

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

FILED

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LANCE S. WILSON
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RICHARD W. LEWIS, PhD.,)
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vs.) CV-N-99-0386-ECR-RAM
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ELIZABETH RICHITT, PhD, ET AL.)
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PRESENT: _____ EDWARD C. REED, JR. _____ U.S. DISTRICT JUDGE
DEPUTY CLERK: WAYNE JULIAN REPORTER: NONE APPEARING
COUNSEL FOR PLAINTIFF (S): NONE APPEARING
COUNSEL FOR DEFENDANT (S): NONE APPEARING

MINUTE ORDER IN CHAMBERS:

On May 17, 2001, Tyrone Duff and Linda Duff ("Duffs") filed a motion to dismiss Richard W. Lewis's ("plaintiff") second amended complaint (#116). Plaintiff opposed (#118) on June 4, 2001. The Duff's replied (#125) on June 15, 2001.

The motion to dismiss has two arguments. First, the Duffs argue that the second amended complaint is barred by the doctrines of res judicata and collateral estoppel because this court previously entered an order striking the complaint in its entirety.

Res judicata and collateral estoppel do not apply in this case because there has been no previous adjudication of plaintiff's claims on the merits. Our previous order (#66) was a determination of whether certain defendants possessed immunity from suit. We granted plaintiff leave to amend his complaint to reflect our decision that certain defendants had absolute immunity from suit for their actions.

Second, the Duffs argue that the complaint fails to state

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a claim against them because there is a failure of proof as to the essential elements. A motion to dismiss under Rule 12(b)(6) will only be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Gibson v. United States, 781 F.2d 1334, 1337 (9th Cir. 1986). The review is limited to the complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. Cassettari v. Nevada County, Cal., 824 F.2d 735, 737 (9th Cir. 1987). However, although courts generally assume the facts alleged are true, courts do not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981).

We find that under this standard plaintiff's complaint has stated a claim. Plaintiff alleges that the Duffs acted in a conspiracy with members of the Nevada State Board of Psychological Examiners to discredit him, and to deprive him of his property interest in practicing psychology in Nevada. Specifically, plaintiff alleges that the Mr. Duff met with Richard Weiher and Christa Peterson, prior to his testimony before the Nevada State Board of Psychological Examiners, and took information that was wrongly given to him and used it in a subsequent lawsuit.

The Duffs are correct in their assertion that a claim for section 1983 requires some kind of state action. 42 U.S.C. § 1983, Paratt v. Taylor, 451 U.S. 527 (1980). Although section 1983 requires state action, actions on the part of an individual may be treated as state action, if the individual was a "willful participant in joint action with state agents." Ibarra v. Las Vegas Metro. Police Dept., 572 F. Supp. 562, 564 (D. Nev. 1983). Plaintiff's complaint alleges that the actions of the Duffs was intertwined with the actions of state actors.

NRS 641.318 does provide immunity for those persons who initiate a claim or assist with an investigation of a psychologist. However, it makes an exception for actions that are initiated with malicious intent. If plaintiff can prove Mr. Duff's action were undertaken with malice, than Mr. Duff would not be able to claim the immunity. Plaintiff has alleged that all members of the conspiracy acted maliciously. Pursuant to Fed. R. Civ. P. 9, malice is only required to be pled generally.

IT IS THEREFORE HEREBY ORDERED THAT, the motion to dismiss
(#116) is DENIED.

LANCE S. WILSON, CLERK

By: Wayne Julie
Deputy Clerk