 1.

² Doc. 5.

³ Doc. 7.

⁴ *Briscoe v. Mohr*, No. 19-3306, 2020 WL 1813660, at *4 (6th Cir. Mar. 16, 2020), *cert. denied sub nom. Briscoe v. Chambers-Smith*, 141 S. Ct. 911 (2020).

⁵ *Id.* at *1.

Case No. 1:18-cv-02417

GWIN, J.

After an October 2021 jury trial, a verdict was returned for Plaintiff Briscoe against Defendant Steve Weishar.⁶ The jury awarded Plaintiff Briscoe \$1,000 in damages and an additional \$2,000 in punitive damages.

This Court ruled on motions during pretrial hearings and during trial. Those rulings are summarized below.

Plaintiff Briscoe moved for leave to depose Defendant Hurayt.⁷ The ODRC Defendants opposed.⁸ This Court **DENIED** this motion.⁹

Plaintiff Briscoe moved for default judgment against Defendant Hurayt.¹⁰ Plaintiff Briscoe brought a claim for intentional infliction of emotional distress under Ohio State law against Defendant Hurayt.¹¹ Because Plaintiff Briscoe did not argue this claim on appeal to the Sixth Circuit, he abandoned it.¹² Therefore, this Court **DENIED** this motion.

ODRC Defendants moved in limine to exclude the proffer of evidence and arguments that Plaintiff Briscoe suffered collateral injuries because his security classification increased after his Rules Infraction Board hearing conviction.¹³ This Court **GRANTED** in part and **DENIED** in part this motion.¹⁴ Plaintiff was allowed to proffer evidence that the Rules Infraction Board hearing conviction elevated his security classification from Level 1 to Level 4. Plaintiff was not allowed to proffer evidence regarding any subsequent emotional difficulties he suffered or any potential impact on parole.

⁶ Doc. 70.

⁷ Doc. 39.

⁸ Doc. 45.

⁹ Transcript of Trial (Unofficial) at 14–15, Briscoe v. Mohr, et al., No. 1:18-cv-02417 (N.D. Ohio, Oct. 12, 2021).

¹⁰ Doc. 43. *See also* Doc. 37.

¹¹ Doc. 1 at 39.

¹² *Briscoe*, 2020 WL 1813660 at *1 (citing *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005)).

¹³ Doc. 57.

¹⁴ Transcript of Trial (Unofficial) at 10–11, Briscoe v. Mohr, et al., No. 1:18-cv-02417 (N.D. Ohio, Oct. 12, 2021).

Case No. 1:18-cv-02417

GWIN, J.

ODRC Defendants moved in limine to exclude the proffer of evidence and witnesses at trial relating to Plaintiff Briscoe's claimed mental health and emotional injuries.¹⁵ This Court **GRANTED** this motion.¹⁶

Plaintiff moved for a continuance to allow counsel to appear, to seek newly discovered evidence, to receive discovery, and to file a class action related to his procedural due process claim.¹⁷ This Court **DENIED** this motion.¹⁸

IT IS SO ORDERED.

Dated: November 1, 2021

s/ James S. Gwin

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE

¹⁵ Doc. 58.

¹⁶ Transcript of Trial (Unofficial) at 9-10, Briscoe v. Mohr, et al., No. 1:18-cv-02417 (N.D. Ohio, Oct. 12, 2021).

¹⁷ Docs. 65; 65-1.

¹⁸ Transcript of Trial (Unofficial) at 2, Briscoe v. Mohr, et al., No. 1:18-cv-02417 (N.D. Ohio, Oct. 12, 2021).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ELVERT S. BRISCOE, JR., : CASE NO. 1:18-cv-02417

Plaintiff, VERDICT FORM

GARY MOHR, et al.,
Defendants

PLAINTIFF ELVERT BRISCOE'S FEDERAL
§ 1983 CLAIMS AGAINST DEFENDANT
STEVE WEISHAR

Question 1. We, the Jury in this case, having been duly impaneled and sworn, find in favor of: Plaintiff [enter Plaintiff Briscoe or Defendant Weishaar].

Only if returning a verdict in favor of Plaintiff Briscoe on Question 1, proceed to Question 2 and 3.

Question 2. We, the Jury in this case, having been duly impaneled and sworn, award damages of \$1,000 to Plaintiff Briscoe.

Question 3. We, the Jury in this case, having been duly impaneled and sworn, further find that Defendant Weishar's conduct was [enter was or was not] recklessly and callously indifferent to Plaintiff Briscoe's First Amendment rights and award punitive damages in the amount of \$2,000 to Plaintiff Briscoe.

Signed by jurors concurring in this verdict this 14th day of October 2021.

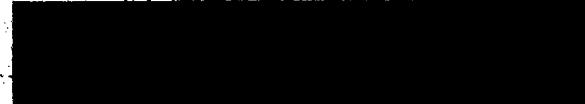
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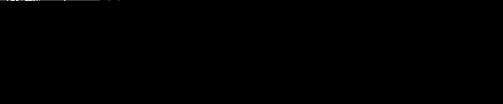
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