CASE NO. 16-1435

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REVEREND BRANDON BAKER,

Plaintiff/Appellant,

v.

CITY OF LOVELAND, ET AL.,

Defendants/Appellees.

APPELLEES' RESPONSE BRIEF

Appeal from the United States District Court for the District of Colorado
The Honorable Judge Michael J. Watanabe
Civil Action No. 1:15-cv-01920-MJW

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ORAL ARGUMENT IS NOT REQUESTED

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REVEREND BRANDON BAKER

Plaintiff-Appellant,

v.

CITY OF LOVELAND,
LOVELAND POLICE DEPT.,
RICK ARNOLD, in his official and individual capacity,
JEFF PYLE, in his official and individual capacity,
ANDRES SALAZAR, in his official and individual capacity,
GORDON MCLAUGHLIN, in his official and individual capacity,
UNKNOWN DEFENDANTS, in their official and individual capacities.

Defendants-Appellees.

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On Appeal from United States District Court
for the District of Colorado

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STATEMENT OF RELATED CASES

Rev. Baker originally filed two lawsuits, the first in the U.S. District Court for the District of Colorado, 15-cv-01864-LTB-GPG, followed by a complaint in Colorado state court, *Rev. Brandon Baker v. City of Loveland*, 15CV245, Larimer County District Court. The Defendants removed 15CV245 to the U.S. District Court for the District of Colorado, which is the underlying case from which this appeal originates, 15-cv-01925-MJW. The Defendants moved to consolidate 15-cv-01864-LTB-GPG with 15-cv-01925-MJW; however, prior to the District Court ruling on the Defendants' motion to consolidate, 15-cv-01864-LTB-GPG was dismissed for Rev. Baker's failure to comply with Rule 8 and Judge Gallagher's related order requiring Rev. Baker to file an amended complaint. Thus, Defendants' motion to consolidate became moot and the parties proceeded with litigation in 15-cv-01925-MJW.

I. ISSUES PRESENTED FOR REVIEW[1]

WHETHER REVEREND BAKER CAN ASSERT JUDICIAL ESTOPPEL WHEN HE VOLUNTARILY AGREED TO AMEND HIS COMPLAINT

WHETHER REVEREND BAKER'S AMENDED COMPLAINT COMPLIED WITH THE PLEADING STANDARDS SET FORTH IN *BELL ATLANTIC v. TWOMBLY* AND ITS PROGENY

II. STATEMENT OF THE CASE[2]

Reverend Baker filed his complaint in Larimer County District Court, after which the Defendants jointly removed the case to the U.S. District Court for the District of Colorado. (App. 10-33).

During an initial status conference, counsel for the Defendants requested that Rev. Baker file an amended complaint with greater factual specificity, with emphasis on identifying each Defendant's respective role in the constitutional violations alleged. (App. 165, 10/22/15 Trans, p. 17 line 18 – p. 18 line11). Rev. Baker voluntarily agreed to amend his complaint, which the Defendants did not oppose. (App. 165, 10/22/15 Trans., p. 18 line 12 – p. 20 line 25). The District Court did not enter an order mandating that Rev Baker file an amended complaint; rather, the District Court accepted Rev. Baker's voluntary agreement to amend his

[1] All Defendants have filed a joint Response Brief pursuant to 10th Cir. R. 31.3.
[2] Rev. Baker's Opening Brief did not include the relevant decision under review per 10th Cir. R. 28.2(A)(1). The Defendants have thus included it pursuant to 10th Cir. R. 28.2(B).

complaint and entered an order that the Defendants did not need to file an answer or otherwise respond to the original complaint. (App. 34-35).

Rev. Baker subsequently filed an amended complaint listing seventeen claims for relief. (App. 36-79). All Defendants moved to dismiss the amended complaint and Judge Watanabe subsequently granted each motion to dismiss, without prejudice. (App. 148-157). Rev. Baker then filed the ensuing appeal.

All relevant briefing on the Defendants' motions to dismiss is contained in Defendants' Appendix per 10th Cir. R. 10.3(D)(2). (App. 80-147).

III. STATEMENT OF THE FACTS

Rev. Baker contends he is a religious leader whose faith requires him to pray with cannabis. (App. 39, ¶ 11; 56, ¶ 90).[3] Rev. Baker was charged with driving while under the influence. (App. 51, ¶ 63). Rev. Baker claimed that he had not prayed with his cannabis in the twelve hours prior to his arrest. (***Id***., ¶ 63(c)). During the traffic stop, he claims that he complied with the "officer's mean and hostile demand" but was arrested in violation of his "1st, 4th, 5th, 6th equal protection and due process constitutional rights." (App. 52, ¶ 67).

[3] Because the Defendants moved to dismiss Rev. Baker's amended complaint, the facts of this case are drawn entirely from the amended complaint. The Defendants provide only a brief recitation of facts for two reasons: one, Rev. Baker included very few facts notwithstanding his 400-plus allegations, and two, a lengthy review of the facts is not necessary as to disposition of the issues on appeal.

Although entirely unclear from the complaint or amended complaint, the core of Rev. Baker's claims seems to arise from his allegation that "Defendants had no adequate training regarding the Pot DUI stop/investigation...." (App. 54, ¶ 79). He further claims that he was harassed and profiled as a result of his religion and religious practices, including the right to consume and pray with cannabis. (App. 56, ¶ 90). Rev. Baker claims that he denied smoking or possessing marijuana on the day of the arrest, only admitting that he "probably smoked as half the state did." (App. 65, ¶ 221). He then made the averment that his arrest was motivated by his appearance, including his "devout religious rastaman full of dreadlocks." (App. 65, ¶ 223).

The remaining allegations in Rev. Baker's amended complaint are either too vague or conclusory to provide any further factual context to his claims or the issues on appeal. Indeed, as the District Court found, the lack of succinct factual allegations mandated dismissal of Rev. Baker's amended complaint.

IV. SUMMARY OF THE ARGUMENT

Judicial estoppel cannot be applied against the Defendants because they never took inconsistent positions during the pendency of this litigation (or any other litigation involving Rev. Baker). The Defendants always maintained the position that Rev. Baker's pleadings failed to comply with Fed. R. Civ. P. 8. Thus,

even assuming Rev. Baker raised the issue of judicial estoppel with the District Court, which he did not, it is inapplicable to the current proceedings.

Rev. Baker failed to comply with the pleading standards set forth in ***Bell Atlantic v. Twombly*** and ***Ashcroft v. Iqbal***. Under this Court's holding in ***Robbins v. Oklahoma***, 519 F.3d 1242, 1249 (10th Cir. 2008), his failure to identify how each individual government official harmed him necessitated dismissal of his claims.

V. ARGUMENT

A. Judicial Estoppel is not Applicable to the Current Proceedings.

(1) Rev. Baker Forfeited any Argument of Judicial Estoppel by Failing to Raise it in the District Court, thereby Requiring Review under the Plain Error Standard.

Rev. Baker never raised the issue of judicial estoppel with the District Court, specifically failing to raise the theory in his response to the Defendants' motions to dismiss. As previously held by the Tenth Circuit, "[w]here, as here, a plaintiff pursues a new legal theory for the first time on appeal, that new theory suffers the distinct disadvantage of starting at least a few paces back from the block." ***Richison v. Ernest Group, Inc.***, 634 F.3d 1123, 1127 (10th Cir. 2011). While forfeited legal theories may be considered upon appellate review, the Tenth Circuit "will reverse a district court's judgment on the basis of a forfeited theory only if failing to do so would entrench a plainly erroneous result." ***Id***. at 1128.

Plain error requires a showing of "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." ***Id***. The error must show a clear miscarriage of justice, otherwise "[a]ffording plenary appellate review to newly raised legal theories would do much to undermine this adversarial and appellate order." ***Id***. at 1130.

(2) Rev. Baker Cannot Meet the Elements of Judicial Estoppel.

Rev. Baker's judicial estoppel argument is based on the notion that Defendants insisted he file an amended complaint with greater specificity. Having filed an amended complaint with greater specificity (or attempted to), Defendants were precluded from then asking the District Court to dismiss the amended complaint for lack of specificity. Not only are Rev. Baker's representations contrary to the record in the District Court, even assuming that his version of procedural history is accepted, he still cannot meet the elements of judicial estoppel.

Judicial estoppel is triggered when a party assumes a certain position in legal proceedings, obtains judicial relief based upon that position, and then later assumes a contrary position to the prejudice of another party. ***Johnson v. Lindon City Corp.***, 405 F.3d 1065, 1069 (10th Cir. 2005). The actions of the party to be estopped must raise the inference that a judicial officer has been misled by one or

more positions previously taken by that party. ***Id***. Additionally, "the position to be estopped must generally be one of fact rather than of law or legal theory." ***Id***. Based upon these principles, the Defendants' actions in the District Court met none of these factors.

On the first factor, Rev. Baker's attempt to assert judicial estoppel must fail because the theory requires that a party's position be "clearly inconsistent" with a previous position. ***Id***. At the parties' initial status conference, the Defendants requested that Rev. Baker file an amended complaint because he failed to specify in his original complaint how each individual Defendant had harmed him or otherwise deprived him of his constitutional rights. Rev. Baker chose to file an amended complaint but failed to correct any of the errors noted by the Defendants. The Defendants all responded via Fed. R. Civ. P. 12(b) motions, in which they asserted that Rev. Baker's amended complaint failed to identify each actor's alleged responsibility and failed to allege sufficient facts to make his allegations plausible on their face. For purposes of judicial estoppel, the Defendants always maintained the position that Rev. Baker's pleadings were lacking in specificity and plausibility, regardless of the length of his complaint or number of allegations contained therein. Because of the continuity of the Defendants' arguments, judicial estoppel is inapplicable.

Application of judicial estoppel is also inappropriate because the District Court never "accepted" the Defendants' position on Rev. Baker's pleadings. While Rev. Baker's deficient pleadings were raised before the District Court, Judge Watanabe never issued an order requiring that Rev. Baker amend his complaint; to the contrary, Rev. Baker voluntarily agreed to amend once the Defendants agreed to waive any objection under Fed. R. Civ. P. 15. (App. 34-35). Judicial estoppel only applies where the previous court has accepted a prior inconsistent position, thus ensuring "that judicial estoppel is applied in the narrowest of circumstances." ***Id***. (quoting ***Lowery v. Stovall***, 92 F.3d 219, 224 (4th Cir. 1996)). Because the District Court never accepted or ruled upon any position taken by the Defendants, much less a prior inconsistent position, judicial estoppel does not apply.

Finally, on the balance of equity, the Defendants have not obtained any "unfair advantage" over Rev. Baker as a result of his voluntary amendment, which is a requirement for the successful application of judicial estoppel. ***Id***. To date, the Defendants are still unaware of the exact nature of Rev. Baker's claims, mainly because none of his pleadings were successful in tying any particular government official to any constitutional or common law claim. A request for greater specificity in his pleadings, as was required under Fed. R. Civ. P. 8, does not yield an advantage to any party, but rather simply brings into focus the nature of his allegations and seeks to have compliance with the applicable rules and case law.

His repeated failure to heed this standard cannot lead to a finding of prejudice, much less prejudice supporting the application of judicial estoppel.

Although not dispositive, the Defendants would note finally that even if they took inconsistent positions, which they did not, such positions were related to purely legal issues and not factual issues. Because the District Court only ever viewed the case upon Rule 12 motions, all factual averments in the amended complaint were accepted as true by both the Defendants and the District Court.[4] It would be impossible for the Defendants to take contrary factual positions in such a procedural posture. As judicial estoppel is normally reserved only for inconsistent *factual* positions, it would seem almost *per se* inappropriate in a Rule 12 setting. ***Johnson***, 405 F.3d at 1069 ("the position to be estopped must generally be one of fact rather than of law or legal theory.").

B. Rev. Baker's Amended Complaint Fails to Comply with Rule 8 Pleading Standards under *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*.

(1) Standard of Review.

Review of a district court's granting of a motion to dismiss is conducted under a *de novo* standard. ***Albers v. Bd. of Cnty. Comm'rs of Jefferson Cnty.***, 771 F.3d 697, 700 (10th Cir. 2014).

[4] Obviously to the extent such factual averments were plausible on their face, as is required under Fed. R. Civ. P. 8.

The Defendants would note that "ISSUE II" in the Legal Argument section of Rev. Baker's Opening Brief refers to "Primary Rights," a term not often used in a civil rights context, at least not in the context of false arrest. Reading the Opening Brief as whole, however, the Defendants reasonably decipher that this section was meant to address the District Court's dismissal under Rule 8 since the remaining portions of the brief assail the Supreme Court's rulings in ***Bell Atlantic v. Twombly*** and ***Ashcroft v. Iqbal***. [Opening Brief, p. 4-5]. The "Primary Rights" section also avers that this "case should have proceeded through discovery" and "should not have been motioned and ordered to add more specifics and details to a complaint that was already to [*sic*] large, compounded and scrambled.…" [Opening Brief, p. 11]. Thus, although not stated so directly, the Defendants interpret "ISSUE II" to raise a challenge to the District Court's ruling under the ***Twombly/Iqbal*** pleading standard.

(2) Rev. Baker Failed to Comply with the Pleadings Standards Set Forth in *Robbins v. Oklahoma*.

Although this Court applies a uniform standard to notice pleading and dismissals, it has recognized that "complaints in § 1983 cases against individual government actors pose a greater likelihood of failure in notice and plausibility because they typically include complex claims against multiple defendants." ***Robbins***, 519 F.3d at 1242. Thus, "[t]he ***Twombly*** standard may have greater bite in such contexts, appropriately reflecting the special interest in resolving the

affirmative defense of qualified immunity at the earliest possible stage of a litigation." ***Id***. (internal citations and quotations omitted). Under ***Robbins***, a complaint is properly dismissed if the plaintiff fails to identify "*who* is alleged to have done *what* to *whom*.…" ***Id***. at 1250.

A complaint is also flawed where, as here, the complaint fails to provide fair notice to a defendant of the grounds for the claims. Again, as described in ***Robbins***:

> The complaint makes no mention of which if any of these defendants had direct contact with Renee and her parents, and for those defendants who had no direct contact, how they might be individually liable for deprivations of Renee's constitutional rights.
>
> We need not speculate, because the burden rests on the plaintiffs to provide fair notice of the grounds for the claims made against each of the defendants. Given the complaint's use of either the collective term "Defendants" or a list of the defendants named individually but with no distinction as to what acts are attributable to whom, it is impossible for any of these individuals to ascertain what particular unconstitutional acts they are alleged to have committed. ***See Atuahene v. City of Hartford***, 10 Fed.Appx. 33, 34 (2d Cir., May 31, 2001) (granting a motion to dismiss for failure to provide fair notice under Rule 8 in part because "[t]he complaint failed to differentiate among the defendants, alleging instead violations by 'the defendants' "); *Medina v. Bauer*, 2004 WL 136636, *6 (S.D.N.Y., Jan.27, 2004); *Lane v. Capital Acquisitions and Mgmt. Co.,* 2006 WL 4590705, *5 (S.D.Fla., April 14, 2006).
>
> *Id.* at 1250.

Rev. Baker argues he is entitled to leniency in pleading due to the fact that he is a pro se litigant. A trial court may disregard a pro se litigant's conclusory

allegations which are not entitled to a presumption of truthfulness. ***Meek v. Jordan***, 534 Fed. App'x 762, 764 (10th Cir. 2013) (unpublished) (*citing* ***Ashcroft v. Iqbal***, 556 U.S. 662, 681 (2009)); ***Hall v. Bellmon,*** 935 F.2d 1106, 1110 (10th Cir. 1991) (stating that a court only need accept as true well-pleaded factual contentions, not conclusory allegations); ***see also Sparks v. Singh***, 2014 WL 4452790, at *2 (D. Colo. Sept. 8, 2014) (stating that a pro se litigant's conclusory allegations without supporting factual averments are insufficient to state a claim). After disregarding the conclusory allegations, the trial court considers only the remaining factual allegations to determine whether they plausibly suggest a right to relief. ***Id***. The Court should not assume the role of advocate and should dismiss claims which are supported only by vague and conclusory allegations. ***Northington v. Jackson***, 973 F.2d 1518, 1521 (10th Cir. 1992).

The District Court properly dismissed all of the Defendants because Rev. Baker failed to allege in his amended complaint how each individual defendant violated his civil rights. Notwithstanding the 400-plus allegations, the District Court correctly parsed that there were only eight paragraphs that named individual defendants, and each of the eight paragraphs simply included conclusory allegations. As a representative example, Rev. Baker stated that Officer Salazar "did not investigate, [*sic*] He conducted improper and illegal procedures and actions …" All other allegations naming specific Defendants suffered from the

same flaw, in that they alleged harms only in the broadest abstract, without a clear delineation of specific actions and/or omissions taken by each governmental official. When the eight allegations are then read in the context of Rev. Baker's 400-plus paragraph amended complaint, it becomes impossible to ascertain the nature of any of the Defendants' purportedly illegal or unconstitutional actions. Under ***Robbins***, Rev. Baker's amended complaint was properly dismissed because of his failure to allege sufficient facts to "give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." 519 F.3d at 1247 (quoting ***Ridge at Red Hawk, L.L.C. v. Schneider***, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original).

This Court's ruling in ***Robbins*** also made clear that "context matters in notice pleading," and in complex civil rights actions it is essential that a plaintiff plead sufficient facts to provide *each* defendant "notice of the theory under which their claim is made." ***Robbins***, 519 F.3d at 1249. Because Rev. Baker alleged seventeen claims against five separate defendants (both individuals and entities), it was essential that he demonstrate "an affirmative link between the alleged constitutional violation and each defendant's participation, control or direction, or failure to supervise." (App. 87 (citing ***Butler v. City of Norman***, 992 F.2d 1053, 1055 (10th Cir. 1993)). Rev. Baker's amended complaint, while making passing reference to each Defendant, failed to tether any specific acts or omissions to any

specific claim for relief. As the District Court properly noted, "Plaintiff's Amended Complaint provides neither the Court nor Defendants with any specific factual allegations with regard to any of his claims. As a result, the Court concludes that Plaintiff's claims must be dismissed.…" Under ***Robbins*** and its progeny, the District Court correctly dismissed Rev. Baker's amended complaint and its order should be upheld on appeal.

(3) All of the Defendants were Entitled to Qualified Immunity.

Although only implicitly referenced in its order, the District Court's dismissal also implicates the individual Defendants' right to qualified immunity, and relatedly, an analysis of clearly established law. Again under ***Robbins***, allegations in a plaintiff's complaint must be sufficiently specific to allow the district court an opportunity to analyze a government official's entitlement to qualified immunity at the earliest possible stage since one of the primary goals of qualified immunity is to "protect public officials from the broad-ranging discovery that can be particularly disruptive to effective government." 519 F.3d at 1248 (internal citations and quotations omitted). When a plaintiff deprives the defendants and the court of sufficient factual allegations in a complaint, it becomes "impossible for the court to perform its function of determining, at an early stage of litigation, whether the asserted claim is clearly established." ***Id***. at 1249. Such is the problem with Rev. Baker's amended complaint, as the paucity of specific

allegations deprived the District Court and each individual defendant of the ability to determine whether the law was clearly established at the time of each alleged violation. The absence of allegations supporting an analysis under the second prong of qualified immunity provides an alternative ground for affirmance of the District Court's order.

(4) District Attorney Gordon McLaughlin, individually and in his official capacity, was Entitled to Dismissal of all Rev. Baker's claims Against Him.

Defendant McLaughlin proffered a number of bases that supported dismissal of all of Plaintiff's claims against him, both in his individual and official capacities, as a matter of law. These included absolute immunity, qualified immunity, failure to establish the elements of malicious prosecution, sovereign immunity under the Colorado Governmental Immunity Act, and Eleventh Amendment immunity for official capacity claims.

Notwithstanding his failure to meet Fed. R. Civ. P. 8 pleading requirements, Plaintiff's claims against Defendant McLaughlin were subject to dismissal based on the other grounds set forth in his Motion to Dismiss.

The District Court did not take the opportunity to specifically address the other legal bases for dismissal, choosing instead to focus on the Fed. R. Civ. P. Rule 8 deficiencies. Because this Court may review the granting of a motion to dismiss *de novo*, Defendant requests this Court affirm dismissal of Defendant

McLaughlin on all grounds set out in his Motion to Dismiss. In the interests of judicial economy, Defendant McLaughlin has not reiterated those arguments in this Brief, rather Defendant McLaughlin incorporates by reference the Motion to Dismiss and the legal arguments and authorities set forth therein. (***See*** briefing at App. 80-147).

VI. CONCLUSION

The Defendants respectfully request that the District Court's Order be upheld.

STATEMENT AS TO ORAL ARGUMENT

Oral argument is not requested.

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Date: February 23, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2017, I electronically filed the foregoing **RESPONSE BRIEF ON APPEAL** using the court's CM/ECF system which will send notification of such filing to the following, hand delivered seven (7) hard copies to the court within two (2) business days, and emailed *pro se* Plaintiff a copy:

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