

BENCH MEMO: Bowles v. Hon. R. W. Duling, Bayliss, Gallalee, and Morchower,  
Civil Action No. 87-0570-R.

ATTORNEYS

Bowles: Pro se  
Duling: Nelson Fisher (Asst. Att'y General, Virginia)  
Bayliss,  
Gallalee,  
& Morchower: David Corrigan (Browder, Russell et al.)

Judge, this case comes before you on several motions: Judge Duling's and the other defendants' separate motions for dismissal (or summary judgment) and for Rule 11 Sanctions against Bowles; and the plaintiff Bowles' motion to file an amended complaint.

As you know, Bowles seeks now to file his Amended Complaint. He may file this amended complaint as a matter of right, because the other defendants have not yet filed any responsive pleadings. Rule 15(a), Fed.R.Civ.P. And the motions for dismissal or summary judgment are not considered "responsive pleadings" for purposes of Rule 15(a). Williams v. Wilkerson, 90 F.R.D. 168 (E.D.Va. 1981). Therefore, you should consider his Amended Complaint filed and on the record for purposes of these motions to dismiss his claims.

As we have discussed, you should DISMISS all counts in both Complaints. Thus, you should GRANT the defendant's motions to dismiss. You should also DENY the defendants' motions for Rule 11 Sanctions, since Bowles is pro se.

Here is a brief summary of Bowles' allegations in both Complaints: in his original Count 1, Bowles alleges that Judge Duling made an arbitrary and capricious dismissal of his lawsuit (in the underlying state malpractice action against Morchower), which was in violation of Bowles' First Amendment rights and the Due Process clause of the Fourteenth Amendment to the U.S. Constitution. In his original Count 2, Bowles alleges that Bayliss and Gallalee conspired with Duling to violate his constitutional rights. In his amended Count 1, Bowles alleges that Morchower failed to provide the minimum standard of care

required by the Sixth Amendment, in representing Bowles in the underlying criminal action. Bowles also asserts pendent claims for breach of contract, negligence, fraud and deceptive trade practices against Morchower. Count 2 of the Amended Complaint alleges a Bivens type constitutional tort against Morchower, based on the allegations in amended Count 1. Finally, Amended Count 3 attacks the constitutionality of Rule 4:12 of the Supreme Court of Virginia, as being in violation of the due process clause; this is the Rule under which Judge Duling dismissed Bowles' malpractice claim, for Bowles' failure to respond to discovery in the state suit.

Here are the reasons for dismissing all the counts in both of Bowles' Complaints. I have carefully checked the defendants' briefs for accuracy, and what follows is largely taken from those briefs.

I. The Complaint Should Be Dismissed as to Judge Duling.

A. This Court Lacks Jurisdiction over Challenges to State Court Decisions.

Bowles alleges that defendant Judge Duling improperly dismissed Bowles' suit against Morchower because of Bowles' mere failure to answer discovery. In addition, he claims that Duling conspired with the other defendants to deny Bowles his constitutional rights.

The Supreme Court has clearly held that federal district courts have no subject matter jurisdiction to review the final judgments or decisions of a state court. Dist. of Columbia Court

of Appeals v. Feldman, 460 U.S. 462 (1983). Such a review of state decisions may be had only in the United States Supreme Court. "A district court has no power to entertain a proceeding to reverse or modify the judgment of a State court." El-Amin v. Wilkinson, 454 F.Supp. 804 (E.D.Va. 1978).

Therefore, while the Plaintiff had a statutory right to appeal the decision of the state judge, he does not have the right to use this federal court as an alternative method of review. As the Supreme Court has said, federal district courts "do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those may be had only in" the U. S. Supreme Court. Feldman, 460 U.S. at 486; 28 U.S.C. § 1257.

This action in truth challenges the judicial acts of a state court judge, carried out during the course of the disposition of a case pending in his court. Therefore, this Court lacks subject matter jurisdiction over the case and the Complaint should be dismissed as to Judge Duling.

B. Bowles' Claim for Damages Against Judge Duling is Barred by the Doctrine of Judicial Immunity.

As a judge, the Defendant Duling is entitled to absolute judicial immunity. In Stump v. Sparkman, the Supreme Court held that a judge is not deprived of judicial immunity unless the challenged action was taken in "clear absence of all jurisdiction." Id., 435 U.S. 349, at 357 (1978). The Court noted that the scope of jurisdiction must be broadly construed when consi-

dering judicial immunity. The Court also confirmed that a judge will not be deprived of this immunity merely because the action is "in excess of" his jurisdiction. The judge is protected by judicial immunity as long as the parties dealt with him in his judicial capacity, he performed the type of action normally performed by a judge, and he had jurisdiction over the subject matter of the case. Stump v. Sparkman, 435 U.S. 349.

This judicial immunity extends to suits under 42 U.S.C. § 1983. Id., 435 U.S. at 356. And the fact that Bowles alleges that the defendant engaged in a conspiracy does not alter this result. See Dennis v. Sparks, 449 U.S. 24 (1980).

In the instant case, Bowles' allegations all concern the actions of Defendant Duling in ruling on various matters that came before him during the course of the state court lawsuit. Judge Duling had subject matter jurisdiction over the suit; his decisions were the type of decisions normally made by judges. And Bowles dealt with Judge Duling in his capacity as a judge. The actions challenged here are judicial acts taken by a judge who had jurisdiction over the matter before him. Accordingly, Defendant Judge Duling is absolutely immune from suits for damages, and the Counts as to Judge Duling must be dismissed.

## II. The Complaint Must be Dismissed as to All Other Defendants.

- A. Plaintiff has Failed to Allege Sufficient Facts to Support his Claim that Bayliss, Gallalee and Morchower Acted under Color of State Law.

Bowles has charged Bayliss and Gallalee only with his allegations that they conspired with Judge Duling to violate Bowles'

rights under the First and Fourteenth Amendments, by causing his motion for judgment to be dismissed in the state court action. He states this claim under 42 U.S.C. § 1983.

In order to state a cause of action under Section 1983, the plaintiff must allege: (1) that the defendants acted under color of state law, and (2) that this conduct of the defendants caused the deprivation of a right secured by the Constitution or laws of the United States. See Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985), reh. denied 473 U.S. 925. This Court finds that the plaintiff Bowles has failed to allege sufficient facts to support his conclusory allegations that the defendants acted under color of state law.

Bowles attempts to allege state action on the part of Bayliss and Gallalee by alleging in Count 2 that they conspired with Judge Duling. In order to find state action on the part of these private defendants, this Court must first find that the allegations in the Complaint "specifically present facts tending to show agreement and concerted action" between the state actor (Judge Duling) and the private parties. Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10th Cir. 1983); Hale v. Harney, 786 F.2d 688, 690 (5th Cir. 1986).

In Sooner Products, the Tenth Circuit affirmed the dismissal of the plaintiff's §1983 claim of conspiracy between state judges and private defendants. In addition to requiring that the plaintiff must allege specific facts showing agreement and concerted action, the court in Sooner Products recognized that "the standard is even stricter where the state officials allegedly

involved in the conspiracy are immune from suit," as is Judge Duling here. Id., 708 F.2d at 512. See also Tunheim v. Bowman, 366 F.Supp. 1395 (D.Nev. 1973).

Here the Complaint contains no specific allegation which supports the conclusory statement that Bayliss and Gallalee agreed or conspired with Judge Duling to violate Bowles' rights. Bowles' summary allegations are, as a matter of law, insufficient to demonstrate any conspiratorial nexus. Absent such detailed factual support, the plaintiff has failed to show that these private defendants acted under color of state law; this Court must, therefore, dismiss all claims against the defendants Bayliss and Gallalee.

B. All Claims as to Morchower Must Also Be Dismissed.

For the reasons already given, this Court must also dismiss all Counts of both Complaints as to defendant Morchower.

First, the plaintiff has failed to allege any specific facts which support his allegations that Morchower violated any constitutional rights of the plaintiff. See Milligan v. Newport News, 743 F.2d 227, 230 (4th Cir. 1984). This Court finds that the plaintiff's claims here, allegedly based on the Sixth Amendment, are in reality merely another attempt to pursue his malpractice allegations against defendant Morchower; these are the very claims that were dismissed in the Richmond Circuit Court action. The plaintiff is attempting an "end run" around the doctrine of res judicata, by trying to convince a federal court to now second guess the decisions of a state court.

Consequently, the plaintiff is essentially seeking in federal district court to challenge a prior state court decision. But this he may not do, for the United States Supreme Court has made it clear that federal district courts have no subject matter jurisdiction to review the final judgments of a state court. See Feldman, 460 U.S. 462 (1983). The plaintiff Bowles should have pursued his post-dismissal remedies in the Richmond Circuit Court, or within the state appellate process. Virginia state law provided him with a number of different avenues through which to seek post-judgment relief. His dissatisfaction with Judge Duling's dismissal of his malpractice suit is simply not grounds for federal relief.

Therefore, this Court hereby DISMISSES WITH PREJUDICE all of Plaintiff's claims, in both his original and his Amended Complaints. An appropriate order shall issue.