Original

Appeal No. _16-1435_

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REV BRANDON BAKER
Plaintiff-Appellant
vs.
CITY OF LOVELAND, ET AL
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE MICHAEL J. WATANABE, JUDGE
DISTRICT COURT CASE NO. 15-1920-MJW
(SEE ALSO SAME DISTRICT #15-1864-LTB)

BRIEF OF APPELLANT REV BRANDON BAKER

ORAL ARGUMENT REQUESTED

Rev Brandon Baker
Pro Se
Po Box 24
Nunn CO 80648
307-221-2180

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to Rule 28.2(C)(1) of the Rules of Court for the United States Court of Appeals for the Tenth Circuit, counsel for appellant hereby notifies the Court that no other appeal in or from the same civil action in the lower court was previously before this or any other appellate court under the same or a similar title.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1361. The district court acquired subject matter jurisdiction under 28 U.S.C. §1332 because the case was removed from state court and consolidated with another federal claim related. This court has jurisdiction under 28 U.S.C. §§ 1291 and 1294. On September 30th 2016, the district court entered a final judgment and Plaintiff filed a timely notice of appeal on October 27, 2016.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Plaintiff/Appellant sued City of Loveland, Et Al for multiple harms and damages related to multiple primary and constitutional rights violations in state and federal court. Plaintiff first FEDERAL claim was barely a few pages and barely done in time to save the SOL. It was dismissed, as defendants simultaneously, removed the state claim to federal court AND while trying to consolidate the NOW 2 federal claims.

First Defendants/Appellees motioned that it was vague and needed more specificies added to it, then motioned to have it thrown out for being to long and not being short and precise statements. Clearly this is judicial estoppel as they changed stance multiple times through the litigation.

The following issues are presented:

(1) Did the district court error, when it did not enforce judicial estoppel doctrine, on the defendants, when they clearly changed their legal position in the litigations related.

(2) Did the district court error when they dismissed the claim when there was clear and substantial primary and constitutional rights violated, with clear and substantiated harms and damages.

STATEMENT OF THE CASE

This appeal arises from a dismissal of a civil suit for damages as well as harms via causation from a false arrest plus multiple improper actions and multiple primary right and constitutional violations related. Appellant sued Appellees in district court and the case was dismissed under Rule 8, and this appeal followed.

STANDARD OF REVIEW

The district court's legal conclusions are reviewed de novo. *Davis v. Mineta,* 302 F.3d 1104, 1111 (10th Cir. 2002).

This Court reviews the facts for abuse of discretion. *Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010).

This court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See *Delta Sav. Bank v. United States*, 534 U.S. 1082 (2002).

Because Mr. Baker proceeds pro se, so you must review his arguments liberally. See *Garrett v. Selby Connor Maddux & Janer,* 425 F.3d 836, 840 (10th Cir. 2005).

FACTUAL BACKGROUND

Plaintiff is a ProSe Rule 39. In Forma Pauperis (See F.R.A.P. 24(a)(3)).

Plaintiff is a victim with primary and constitutional rights claims that were further harmed by judicial estoppel. The significance of whether a position or issue is one of fact, law, or a mixture thereof is by no means unique to judicial estoppel.

In *Bell Atlantic Corp. v. Twombly*[1] (2007) and *Ashcroft v. Iqbal*[2] (2009) — the Supreme Court "retired . . .the no-set-of-facts test" and replaced it with the plausibility test.*3* Under this "retooled" test, as one court has called it,*4* "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."*5* In the aftermath of Twombly and Iqbal, there has been a great deal of commentary, debate, and reflection about the plausibility standard and the civil complaint.*6* One study reports that as of June 30, 2009, federal courts have cited Twombly "nearly 24,000 times, making it the seventh most-cited case of all time."*7* In dismissals federal courts have cited Twombly over 66,000.*8* *THIS IS ABSURD, TO MANY REAL CASES DISMISSED!*

---

1. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
2. Ashcroft v. Iqbal, 556 U.S. 662 (2009).
3. Id at 670.
4. *Killingsworth v. HSBC Bank Nevada, N.A.,* 507 F.3d 614, 618 (7th Cir. 2007).
5. Iqbal, 556 U.S. at 678 (citations omitted).
6. See, e.g., Mark Herrmann et al., Plausible Denial: Should Congress Overrule Twombly and Iqbal, 158 U.PA.L.REV. PENN UMBRA 141 (2009). Congress even jumped into the fray. In 2009, then
-Senator Arlen Specter proposed a law, the Notice Pleading Restoration Act, which sought to overturn Twombly and Iqbal. See
Hutchingson v. Metro. Gov't of Nashville and Davidson Cnty., 685 F. Supp. 2d 747, 751-52 (M.D. Tenn. 2010); Jonah B. Belbach, Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal
on Access to Discovery, 121 YALE L. J. 2270, 2284 n.54 (2012).
7. See May We Plead the Court? Twombly, Iqbal, and the 'New' Practice of Pleading, 38 HOFSTRA L. REV. 1191 (2010).
8. We calculate this number based on a search of citing references on Westlaw – September 5, 2012.

SUMMARY OF ARGUMENT

Plaintiff interpleaded all known facts relevant and related he could discover but the district court made fundamental legal errors in dismissing the claims.

Defendants and their counsel are government actors and/or their legal agents and/or representatives of the govt and its interests, they are not seeking justice or truth, just to protect their clients and employees and such related at all costs.

Plaintiff has multiple clear constitutional and primary rights violated with clear and present harms as well as entitlement to relief, dismissed by judicial estopple and the excessive unfounded use of citing Twombly and Iqbal.

Furthermore, Plaintiff was clearly and plausibly arrested for DUI, and was Not Tried for DUI clearly and factually backing a false arrest.

Plaintiffs first related complaints [state and fed] that were dismissed pursuant to Rule12 "did not state proper claims" [that are cited in the district court case as base of dismissal] and were just a mere few pages. They were PRO SE plaintiffs best attempt in a week to save SOL.

From the Facts and evidence alone, it is perfectly clear Plaintiff was stopped without probable cause or a warrant, he was searched without probable cause or a warrant and was arrested without probable cause or a warrant THEN was tried for 2 years then dismissed right before trial.

The evidences also prove all government actors related conspired to violate his primary and/or constitutional rights connected as is Shown PLAIN AS DAY on the dispatch calls, audio recordings and surveillance footage obtained as evidences.

However Plaintiffs consolidated non-dismissed first complaint was multitudes smaller, more plain and clearer [EXCEPT specifics unknown to Plaintiff as DEFENDANTS and THEIR COUNSELS did not release and refused to provide

the documents during the criminal and civil stages] than the current almost 400-paragraph complaint dismissed for Rule 8 [not a clear precise claims], YET they motioned for me to add all the more specifics and details I could (See motions history and status conference verbal motioning).

Mr Baker was clearly, improperly and unconstitutionally detained, arrested, charged in court for 2 years then the charges were magically dropped 10 days before trial.

Mr. Baker has standing and facts to support his suit, with subject-matter jurisdiction and is a real-party-in-interest. See *Esposito v. United States*, 368 F.3d 1271, 1274 n.1 (10th Cir. 2004); *FDIC v. Bachman*, 894 F.2d 1233, 1235-36 (10th Cir. 1990); *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1154 n.7 (10th Cir. 1985).

Mr. Baker's claims satisfy the minimum constitutional requirements for standing—a concrete injury, causation, and redress. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

ARGUMENT AND AUTHORITIES ISSUE I Judicial Estoppel

Had Mr Baker, had a chance to object to the motions in court he would have under judicial estoppel. However the case was stayed (Even discovery which would have aided greatly in making the claims more precise and clear), via mailed motion, for almost a year; while deciding the defendants motions to dismiss. See *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1227 (10th Cir. 2011) (stating that judicial estoppel is an affirmative defense).

A defense Mr Baker asserts to the dismissing of his claim. It is also an equitable doctrine that the court may invoke at its discretion; "we are not bound to accept a party's waiver of a judicial estoppel argument and may consider the issue at our

discretion." *Kaiser v. Bowlen*, 455 F.3d 1197, 1204 (10th Cir. 2006).

"The doctrine of judicial estoppel is based upon protecting the integrity of the judicial system by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *Bradford v. Wiggins*, 516 F.3d 1189, 1194 (10th Cir. 2008) (quoting New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001)). Although there is no precise formula for judicial estoppel, Bradford, 516 F.3d at 1194, generally, the doctrine applies when:

> (1) a party takes a position clearly inconsistent with an earlier-taken position [Defendants first claimed plaintiff's claims were not precise and needed more specifics SEE DOCKET];
>
> (2) adopting the later, inconsistent, position would create an impression that either the earlier or the later court was misled [Defendants succeeded so plaintiff got leave and add specifics to the claim, SEE DOCKET]; and
>
> (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped [Defendants then gained unfair advantage by claiming it was too long and convoluted, and not short plain statements (plaintiff intended to make the claim much smaller and precise, until he was ordered and granted leave to add more specifics and specificies to the claim), SEE DOCKET]. Id. at 750-51 (internal quotation marks omitted); see *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007); Hansen v. Harper Excavating, Inc., 641 F.3d 1216, 1227 (10th Cir. 2011); see also New Hampshire v. Maine, 532 U.S. at 750-51.

The defendants' actions and stances are judicial estopple (See *Beem v. McKune*, 317 F.3d 1175, 1186 (10th Cir. 2003); *United States v. McCall*, 219 F. Supp. 2d 1208, 1211 (D. N.M. 2002); New Hampshire v. Maine, 532 US 742, (2001)). Which applies to All LAW and FACTS especially on Pro Se complaints.

The many defendants' motions were granted on grounds to add "more specifics and specificies" [plaintiff was motioned and ordered to add specifics] to the ORIGINAL complaint *(which had much more clear and plain statements as well as the fact the complaint it was drafted off of [almost word for word] proceeded to trial in this same court house in Colorado THIS MONTH).*

AFTER the Pro Se plaintiff fills the complaint (as motioned and ordered) with any and all specifics and details he can remember… THEN the Defendants motion to dismiss for being to long, confusing and not being clear plain Short statements? That is clear and plain judicial estoppel.

FURTHERMORE, the court did not help the ProSe Rule 39 plaintiff by utilizing F.R.C.P. 12(f); Under Rule 12(f), "t]he court may strike from a pleading … …any redundant, immaterial, impertinent… matter." (thereby helping shorten and clarify the claim).

The doctrine of judicial estoppel, in its most generic form, prevents a party from asserting a position in one legal proceeding *(Motion to Dismiss for being too long, and not short clear plain statements*) that directly contradicts a position taken by that same party in an earlier proceeding *(Status conference, Verbal motion to specicify and add more specifics before Judge MJW*). The elements necessary for the application of judicial estoppel in general, will apply only when the two positions are clearly contradictory (they are); and when the first position has been accepted by the court (It was).

AGAIN THIS IS CLEAR, PLAIN AND PLAUSIBLE "Judicial Estopple on a

Pro Se complaint and Plaintiff!"

Plaintiff has multiple facts in the facts and circumstances interpleaded in each claim in the complaint. Actually over 10 claims from over 2 years of compounding and ongoing financial, mental, emotional and physical damages and anguish impairing his Pro Se abilities, WITH THE STAY OF DISCOVERY, Plaintiff had no real evidence or documents EVER released by DEFENDANTS or THEIR COUNSELS to make the complaint more SHORT, CLEAR, PRECISE, PLAUSIBLE and on point as far as policy, procedure, supervision and training *[pure judicial estopple, abscondence, deceit, fraud and bad faith/misconduct].*

Further more DEFENDANTS and THEIR COUNSELS tricked Pro Se plaintiff into staying discovery as a ploy to gain position in the suit (see related emails).

DEFENDANTS and THEIR COUNSELS have used nothing but judicial/equitable estopple and bad faith to take advantage of the clearly harmed and violated plaintiff from the undisputed facts in this case "Plaintiff was arrested for dui, and was not tried for dui because the dui was dismissed after 2 years of delayed prosecution and harassment, he was arrested and tried reasonably for ONLY following to close [factually] **and it is not an arrest-able** offense, these actions by officers Salazar and Pyle cause extensive and prolonged damages'.

As can be further noted for their irregular call to dismiss the claim without prejudice as Judge pointed out and denied in his final order dismissing without prejudice on 9-30-16 *(just like he mentioned in staying discovery).*

HOWEVER DEFENDANTS and THEIR COUNSELS motioned and judge gave order for Plaintiff to specify and add more specifics and details in an amended complaint after already staying discovery to discover more specifics.

So plaintiff added as much as he could remember. Plaintiffs believes these

motions and orders to STAY, AMEND and add more specifics by the government (*Defendants, their counsel and judge*) were in bad faith and are judicial estoppels to get Plaintiff to break rules 8 and 12 mentioned in the dismissal.

FURTHER MORE UNDER THE: Doctrine of EQUITABLE ESTOPPEL, sometimes known as estoppel in pais, protects one party from being harmed by another party's voluntary conduct. Voluntary conduct may be an action, silence, Acquiescence, or concealment of material facts. The related doctrine of judicial estoppel binds a party to his or her judicial declarations, such as allegations contained in a lawsuit complaint or testimony given under oath at a previous trial. Judicial estoppel protects courts from litigants' using opposing theories in the attempt to prevail twice.

The defendants asserted 2 different stances in district court to the claims, in two different suits, thereby introducing the risk of inconsistent court decisions that pose a threat to judicial integrity. See *Queen v. TA Operating, LLC*, 734 F.3d 1081, 1091 (10th Cir. 2013).

Also, Defendants achieved an unfair advantage over plaintiff by changing stances on the claim in litigation in 2 different cases and thus getting him to make his claim so deep and full they got it thrown out for not being short, plain and precise statements. See Eastman, 493 F.3d at 1159-60. Thus, we conclude that this appeal should be granted based on judicial estoppel and the case remanded back to Dist Court of Colorado for Proper litigation. See Also Cf. Moses, 606 F.3d at 798

ARGUMENT AND AUTHORITIES ISSUE II PRIMARY RIGHT

The term "cause of action" is defined in terms of a primary right and a breach of the corresponding duty; the primary right and the breach together constitute a cause of action.

The primary right was the right not to be wrongfully deprived of Life, Liberty, Property, Constitutional Protections and such pleaded throughout the litigation; And the corresponding duty was the duty not to wrongfully deprive a person of Life, Liberty, Property, Constitutional Protections and such pleaded. The breach was the conduct of defendants/Appellees depriving a plaintiff/Appellant of Life, Liberty, Property, Constitutional Protections and such pleaded. See *Yanke v. City of Oakland*, 2009 U.S. Dist. LEXIS 74094.

Under the primary rights theory, the determinative factor is the harm suffered. Plaintiff has multiple clear constitutional and/or primary rights violated, with even more clear harms.

This case should have proceeded through discovery and Pro Se defendant is entitled to the case being re-opened and remanded back to the lower court, and should not have been motioned and ordered to add more specifics and details to a complaint that was already to large, compounded and scrambled by an overwhelmed pro se Plaintiff.

This is true because:

> Under the primary rights theory, a cause of action' is comprised of
> a "primary right" of the plaintiff,
> a corresponding "primary duty" of the defendant, and
> a wrongful act by the defendant constituting a breach of that duty.

A primary right "is simply the plaintiff's right to be free from any particular injury suffered *[i.e. Profiling, 4th amend violation, false arrest and etc as cited in his claims],* and violation of a single primary right gives rise to a single cause of action. The primary right must be distinguished from the legal theory on which liability for that injury is premised.

The primary right must also be distinguished from the remedy sought.

The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.

CONCLUSION

Plaintiff clearly had many primary rights violated. DEFENDANTS and THEIR COUNSELS say through out the 4 related suits to these const. and primary right violations that the suit was too short, vague and unspecific AND, That it needed more added to it, THEN CHANGE TO its too long and compounded… ALL the while manipulating the litigation, discovery, motions and such against a single Pro Se defendant to back their stance that changed multiple times from asserting a position in this judicial proceeding that is contrary or inconsistent with a position previously asserted in a prior proceeding *(as stated AND CITED BY PLAINTIFF IN HIS RESPONSES [VERBAL AND WRITTEN]* TO DEFENDANTS MOTIONS AND SUCH RELATED TO THE SUBJECT.

Judicial estoppel is a doctrine invoked by courts in their discretion and is an extraordinary remedy that should be applied with caution. The doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a (6) result of ignorance, fraud, or mistake.
ALL OF THESE ELEMENTS WERE DONE AND MET BY THE DEFENDANTS AND THEIR COUNSEL, ALLOWING THIS VIOLATES THE ABA MODEL CODE OF JUDICIAL CONDUCT!

Wherefore this Rule 39. In Forma Pauperis **(See F.R.A.P. 24(a)(3))** Plaintiff humbly asks this court to grant appeal, reprimand the case back to lower court and give him legal counsel if available.

ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34, defendant requests oral argument.
Respectfully Submitted, 1-24-17,

By, Rev Brandon Baker

s/Rev Brandon Baker

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it is proportionally spaced and contains 3500 words, including the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).
I relied on my word processor to obtain the count and it is Word for Windows.
I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Rev Brandon Baker 1-24-17

CERTIFICATE OF SUBMISSION AND CERTIFICATE OF SERVICE

I hereby certify that: I submitted, in paper format, on 1-24-17, the foregoing Appellant's Brief to the Clerk of the Court via hand. As to this submission, I certify that:
(1) The document is an exact copy of the written document filed with the Clerk's office;
(2) all required privacy redactions have been made; and
(3) the Appellant's Brief has been served on all defendants (Appellees) and that the original and seven copies were hand delivered to:

Elisabeth A. Shumaker, Clerk of the Court,
United States Court of Appeals for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

By Rev Brandon Baker

s/Rev Brandon Baker