IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	)	
	)	No. 4:15CR00001-1 BSM
	)	
v.	)	18 U.S.C. § 666 (a)(1)(B)
	)	
MICHAEL A. MAGGIO	)	

DEFENDANT'S SENTENCING MEMORANDUM AND MOTION FOR DOWNWARD DEPARTURE

The Defendant, Michael Maggio, by and through undersigned counsel, submits this sentencing memorandum setting forth circumstances this Court should consider in determining a reasonable sentence that is sufficient but not greater than necessary to comply with the directives of 18 U.S.C. § 3553(a). Mr. Maggio respectfully asks that this Court impose a sentence below the applicable guideline range. In support of this request, Mr. Maggio offers the following:

I. THE NEED TO PROVIDE JUST PUNISHMENT AND AFFORD DETERRENCE WILL BE MET EVEN BY A BELOW-GUIDELINE SENTENCE

Mr. Maggio pleaded guilty to federal bribery, a crime which breached the trust granted him by the citizens of the State of Arkansas, Faulkner County, fellow attorneys, trusted staff, his family, and himself. In doing so, he has brought shame upon himself and the profession he worked so hard to accomplish.

Mr. Maggio began his punishment in 2013; much of which was self-imposed. Mr. Maggio withdrew from the race for a position in the Arkansas Court of Appeals in 2013 of his own accord. He was favored to win and would have surely been successful in his pursuit. Mr. Maggio willingly left the position of Circuit Judge of Faulkner County. In addition, he gave up his license to practice law. Many others in his position would still be practicing his trade. He chose to do the right thing for

his profession and the people he served.

To suffer such humiliation, embarrassment, and utter failure is the ultimate deterrent. Mr. Maggio seeks to care for his family and himself in the remaining years of his life.

Mr. Maggio takes full responsibility for his behavior and by pleading guilty subjects himself to punishment. The question is: What form shall that punishment take? Mr. Maggio pleaded guilty to using his position to accept money in return for an expectation of money to run his campaign. Whatever the Court imposes, it will come on the heels of significant punishment exceeding what has been mentioned.

Mike will now be a convicted felon who will never again be able to work in the legal business. For these reasons, the need to provide a just punishment for the offense will be met even by a below-guideline sentence. *See* 18 U.S.C. § 3553(a)(2)(A). The Court has a vital role to play in crafting a punishment. The Court must also consider the need to afford adequate deterrence to criminal conduct. However, Mr. Maggio presents no risk of recidivism.

Nearly three years have passed since the crime. *See* 18 U.S.C. § 3553(a)(2)(B). As time goes by, the likelihood of repeated crime ebbs and need for deterrence diminishes. Mr. Maggio has committed no other crime. This was a crime of opportunity. He will never have an opportunity to commit such a crime again. It will be impossible for him to gain similar employment in the future. Furthermore, he will be under the supervision of a federal probation officer who will monitor his employment during the years that he is on probation or supervised release.

Mr. Maggio is not a defendant who poses a risk of committing random crime in the community. A drug dealer, a bank robber, and child pornographer always present a risk of recidivism due to the nature of those crimes. In contrast, Mike will never again be a Judge or even an attorney. No prison sentence is necessary here to

incapacitate him in order to make the community safe. This goal has already been accomplished regardless of the length of this Court's sentence.

We must realize that a defendant who holds a professional license such as a law license can never have that license again. A defendant who is, for example, a mechanic or similar profession suffers no such loss. He can return to his profession.

The Court will have an opportunity to supervise Mr. Maggio through probation or supervised release. In the unlikely event that he commits another crime in the future the Court may find comfort in the fact that it will be permitted to sentence him to a steep prison sentence upon revocation. For example, in the event that this Court imposes a sentence of probation, it would have the authority to re-sentence him under the original options, including a ten-year maximum sentence and the presently applicable guideline range.

See 18 U.S.C. § 3565(a)(2) (upon a probation revocation, the Court shall "resentence the defendant under subchapter A [18 U.S.C. §§ 3551-3559]"). On the other hand, if this Court imposes a term of imprisonment followed by supervised release, it would be authorized upon a revocation of the supervised release to sentence Mr. Maggio to up to 36 months imprisonment. *See* 18 U.S.C. § 3583(e)(3).

II. THE SENTENCING GUIDELINES ARE NEITHER MANDATORY NOR PRESUMPTIVELY REASONABLE.

The sentencing guidelines and its commentary are merely two of many factors this Court must consider. 18 U.S.C. § 3553(a)(4), (5). In *United States v. Booker*, the Supreme Court held that the sentencing guidelines shall no longer be mandatory but instead shall be "advisory." 543 U.S. 220, 125 S. Ct. 738 (2005). While district courts must still consult the guidelines, they must now "take account of the Guidelines together with other sentencing goals." *Id.* at 261 (emphasis added). As a result of the holding in *Booker*, the sentencing factors set forth in 18 U.S.C. § 3553(a) have been

reinvigorated. The primary directive of § 3553(a) is for sentencing courts to impose a sentence "sufficient, but not greater than necessary," to comply with the purposes set forth the statute.

Mr. Maggio has complied with the agreement between himself and the Government. In fact the Government stated that it was not opposed to probation in a previous hearing. The Government modified their sentencing recommendation from a presumptive sentence of probation to around 30 months to the full possible sentence of 10 years after Mr. Maggio filed a motion to withdraw his guilty plea and motion to dismiss the charges. Mr. Maggio filed his motion from an abundance of caution on how to proceed. After reviewing the actual statute under which he was charged, it appeared that there were several elements of the statute that did not apply. He filed his motion based on the fact that every district court reviewing the issues presented have dismissed the charges. The Court asked this same question at the motion hearing.

The rules provide that Mr. Maggio received extra point because he is a public official and an elected official. In Mike's case, the Government proposes he receive additional points since he is both. The additional points should be modified from 8 points to 4 as an elected official is also a public official by definition. Maggio is being unfairly punished by the additional 4 points. In addition, Mr. Maggio will receive a 2-point reduction since he will be 55 years of age June 2016.

Maggio has never changed his story. His plea of guilty basically comes down to an expectation that he would receive some funds for his campaign. Maggio's crime is a non-violent offense where no one was harmed. There is no drug activity or other violent issues presented. Mr. Maggio never received a penny. The $12,000.00 his campaign received was voluntarily refunded before notice of any investigation because he was withdrawing from the race. Mr. Maggio never expected

any personal gain and never received any. He has lost everything.

In the Government's new PSR, Mr. Maggio was assessed the maximum points based on the claim by the Government that there was a loss of $4.2 million which was the amount of remittitur entered by Mr. Maggio in a civil case. In short, the civil case involved an elderly lady who died after spending less than 24 hours in the nursing home belonging to the defendant in the case.

The jury awarded $5.2 million. It should be noted that the jury decided 12 to 0 that the defendant WAS NOT LIABLE for the death of Mrs. Bull. She was in the nursing home for less than 24 hours. Please see **Exhibit 1** which is the Verdict Form No. 5 *Interrogatories as to Wrongful Death Claim* showing that the jury answered in the negative that the nursing home was NOT the proximate cause of the death of Martha Bull.

The jury decided 9 to 3 for negligence in her end of life care. Please see **Exhibit 2** which is the Verdict Form No. 3 *Interrogatories as to Resident's Rights Claim.*

The jury stated that there was ordinary negligence. Please see **Exhibit 3** which is the Verdict Form No. 3 *Interrogatories as to Ordinary Negligence Claim* and setting the damages at $5.2 million.

The plaintiff asked for $6 million for her death and $1 million for her pain and suffering. Please see **Exhibit 4** which is page 22 of the trial transcript where Thomas Buchanan in closing requested "straight up $7,000,000.00" Maggio reduced the amount of claim to the amount requested by the plaintiff.

Retired Federal Judge Jim Moody testified that remittitur was the proper vehicle in such matters. Please see **Exhibit 5**. He also testified that the proper award should be $1 million. This was the amount Mike Maggio awarded. Please see **Exhibit 6** which are pages 54 through 59 of the trial transcript where Retired Federal

Judge Jim Moody stated that any amount exceeding $1 million would be excessive and would shock the conscience.

After the remittitur, the plaintiff had one of three options: 1) an automatic new trial; 2) an automatic appeal; or 3) accept the remittitur. The plaintiff accepted the $1 million. This case already had a voluntary non-suit two years earlier. Maggio was consistent in his ruling for both trials. The plaintiff took the non-suit because of the rulings and were looking for a different judge.

We must remember that Maggio cannot be charged with a crime regarding his position as a Judge. In fact, he was dismissed from the civil lawsuit associated with the remittitur. We must note that since 1872, the United States Supreme Court has recognized that Judges must act without fear of reprisal for decisions made. See, *Bradley v. Fisher,* 80 U.S. 335,351 (1872).

Even acts done maliciously or corruptly do not subject a Judge to a civil action. See, *Stump v. Sparkman,* 435 U.S. 355-56 (1978). See also, *Forrester v. White,* 484 U.S. 219 (1988). Please see attached **Exhibit 7** which is the *Brief in Support of Motion to Dismiss Separate Defendant Michael Maggio* filed in the civil action: *Rosey Perkins, et al. v. Michael Maggio*, et al., Faulkner County Circuit Court, 5th Division, Case number, 23CV-14-862, Please see attached **Exhibit 8** which is the *Order Dismissing Michael Maggio.*

The United States Supreme Court recently issued several opinions affirming the rights of district courts to conclude that a below-guideline sentence is reasonable. In *Gall v. United States*, the Court rejected an appellate rule that required "extraordinary"circumstances to justify a sentence outside the guideline range. — U.S. —, 128 S.Ct. 586 (2007).

In *Gall*, the district court sentenced a defendant whose guideline range was 30-37 months imprisonment to a sentence of merely 36 months on probation, yet the

circuit court vacated the sentence. The Supreme Court reinstated the below-guideline sentence and held that it was reasonable. *Id.* at 602. The Court rebuked the appellate courts which have adopted an "impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Id.* at 595.

According to the Court, "the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however." *Id.* at 596. Moreover, the district court "must make an individualized assessment based on the facts presented." *Id.* In the end, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Id.* at 598.

In *Kimbrough v. United States*, the Supreme Court held that a district court may reasonably impose a below-guideline sentence based on the notorious crack-powder cocaine disparity. — S. Ct. —, 128 S. Ct. 558, 575 (2007). In *Kimbrough*, the Court rejected the government's claim that such freedom would result in unwarranted sentence disparities, as described in 18 U.S.C. § 3553(a)(6). *Id.* at 574.

The Court noted the following: We have accordingly recognized that, in the ordinary case, the Commission's recommendation of a sentencing range will "reflect a rough approximation of sentences that might achieve §3553(a)'s objectives." The sentencing judge, on the other hand, has "greater familiarity with … the individual case and the individual defendant before him than the Commission or the appeals court." He is therefore "in a superior position to find facts and judge their import under §3353(a)" in each particular case.

In light of these discrete institutional strengths, a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case "outside the 'heartland' to which the Commission

intends individual Guidelines to apply." *Id.* at 574-75 (citations omitted). *See also Nelson v. United States*, — S. Ct. —, 2009 WL 160585 (Jan. 26, 2009) ("The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.") (emphasis in original).

Even in the Eleventh Circuit, "a sentence within the guidelines range is neither "per se" nor "presumptively" reasonable. *United States v. Talley*, 431 F.3d 784, 786 (11 Cir. 2005); *United States v* th . *Hunt*, 459 F.3d 1180, 1185 (11th Cir. 2006); *United States v. Wade*, 458 F.3d 1273, 1282 (11th Cir. 2006). In *Hunt*, the Court noted the following: "We do not believe it is appropriate to dictate a 'strength' of consideration applicable in every case. Nor do we find a presumption to be useful in this context.

Presumptions are burden-shifting tools." 459 F.3d at 1185. Furthermore, the Eleventh Circuit itself has held that a below-guideline sentence is reasonable in certain cases. *See, e.g., United States v. Williams*, 435 F.3d 1350, 1353, 1356 (11th Cir. 2006); *United States v. Gray*, 453 F.3d 1323, 1325 (11th Cir. 2006).

In the present case, the advisory guideline range is probation to 36 months imprisonment. However, the directives of *Booker*, *Gall* and *Kimbrough* make clear that a district court may not apply the guidelines uncritically and habitually or else it risks committing error. As the Court knows, the guidelines and its commentary are merely two of the many factors set forth in Section 3553(a) (subsections (4) and (5)) and they deserve no special weight in that balancing act. *Gall, supra*; *Kimbrough, supra*. Here the guideline range is simply too high. Under the other factors listed in 18 U.S.C. § 3553(a), a sentence below the range is reasonable in this case.

III. THE ADVISORY GUIDELINE RANGE FAILS TO ACCOUNT FOR MR. MAGGIO'S SERIOUS HEALTH PROBLEMS

Mr. Maggio's chronic and dire medical condition warrants a below-guideline

sentence. He has alarming health problems, including chronic depression, hypertension, sleep apnea, and a cleft palate which requires regular surgery. Mr. Maggio requires regular operations by a maxillofacial surgeon to control the cleft palate movement. Mr. Maggio also takes several medications each day. The law requires that the Court consider the need for the sentence to provide Mr. Maggio with "medical care . . . in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). Furthermore, the sentencing guidelines also explicitly authorize a downward departure for this reason.

See U.S.S.G. § 5H1.4. "[A]n extraordinary physical impairment may be a reason to depart downward; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." *Id.* In light of Mr. Maggio's extraordinary medical problems this is the rare case in which the Court should employ this downward departure.

While the Bureau of Prisons may be able to provide adequate care to Mr. Maggio during a term of incarceration, it would be extremely inefficient to require the Bureau to pay the bill for these costs. Furthermore, the quality of care in the BOP — where a physician would have to begin from scratch — would likely be inferior to the ongoing long-term care Mr. Maggio has received from the doctors who have treated him for years.

IV. THE SENTENCE MUST ACCOUNT FOR MR. MAGGIO'S REMARKABLE ACCEPTANCE OF RESPONSIBILITY

The Court's ultimate sentence should reflect the fact that Mr. Maggio has shown extraordinary acceptance responsibility for these crimes. The mere three-level reduction for pleading guilty in this case fails to account for Mr. Maggio's striking repentance during the three years since his crime was uncovered. This is a rare case in which a defendant has shown extraordinary acceptance of responsibility worthy of

a greater reduction. *See United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005) (district court may apply a departure "for extraordinary remorse"); *United States v. Kim*, 364 F.3d 1235, 1240-41, 1245 (11th Cir. 2004) ("extraordinary restitution" may warrant a downward departure).

V. MR. MAGGIO'S PERSONAL HISTORY AND CHARACTERISTICS MERIT A BELOW-GUIDELINE SENTENCE

The history and characteristics of Mr. Maggio — beyond his crime — must be included in the calculus of the reasonable sentence. 18 U.S.C. § 3553(a)(1). "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall v. United States*, — U.S. —, 128 S. Ct. 586, 598 (2007).

A lot has been made of Mike being a lawyer and a Judge. As Judge Miller said when he admonished the prosecutor: " the view from the defendant position is not the same as from being a Judge and to not impute any knowledge to him." and to not say that again.

Mike throughout his life has fought to over come systematic bullying and intimidation from the public. His being born with a birth defect did lead to continual bullying from peers, teachers, adults and others he met in his life. He understands all too well the impact that has on people. He has worked hard to rise above the taunts and jeers. He has worked hard to rise above the negative admonitions. He worked hard to treat all with respect. Anyone that ever interacted with him for any length of time would say he was nice and respectful. He has suffered the most through this terrible ordeal.

He is first and foremost a family man. He loves and cherishes his family. His life has been spent trying to provide for them in all areas spiritually,

emotionally, physically, economically. The past 2 years he has not been able to do that in the best way possible. He has suffered tremendously. He desperately wants to get back to taking care of his family and their needs.

In his community he is missed. He was always one of the first to volunteer to help any non-profit or group that needed help. Not just in his home community but in countless communities across the state and in fact in other states as well. He was instrumental in assisting a local non-profit farmer market in Van Buren County to get started and supported them every time he could.

Mike volunteered to assist CASA, United Way, Boys and Girls Club, Boy Scouts, Girl Scouts, sponsored numerous after school and sports team activities, American Cancer Society, American Lung Society, Lion's Club, Kiwanis Club, Relay for Life, along with many more private examples of helping families in need.

He has assisted the victims of tornadoes. He helped to rebuild a church that was destroyed by a tornado. He bought furniture for a grandmother struggling to raise her grandchildren. He was a tireless champion for those in need no matter when or where he could be counted on to be a volunteer.

He spent time after Katrina volunteering with KaBoom to build safe playgrounds for children in Mississippi, Louisiana and Arkansas. He brought his boys and their friends to help. He wanted to instill in his children the work ethic of volunteering and helping others. He proudly displayed pictures of he and his boys building those playgrounds. To this day his boys volunteer to help victims of disasters.

Mike Maggio continues even today to help. He and Dawn assist in providing meals to Bethlehem house, a local homeless shelter. He and Dawn once again volunteered at the recent Chase Race, a fundraiser for both the humane

society and Arkansas children's hospital. He looks forward to being able to continue his long history of community volunteerism.

Mike's father is suffering from effects of dementia. He travels frequently to help his mother give care to him. He is an integral part of the care team. He assists his mother in daily talks and help with decisions for his care and their future. If he is not allowed to continue to help his mother care for him this places a tremendous burden on her and certainly one that can be avoided.

There is no simple way to describe the enormous, continuous, complete, and total personal, professional and political destruction Mike has suffered in the last 2 plus years. There is no way to describe waking up every day and being tried and convicted in the court of public opinion by the media. He has been shunned by his colleagues and many others. His case is used in CLE around the country. His case is used in judicial CLE in Arkansas. So the question of deterrence is answered most definitely, both personally and professionally.

Mike is so much more than this one issue. To quote Bryan Stevenson of the Equal Justice Institute: "One thing I know every person is so much more than one 5 minute portion of their life."

In his private and judicial career he handled close to 50,000 cases. The FBI reviewed every case and said they could find no evidence of any wrongdoing in any other case. The BBB rated his private practice as A+ with no complaints. You would be extremely hard pressed to find any litigant or person that had contact with Mike that would ever say a bad thing about him. He was and still is well liked and respected by those folks that know him.

The goal of any punishment is to first punish fairly and then ensure the behavior doesn't happen again.

As to punishment. Mike has already been tried and convicted and punished in the court of public opinion. Mike has self imposed severe and permanent penalties. He voluntarily withdrew from the election of the Court of Appeals. A race he would have won.

Mike voluntarily resigned his Circuit Judge position. He voluntarily surrendered his law license (he could still have it today). He is the recipient of relentless front page press thereby hampering his ability to be employed. All of this as the result of a judicial decision which was not a final order.

So to "pile on" by warehousing Mike in an out of sight jail cell really borders on the cruel. To satisfy some blood lust to punish him even more is counter productive. His family will suffer even more economic, personal, emotional and spiritual destruction. Surely, the goals of rehabilitation and redemption are forefront of Judge Miller.

To continue to "break" Mike and his family accomplishes nothing. By spending more taxpayer money housing him when he is not a threat to re-offend or a threat to society is a waste of valuable resources. Even Judge Miller asked the question "how can I sentence a man to jail for a crime he can't be charged with legally?"

Give Mike credit for his life of service to others. Give him credit for his self imposed 26 months of permanent penalties. Give him the opportunity for rehabilitation and redemption. Give him probation and hope.

Mr. Maggio has lived an honorable, lawful life in all respects outside of the crime in this case. He has no prior criminal history whatsoever — no arrests, no misdemeanors, no felonies. Moreover, he has lived a life of benevolence toward countless friends and family members. Counsel has included with this memorandum more than a 50 letters, which describe in detail Mike's good works

and his extreme remorse for this crime. Please see attached **Exhibit 9** which are letters of support for this Court and Mr. Maggio.

VI. CONCLUSION

Mr. Maggio's crime is serious and must be punished, but the Court has wide discretion in fashioning a form of sentence that is reasonable and is not greater than necessary to answer the factors set forth in 18 U.S.C. § 3553(a). Therefore, he asks that this Court impose a sentence that is below the advisory sentencing guidelines and seriously consider probation.

Respectfully submitted,

/s/ James E. Hensley, Jr. 99069
HENSLEY LAW FIRM, P.A.
P. O. Box 11127
Conway, Arkansas 72034
501.327.4900 Fax: 501.400.7920
jehensley@centurytel.net

CERTIFICATE OF SERVICE

I, James E. Hensley, Jr., certify that the forgoing instrument in 14 point was delivered to the following this **March 21, 2016.**

Judge's Clerk Brice_Nengsu_Kenfack@ared.uscourts.gov
David Hernandez david_hernandez@arep.uscourts.gov
Edward P. Sullivan edward.sullivan@usdoj.gov
Julie E. Peters Julie.Peters@usdoj.gov sharon.talbot@usdoj.gov
and ECF Filing

/s/ James E. Hensley, Jr.

Exhibit 1 to:

Defendant's Sentencing Memorandum and Motion for Downward Departure
United States of America v. Michael A. Maggio
No. 4:15CR-01-1 BSM
18 U.S.C. § 666(a)(1)(B)

This Exhibit is:
Verdict Form No. 6
Interrogatories as to Wrongful Death Claim
Rosey Perkins et al. v. Greenbrier Nursing Home, et al.
Faulkner County Circuit Court
Case # 23CV-12-125

CV-12-125

FILED
DATE 5-17-13 @ 4:00 pm
Rhonda Wharton, Clerk
By ____ DC

VERDICT FORM NO. 5

INTERROGATORIES AS TO WRONGFUL DEATH CLAIM

1. Do you find from a preponderance of the evidence that a wrongful act or omission of Greenbrier Nursing and Rehabilitation Center was a proximate cause of the death of Martha Bull?

_______ Yes ___✓___ No

2. If you answered "yes" to the above question, please state the amount of damages, which you find from a preponderance of the evidence, sustained by the Estate of Martha Bull and the wrongful death beneficiaries of Martha Bull as a result of the wrongful death of Martha Bull.

3. You are instructed that any element of damage considered by you in answering this interrogatory should not also be considered by you in answering any other interrogatory.

On the claim for wrongful death of Martha Bull, we, the jury, award damages to the Estate of Martha Bull as follows:

a. For Martha Bull's loss of life:

$____________________

b. For any mental anguish suffered by the wrongful death beneficiaries as a result of the death of Martha Bull and reasonably probable to be suffered by wrongful death beneficiaries in the future:

$____________________

____________________ Foreperson
(Foreperson signs if unanimous, or nine or more who agree please sign below.)

____________________ ____________________

____________________ ____________________

____________________ ____________________

____________________ ____________________

____

23CV-12-125 231-23100005320-077
ROSEY PERKINS ET AL V GREENBR 1 Page
FAULKNER CO 05/17/2013 04:00 PM
CIRCUIT COURT FI70A

Exhibit 2 to:

Defendant's Sentencing Memorandum and Motion for Downward Departure
United States of America v. Michael A. Maggio
No. 4:15CR-01-1 BSM
18 U.S.C. § 666(a)(1)(B)

This Exhibit is:
Verdict Form No. 3
Interrogatories as to Resident's Rights Claim
Rosey Perkins et al. v. Greenbrier Nursing Home, et al.
Faulkner County Circuit Court
Case # 23CV-12-125

CV-12-125

FILED
DATE 5-17-13 @ 4:00pm
Rhonda Wharton, Clerk
By ________ DC

VERDICT FORM NO. 3

INTERROGATORIES AS TO RESIDENT'S RIGHTS CLAIM

1. Do you find from a preponderance of the evidence that Greenbrier Nursing and Rehabilitation Center deprived Martha Bull of her statutory resident's rights and/or infringed upon her resident's rights causing her damages or injuries?

___✓___ Yes ________ No

2. You are instructed that any element of damage considered by you in answering this interrogatory should not also be considered by you in answering any other interrogatory.

______________________________ Foreperson

(Foreperson signs if unanimous, or nine or more who agree please sign below.)

[signatures]

ONCE YOU HAVE COMPLETED VERDICT FORM NO. 3, PLEASE COMPLETE VERDICT FORM NO. 4.

23CV-12-125 231-23100005320-075
ROSEY PERKINS ET AL V GREENBR 1 Page
FAULKNER CO 05/17/2013 04:00 PM
CIRCUIT COURT FI70A

Exhibit 3 to:

Defendant's Sentencing Memorandum and Motion for Downward Departure
United States of America v. Michael A. Maggio
No. 4:15CR-01-1 BSM
18 U.S.C. § 666(a)(1)(B)

<u>This Exhibit is:</u>
Verdict Form No. 1
Interrogatories as to Ordinary Negligence Claim
Rosey Perkins et al. v. Greenbrier Nursing Home, et al.
Faulkner County Circuit Court
Case # 23CV-12-125

CV-12-125

FILED
DATE 5-17-13 @ 4:00pm
Rhonda Wharton, Clerk
By _____ DC

VERDICT FORM NO. 1

INTERROGATORIES AS TO ORDINARY NEGLIGENCE CLAIM

1. Do you find from a preponderance of the evidence that there was ordinary negligence on the part of Greenbrier Nursing and Rehabilitation Center which was a proximate cause of the damages or injuries sustained by Martha Bull?

✓ Yes _____ No

2. You are instructed that any element of damage considered by you in answering this interrogatory should not also be considered by you in answering any other interrogatory.

Scott M_____ Foreperson

(Foreperson signs if unanimous, or nine or more who agree please sign below.)

_____________________ _____________________

_____________________ _____________________

_____________________ _____________________

_____________________ _____________________

____

ONCE YOU HAVE COMPLETED VERDICT FORM NO. 1, PLEASE COMPLETE VERDICT FORM NO. 2.

23CV-12-125 231-23100005320-073
ROSEY PERKINS ET AL V GREENBR 1 Page
FAULKNER CO 05/17/2013 04:00 PM
CIRCUIT COURT FI70A

CV-12-125

FILED
DATE 5-17-13 @ 4:00pm
Rhonda Wharton, Clerk
By ________ DC

VERDICT FORM NO. 4

DAMAGES AS TO ORDINARY NEGLIGENCE, MEDICAL NEGLIGENCE, AND/OR RESIDENT'S RIGHTS CLAIM

1. If you answered "yes" to any of the questions on Verdict Form Nos. 1, 2, and/or 3, please state the amount of damages, which you find from a preponderance of the evidence, sustained by Martha Bull as a result of the ordinary negligence, medical negligence, and/or deprivation or infringement of Martha Bull's statutory resident's rights on the part of Greenbrier Nursing and Rehabilitation Center.

2. If you answered "no" to all of the questions on Verdict Form Nos. 1, 2, and 3, then take no further action.

On the claim for ordinary negligence, medical negligence, and/or deprivation or infringement of Martha Bull's statutory resident's rights, we, the jury, award damages to the Estate of Martha Bull, as follows:

a. For any conscious pain and suffering experienced by Martha Bull; and/or

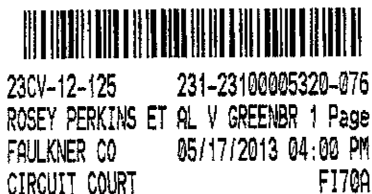
b. For any mental anguish suffered by Martha Bull:

$ 5,200,000.00

_______________ Foreperson

(Foreperson signs if unanimous, or nine or more who agree please sign below.)

ONCE YOU HAVE COMPLETED VERDICT FORM NO. 4, PLEASE COMPLETE VERDICT FORM NO. 5.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ROSEY PERKINS ET AL V GREENBR 1 Page
FAULKNER CO 05/17/2013 04:00 PM
CIRCUIT COURT FI70A

Exhibit 4 to:

Defendant's Sentencing Memorandum and Motion for Downward Departure
United States of America v. Michael A. Maggio
No. 4:15CR-01-1 BSM
18 U.S.C. § 666(a)(1)(B)

This Exhibit is:
Page 22 of the trial transcript where Plaintiff's Attorney, Thomas Buchanan in closing requested "straight up $7,000,000.00.
Interrogatories as to Ordinary Negligence Claim
Rosey Perkins et al. v. Greenbrier Nursing Home, et al.
Faulkner County Circuit Court
Case # 23CV-12-125

1 have been five and six of the number on each side.
2 And when the stakes are high we're going to ask you,
3 like they are here, we're going to ask you to come
4 back with a verdict that fully and fairly compensates
5 Martha Bull for the mental anguish, fear, loneliness,
6 intolerable pain, humiliation that she experienced
7 those two days. And I told you, straight up
8 $7,000,000. And anything less than that cheats the
9 estate of Martha Bull. Six for Martha, one for the
10 family. Six for Martha for all that she endured and
11 went through and one for the family. Ladies and
12 gentlemen if somebody tries to break the law, policy
13 them. If they say well we just don't know, we don't
14 know. You can have doubts on both sides. You can
15 have 49 percent doubt. The question is whether by 51
16 percent of the evidence, based on what you heard on
17 the witness stand, she would have lived if she had
18 gone to a hospital that had the facilities available
19 to take care of her. They violated the rules. And
20 now it's up to you to enforce them, because if we
21 don't enforce the rules, you might as well order up a
22 wrecking ball for this court house. Because it's not
23 going to mean a thing. Bring in the cranes, tear it
24 down. If we don't have rules that are enforced, why
25 do we have rules. Ladies and gentlemen, if you award

Exhibit 5 to:

Defendant's Sentencing Memorandum and Motion for Downward Departure
United States of America v. Michael A. Maggio
No. 4:15CR-01-1 BSM
18 U.S.C. § 666(a)(1)(B)

<u>This Exhibit is:</u>
Page 37, 38 and 39 of the deposition transcript where RETIRED FEDERAL JUDGE JIM MOODY states that remittitur is the proper vehicle in such matters.
Rosey Perkins et al. v. Greenbrier Nursing Home, et al.
Faulkner County Circuit Court
Case # 23CV-12-125

1 that -- you said you charge for your time. Do you
2 charge the firm for your time?
3 A No. I should say that the firm charges my
4 time to the client.
5 Q Okay.
6 A If -- if they think it's of any benefit to the
7 client, they -- they will add that as an additional
8 charge.
9 Q I know that Mr. Everett has provided me with a
10 letter that has your opinions. What are they?
11 A What are my opinions?
12 Q Yes. In this -- in this case.
13 A All right. Well, I think there are three in
14 number, and they're probably adequately set out in
15 that letter. But, one, just by way of background, I
16 could give an opinion that there are federal rule --
17 I mean civil procedural rules in state court that
18 tell a judge what he's to do in case of a motion for
19 remittitur or to just review any verdict for
20 excessiveness.
21 Then based on my review of the trial
22 transcript and all of the other material that we've
23 discussed here today, it was my opinion as an
24 impartial judge that if I had been sitting in
25 judgment on this case -- or any judge, any impartial

1 judge, that a remittitur would and should have been
2 granted given the evidence in this case and the --
3 and the limited amount of the damages.
4 And then the only final thing would be to
5 explain the rule that a party who has -- or a party
6 that has been told that there will be a remittitur
7 in the case has the option of either accepting the
8 remittitur or electing to retry the case and refuse
9 the remittitur.
10 Those are essentially the three opinions that
11 I was asked to consider and the opinions that I
12 have.
13 Q Okay. I want to make sure that I understand.
14 This very first opinion that there are several
15 procedural rules that a trial judge should consider
16 when evaluating a motion for remittitur and for
17 excessiveness of the verdict.
18 A Well, maybe I better clarify that.
19 Q Okay.
20 A What -- what I really mean is that the law
21 provides a mechanism that tasks a sitting trial
22 judge to review a verdict for excessiveness and
23 usually at the request of one of the parties. And I
24 mean, I don't think there's any dispute about that,
25 the law is what it is. But just so the jury

1 understands that this is not something that a judge
2 just does on a whim, there is a process by rule
3 where the court is obligated to look at verdicts and
4 review them for excessiveness.
5 And that would, of course, be a motion to
6 either set it aside or grant a new trial or for
7 remittitur if -- if they meet the criteria of the
8 rule. That -- that would be the first opinion.
9 Q Okay.
10 A Yeah.
11 Q And what rule is that in Arkansas?
12 A Well, the statute is at Arkansas Code
13 Annotated 16-64-124, is the remittitur statute. The
14 section that precedes that, 123, I believe, is the
15 one that defines excessiveness or what an excessive
16 verdict would be.
17 Q Okay. 16-64-124 gives the court inherent
18 authority to remit a verdict if it's -- the -- in
19 the trial judge's view, excessive?
20 A That's -- that's the way I read the statute,
21 yes, sir.
22 Q And 123 -- 16-64-123 defines what is
23 excessive? That's your reading?
24 A Yes, sir.
25 Q Okay. So when you analyze this case, are you

Exhibit 6 to:

Defendant's Sentencing Memorandum and Motion for Downward Departure
United States of America v. Michael A. Maggio
No. 4:15CR-01-1 BSM
18 U.S.C. § 666(a)(1)(B)

<u>This Exhibit is:</u>
Page 54-59 of the deposition transcript where RETIRED FEDERAL JUDGE JIM MOODY states that any amount exceeding $1 million would be excessive and shock the conscience.
Rosey Perkins et al. v. Greenbrier Nursing Home, et al.
Faulkner County Circuit Court
Case # 23CV-12-125

1 A Well, I don't know that I've given it that
2 much thought. I did decide that it was reasonable
3 to remit it to a million dollars, but I didn't try
4 to evaluate precisely what the damages would be.
5 Q Well, my question to you is: Would the
6 evidence have supported a million and a half dollar
7 verdict?
8 A I don't know. I don't have an opinion about
9 that.
10 Q Do you have an opinion as to whether or not
11 the evidence would have supported a $1,100,000
12 verdict?
13 A Well, again, I haven't made that analysis, so
14 I don't have that opinion.
15 Q Well, you've looked at the -- you've looked at
16 the trial transcript; right?
17 A Uh-huh, sure.
18 Q Is there anything that you can sit here right
19 now that you think you need to look at to answer
20 that question?
21 A Well, I'd have to give it some thought
22 probably. I mean, my -- my principal analysis was
23 was the verdict excessive, and my conclusion was
24 yes. So a remittitur should have been granted.
25 I was less concerned about the amount of the

1 million dollars. I frankly didn't give that as much
2 consideration. And I probably have to go back and
3 look at some of the information again just to be
4 sure. I didn't focus on that, frankly. Although, I
5 don't have any dispute that that was a reasonable
6 amount.
7 Q A million dollars?
8 A Uh-huh.
9 Q Okay. My question is. As you sit here right
10 now, can you give us an opinion one way or the other
11 as to whether a $1,500,000 verdict for the
12 plaintiffs would have been reasonable?
13 A Well, can I give you an opinion? Yes, I can
14 give you an opinion that I think a million dollars
15 is as much as this case could be supported by the
16 evidence.
17 Q Okay. And anything above a million dollars
18 is, in your view, would shock your conscience?
19 A Yes.
20 Q Okay. And anything above $1 million, you
21 would believe to be influenced by passion and
22 prejudice?
23 A Yes.
24 Q And so even a $1.1 million verdict, in your
25 view, would have been excessive?

1 A Yes.
2 Q Okay. Why is the million dollar cutoff?
3 What's the significance of $1 million?
4 A Well, you mean why -- why do I think that
5 that's adequate? Because I think that in my
6 judgment, in my experience -- and as I say, I have
7 to make a subjective determination based on the
8 trial transcript that I reviewed -- that anything in
9 excess of that amount, anything more than a million
10 dollars would be excessive and could not be
11 justified by the evidence that the jury heard.
12 Q And --
13 A It's sort of a cutoff point.
14 Q Okay.
15 A Yeah.
16 Q And I want to make sure that I understand.
17 And I'm not asking about adequate. You used the --
18 A Oh, I understand.
19 Q -- phrase "adequate." And the standard is
20 what would shock the trier of fact's conscience,
21 and --
22 A Right.
23 Q -- and so it's your testimony that a million
24 dollars is the absolute cutoff and that anything
25 above that would shock your conscience?

1 A Yes, that's correct.
2 Q And is it your view that it would shock any
3 reasonable trial judge's conscience?
4 A Yes.
5 Q And so, in your view, there is no reasonable
6 trial judge who could have looked at this transcript
7 and determined that -- let me back up because I'm
8 about to ask a terrible question, which isn't
9 unusual, but --
10 A That's all right. Go ahead.
11 Q In your view -- or -- help me with this.
12 Is it your opinion that any reasonable --
13 there is no reasonable trial judge who could look at
14 this transcript and say that $1.5 million is
15 reasonable?
16 A No, I -- I'm not sure I can go that far.
17 Because I think reasonable minds can differ on any
18 opinion like this. I mean, this is not -- this is
19 not science, this is not math where you just add up
20 figures and -- and get one result, this is a matter
21 of judgment. A reasonable judge might conclude that
22 a million one five or a million five would be the
23 cutoff point.
24 But I think that a -- a reasonable judge, a
25 reasonable, impartial judge -- and -- and I put

1 myself in that role, trying to be reasonable and
2 impartial here -- would conclude that anything more
3 than a million dollars would be excessive and
4 influenced or the product of passion and prejudice
5 and would shock the conscience of the court.
6 Now, I can't speak for every other reasonable
7 judge, they may -- they may come to a different
8 conclusion.
9 Q Sure. And so if -- if we get an expert
10 witness --
11 A Uh-huh.
12 Q -- that has been a judge, are you going to
13 be -- if he comes to the opinion that -- he or she
14 comes to the opinion that, you know, let's say
15 2 million would not have been excessive, you're not
16 going to say that that's an unreasonable opinion,
17 are you?
18 A Well, I haven't heard that opinion or who that
19 opinion came from, but -- so I can't just
20 automatically say no. But, I mean, I -- I recognize
21 that other people similarly qualified to me could
22 reach a different conclusion. I'm not -- I'm not
23 saying that I'm the ultimate arbiter here.
24 Q Sure.
25 A I'm just saying this is my opinion.

1 Q Right. And I think you phrased the question
2 better than I did. And that is, you would agree
3 that similarly qualified people to you could reach
4 different opinions on this issue?
5 A I don't -- I don't doubt that, no.
6 Q And you would agree that similarly qualified
7 folks to you could reach an opinion that the motion
8 for remittitur should not have been granted?
9 A Oh, yes. I don't -- I mean, there could be
10 people out there that disagree with my opinion. I
11 concede that, yes.
12 Q And you could see that some of those people --
13 I mean, would you at least con -- make room for the
14 notion that it would not be unreasonable for someone
15 to have the opinion that the amount of the
16 remittitur was too much?
17 A Well, they may have that opinion. Would I
18 agree with it, no. I mean, I can see that somebody
19 qualified to make that judgment could come to a
20 different conclusion than I just did, but I
21 wouldn't -- I wouldn't just agree with it because
22 somebody else made that statement.
23 Q Well, sure, sure. I mean, that's reason that
24 we have dissents even at the United States Supreme
25 Court; true?

Exhibit 7 to:

Defendant's Sentencing Memorandum and Motion for Downward Departure
United States of America v. Michael A. Maggio
No. 4:15CR-01-1 BSM
18 U.S.C. § 666(a)(1)(B)

This Exhibit is:
Brief in Support of Motion to Dismiss Separate Defendant Michael Maggio
Rosey Perkins et al. v. Greenbrier Nursing Home, et al.
Faulkner County Circuit Court
Case # 23CV-12-125

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
FIFTH DIVISION

FILED
2014 DEC 23 PM 2 35
RHONDA WHARTON, CLERK
BY ______ DC

ROSEY PERKINS and RHONDA COPPAK
Individually and as Co-Administratrixes
and Personal Representatives of the
Estate of Martha Bull, deceased

VS. **23CV-14-862**

MICHAEL MAGGIO,
Individually and In His Official Capacity;
MICHAEL MORTON; GILBERT BAKER;
and JOHN DOES 1-5 **DEFENDANTS**

BRIEF IN SUPPORT OF MOTION TO DISMISS
SEPARATE DEFENDANT MICHAEL MAGGIO

Separate Defendant Michael Maggio hereby moves this Court pursuant to Rule 12(b)(1) and (6) of the Arkansas Rules of Civil Procedure to dismiss Plaintiffs' *Complaint*. The grounds for this request are more fully stated herein as follows:

STANDARD FOR DISMISSAL

Arkansas Rules of Civil Procedure, Rule 12 (b)(6) provides for the dismissal of a *Complaint* for "failure to state *facts* upon which relief can be granted." Ark. R. Civ. P. 12(b)(6) (2014) (emphasis added). Since Rule 12 (b)(6) tests the sufficiency of that pleading, it is necessary to read it in conjunction with Arkansas Rules of Civil Procedure, Rule 8, which deals with the requisite contents of the pleading. Thompson-Holloway Agency, Inc. v. Gribben, 3 Ark. App. 119, 122 (1981). Rule 8 provides:

> A pleading which sets forth a claim for relief, whether a *Complaint*, . . . shall contain . . . (2) a statement in ordinary and concise language of *facts* showing that the pleader is entitled to relief, . . .

Ark. R. Civ. P. 8 (2014) (emphasis added). Pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them. Bethel Baptist

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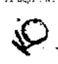


Church v. Church Mut. Ins. Co., 54 Ark. App. 262, 924 S.W.2d 494 (1996). "Our rules require fact pleading and *a Complaint must state facts, not mere conclusions*, in order to entitle the pleader to relief." Martin v. Equitable Life Assur. Soc. of the United States, 344 Ark. 177, 180, 40 S.W.3d 733, 736 (2001) (emphasis added). Thomas v. Pierce, 87 Ark. App. 26, 184 S.W.3d 489 (2004).

The federal courts have recently adopted fact-based pleading and apply similar standards as those used by Arkansas state courts. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) ; Ashcraft v. Iqbal, 556 U.S. 662 (2009). Under the federal standard, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 at 678. This standard requires "more than a sheer possibility that a defendant has acted unlawfully." Id. Even after liberally construing Plaintiff's allegations, the Plaintiff's *Complaint* fails as a matter of law.

Whether a court has subject-matter jurisdiction is based on the pleadings. Union Pac. R.R. Co. v. State ex rel. Faulkner County, 316 Ark. 609, 612, 873 S.W.2d 805, 806 (1994). It is well settled that subject-matter jurisdiction is a court's authority to hear and decide a particular type of case. Edwards v. Edwards, 2009 Ark. 580, at 3-4, 357 S.W.3d 445, 448 (2009). A court acquire subject-matter jurisdiction under the Arkansas Constitution or by means of constitutionally authorized statutes or court rules. Id. Likewise, if a court does not acquire subject-matter jurisdiction under the Arkansas Constitution or some other means, the court is without authority to hear and decide the matter.

I. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED BECAUSE DEFENDANT MAGGIO IS IMMUNE FROM SUIT.

Since 1872, the United States Supreme Court has recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, 80 U.S. 335, 351 (1872). For this reason, "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." Stump v. Sparkman, 435 U.S. 349, 355-356 (1978) (citing Bradley v. Fisher, 80 U.S. 335, 351 (1872)). A long line of the United State Supreme Court's precedents acknowledge that, generally, a judge is immune from a suit for money damages. *See*, e. g., Forrester v. White, 484 U.S. 219 (1988); Cleavinger v. Saxner, 474 U.S. 193 (1985); Dennis v. Sparks, 449 U.S. 24 (1980); Supreme Court of Va. v. Consumers Union of United States, Inc., 446 U.S. 719 (1980); Butz v. Economou, 438 U.S. 478, (1978); Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967). There are two (2) exceptions to this general rule of immunity. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Mireles v. Waco, 502 U.S. 9, 11 (1991). Second, a judge will not be immune for actions, though judicial in nature, are taken in the clear absence of all jurisdiction. Stump, 435 U.S. at 357. Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages. Mireles, 502 U.S. at 11.

Defendant Maggio is absolutely immune from suit and damages for two (2) reasons: First, Defendant Maggio had jurisdiction to act in the Bull case at all relevant times. Second, the

act of remitting a verdict cannot be said to be a "nonjudicial" or ad ministrative act, but rather a "judicial act" pursuant to the United States Supreme Court's precedent.

A. IT IS UNDISPUTED THAT DEFENDANT MAGGIO HAD JURISDICTION TO ACT AT ALL TIMES IN THE BULL CASE AND THUS CANNOT BE SAID TO HAVE ACTED IN THE "CLEAR ABSENCE OF JURISDICTION."

In Stump, *supra.*, the United States Supreme Court rejected a suit filed by a woman against an Indiana judge who had years earlier ordered the woman -- who was then 15 and allegedly mentally impaired -- sterilized without her knowledge. Stump v. Sparkman, 435 U.S. 349, 351-355 (1978). The first step in determining whether a judge is entitled to immunity is whether at the judge had jurisdiction at the time he took the challenged action. Id. at 356. The Court analyzed that under Indiana law, Judge Stump had "original exclusive jurisdiction in all cases at law and in equity whatsoever ...;" jurisdiction over the settlement of estates and over guardianships, appellate jurisdiction as conferred by law, and jurisdiction over "all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer." Id. at 357. The Court characterized Judge Stump's jurisdictional grant as broad. As a result, the Court concluded that he did not act in the "clear absence of all jurisdiction." To illustrate the difference between acting in the "absence of jurisdiction" versus in "excess of jurisdiction" the United Stated Supreme Court has offered the following example: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. U.S. v. Bradley, 80 U.S. 335, 352 (1872).

Arkansas circuit courts have original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Arkansas Constitution. Ark. Code Ann. § 16-13-201(a) (2014). Like in Stump, this is a broad grant of authority. Further, there is no allegation made by the Plaintiffs that Defendant Maggio lacked jurisdiction to enter any of the Orders mentioned in the *Complaint*, i.e. *Judgment* entered on June 6, 2013 and *Order on Defendant's Motion for New Trial or Remittitur* entered on July 11, 2013.

Specifically, the *Complaint* admits that Defendant Maggio is a former circuit judge in the 20th Judicial Circuit, Second Division, (*Complaint* ¶ 11), and that Maggio was the presiding judge over the nursing home neglect lawsuit against Greenbrier Nursing and Rehabilitation Center. (*Complaint* ¶ 14). Based on the facts presented in the Plaintiff's own *Complaint*, there is no question as a matter of law that Defendant Maggio had jurisdiction to enter orders in the Bull case as the presiding circuit court judge with original jurisdiction over the Plaintiffs' 2012 claims. In fact, paragraph twelve (12) of the Plaintiffs' original *Complaint* filed on February 8, 2012 in the Bull matter states that jurisdiction was proper in circuit court.

B. THE ENTRY OF THE ORDER ON DEFENDANTS' MOTION FOR NEW TRIAL OR REMITTITUR WAS A "JUDICIAL ACT" AS DEFINED BY THE UNITED STATES SUPREME COURT.

Upon being faced with a judge with jurisdiction to act, Ms. Sparkman argued that Judge Stump was not entitled to judicial immunity because his approval of the petition at issue did not constitute a "judicial" act. Stump v. Sparkman, 435 U.S. 349, 360 (1978). However, the Court refused to characterize the approval of the petition as a nonjudicial act. Id. In determining whether an act by a judge is a "judicial" one, the first factor to consider is "the nature of the act itself, i.e., whether it is a function normally performed by a judge". Id. at 361. *See* McAlester v.

Brown, 469 F. 2d 1280, 1282 (1972)). The second factor to review are "the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." Id. This factor is broadly construed. In McCalester, the 5th Circuit held that a state district judge was entitled to judicial immunity, even though "at the time of the altercation [giving rise to the suit] Judge Brown was not in his judge's robes, he was not in the courtroom itself, and he may well have violated state and/or federal procedural requirements regarding contempt citations." McAlester v. Brown, 469 F. 2d 1280, 1282 (1972)). After a review of these factors, the Court held that Judge Stump's approval of the sterilization petition was a judicial act.

In Mireles, the incident giving rise to a suit involved Judge Mireles's order to police officers to find Mr. Waco, a public defender who had missed the initial call of Judge Mireles's morning calendar. Mireles, 502 U.S. at 10. The police officers were order by Judge Mireles "to forcibly and with excessive force seize and bring [Mr. Waco] into his courtroom." Id. In reversing the lower court, the United States Supreme Court further clarified the scope for addressing whether an act was a function normally performed by a judge. The Court stated:

> Of course, a judge's direction to police officers to carry out a judicial order with excessive force is not a "function normally performed by a judge." But if only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a "nonjudicial" act, *because an improper or erroneous act cannot be said to be normally performed by a judge*. If judicial immunity means anything, it means that a judge "will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority." Accordingly, as the language in Stump indicates, the relevant inquiry is the "nature" and "function" of the act, not the "act itself." In other words, we look to the particular act's relation to a general function normally performed by a judge, in this case the function of directing police officers to bring counsel in a pending case before the court.

Mireles, 502 U.S. at 12-13 (emphasis added) (internal citations omitted). The Court looked to California law and confirmed that a judge's direction to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge and Mr. Waco, who was called into the courtroom for purposes of a pending case, was dealing with Judge Mireles in the judge's judicial capacity. Id. at 12. For these reasons, the United States Supreme Court reversed the lower court's determination that Judge Mireles actions did not qualify as a "judicial act."

Here, the Plaintiffs main allegations against Defendant Maggio stem from his entry of an *Order on Defendants' Motion for New Trial or Remittitur* which reduced the *Judgment* entered on June 6, 2013 in the amount of $5.2 million dollar to $1 million dollars on July 11, 2013. The first question is whether the remittitur of a verdict and entry of an order are functions normally performed by a judge.

Arkansas courts have the inherent power to remit a jury award if the award is grossly excessive or appears to be the result of passion or prejudice. Newbern, Ark. Civil Prac. and Proc. § 27-1; Holmes v. Hollingsworth, 234 Ark. 347, 352 S.W.2d 96 (1961). Further, a court may remit a jury award on its own motion. McNair v. McNair, 316 Ark. 299, 307 (1994). There is no question under Arkansas law that courts have the power to remit a jury award. There can also be no dispute that the function of entering an order or the granting of a motion is an act normally done only by a judge.

Comparing Stump to the case before this Court, both Judge Stump and Defendant Maggio granted a petition/motion pending in their respective courts. Further, both Judge Stump and Defendant Maggio had jurisdiction to enter the orders complained of in their respective cases. Further, Defendant Maggio was vested with the inherent authority to remit a jury award just like Judge Stump had the authority to entertain petitions for sterilization under Indiana law.

Now it is anticipated that the Plaintiffs in this case will argue that Defendant Maggio's alleged actions were so terrible as to not constitute a "judicial act" as they have alleged that his actions were criminal. The United State Supreme Court has determined that this is a failing argument. In reversing the lower court, the Supreme Court in Stump stated:

> Both the Court of Appeals and the respondents seem to suggest that, because of the tragic consequences of Judge Stump's actions, he should not be immune. For example, the Court of Appeals noted that "[t]here are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take," 552 F. 2d, at 176, and respondents argue that Judge Stump's action was "so unfair" and "so totally devoid of judicial concern for the interests and well-being of the young girl involved" as to disqualify it as a judicial act. Brief for Respondents 18. Disagreement with the action taken by the judge, however, does not justify depriving that judge of his immunity. Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of "the proper administration of justice... [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, 13 Wall., at 347. The fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit.

Stump, 435 U.S. at 364-365. As previously stated, "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, ***and are alleged to have been done maliciously or corruptly***." Stump v. Sparkman, 435 U.S. 349, 355-356 (1978) (citing Bradley v. Fisher, 80 U.S. 335, 351 (1872)) (emphasis added). Allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial, does not allow for a plaintiff to pierce the doctrine of judicial immunity from suit. Mireles v. Waco, 502 U.S. 9, 11 (1991).

For the reasons set forth above, the Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

II. THE COURT LACKS SUBJECT MATTER JURISDICTION TO CONSIDER ALLEGATIONS OF JUDICIAL MISCONDUCT PURSUANT TO THE ARKANSAS CONSTITUTION.

The *Complaint* further fails because this Court is without subject matter jurisdiction to consider allegations of judicial misconduct pursuant to Amendment 66 to the Arkansas Constitution and Act 637 of 1988 implementing the provisions of Amendment 66 and codifying the Judicial Discipline and Disability Commission's ("JDDC") enabling statutes at Ark. Code Ann. § 16-10-401 *et. seq.* Amendment 66 states in part:

> (b) Discipline, Suspension, Leave, and Removal: The Commission may initiate, and shall receive and investigate, Complaints concerning misconduct of all justices and judges, and requests and suggestions for leave or involuntary disability retirement. Any judge or justice may voluntarily request that the Commission recommend suspension because of pending disciplinary action or leave because of a mental or physical disability. Grounds for sanctions imposed by the Commission or recommendations made by the Commission shall be violations of the professional and ethical standards governing judicial officers, conviction of a felony, or physical or mental disability that prevents the proper performance of judicial duties. Grounds for suspension, leave, or removal from office shall be determined by legislative enactment.
>
> ...
>
> (f) Rules: The Supreme Court shall make procedural rules implementing this amendment and setting the length of terms on the Commission.

Ark. Const. Amendment 66. Pursuant to the enabling statutes, the JDDC is solely charged with initiating or receiving information, conducting investigations and hearings, and making recommendations to the Supreme Court concerning allegations of judicial misconduct. Ark. Code Ann. § 16-10-404(a)(1). As previously stated, Arkansas circuit courts have original jurisdiction of all justiciable matters *not otherwise assigned pursuant to the Arkansas Constitution*. Ark. Code Ann. § 16-13-201(a) (2014) (emphasis added). As stated in Amendment 66 to the Arkansas Constitution, the JDDC and ultimately the Arkansas Supreme Court have jurisdiction for all complaints of judicial misconduct.

The Plaintiffs have already filed a Complaint with the JDDC regarding the same allegations in this matter. (JDDC Case Number 14-151). On August 6, 2014, the JDDC approved an Agreed Sanction which removed Defendant Maggio from the bench. The effect of the sanction by JDDC on August 6, 2014 was to moot Case Number 14-151. As a result, JDDC 14-151 was concluded with "no finding." (p. 20). Aside from Defendant Maggio being immune from suit, the Plaintiffs may only further pursue Defendant Maggio in accordance with Amendment 66 to the Arkansas Constitution and may not further pursue him here in an action for damages.

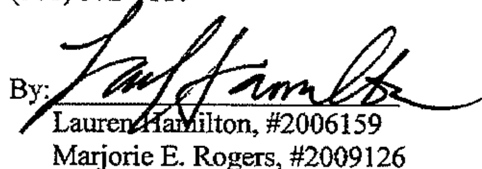
For these reasons stated above, the Complaint against Defendant Maggio should be dismissed with prejudice pursuant to Rule 12(b)(1) and (6) of the Arkansas Rules of Civil Procedure.

WHEREFORE, Separate Defendant Michael Maggio prays that the Complaint be dismissed with prejudice as against him, for attorneys' fees and costs, and for all other relief to which he is entitled.

Respectfully submitted,

MICHAEL MAGGIO

HILBURN, CALHOON, HARPER,
PRUNISKI & CALHOUN, LTD.
Post Office Box 5551
North Little Rock, AR 72119
(501) 372-0110



By: Lauren Hamilton, #2006159
Marjorie E. Rogers, #2009126

CERTIFICATE OF SERVICE

I, Lauren Hamilton, do hereby certify that I have delivered a true and correct copy of the foregoing pleading has been mailed, on this 22nd day of December, 2014, to the following:

Thomas G. Buchanan
Angela S. Cole
217 West Second Street, Ste. 115
Little Rock, AR 72201

R. Brannon Sloan, Jr.
313 West Second Street
Little Rock, AR 72201

Lauren Hamilton

Exhibit 8 to:

Defendant's Sentencing Memorandum and Motion for Downward Departure
United States of America v. Michael A. Maggio
No. 4:15CR-01-1 BSM
18 U.S.C. § 666(a)(1)(B)

This Exhibit is:
Order Dismissing Separate Defendant Michael Maggio
Rosey Perkins et al. v. Greenbrier Nursing Home, et al.
Faulkner County Circuit Court
Case # 23CV-12-125

BOOK 2015 PG 1179

FILED
2015 APR 10 AM 9 03
RHONDA WHARTON, CLERK
BY _____ DC

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
FIFTH DIVISION

ROSEY PERKINS and RHONDA COPPAK
Individually and as Co-Administratrixes
and Personal Representatives of the
Estate of Martha Bull, deceased — **PLAINTIFFS**

VS. **23CV-14-862**

MICHAEL MAGGIO,
Individually and In His Official Capacity;
MICHAEL MORTON; GILBERT BAKER;
and JOHN DOES 1-5 — **DEFENDANTS**

ORDER DISMISSING MICHAEL MAGGIO

On the 27th day of March, 2015, Separate Defendant Michael Maggio's *Motion to Dismiss* pursuant to Rule 12(b)(1) and (6) of the Arkansas Rules of Civil Procedure came on for hearing. The Plaintiffs appeared through counsel, Thomas G. Buchanan and R. Brannon Sloan, Jr. Separate Defendant Maggio appeared through counsel, Lauren Hamilton and Marjorie Rogers, Separate Defendant Baker appeared though counsel, David Donovan, and Separate Defendant Morton appeared through counsel, John C. Everett and Kirkman T. Dougherty. Based on the pleadings, the arguments of counsel, and all other things and matters properly before the Court, the Court finds as follows:

1. Separate Defendant Maggio moves this Court to dismiss the Plaintiffs' Complaint as to him on the basis that he is immune from suit and liability under the common law doctrine of judicial immunity and additionally that this Court lacks subject matter jurisdiction to hear the Plaintiffs' claims against Defendant Maggio.

2. Rule 12 (b)(6) of the Arkansas Rules of Civil Procedure provides for the dismissal of a Complaint for "failure to state facts upon which relief can be granted." Ark. R. Civ. P.

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ROSEY PERKINS ET AL V MICHAE 5 Pages
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CIRCUIT COURT JU30

12(b)(6) (2014). Pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them. Bethel Baptist Church v. Church Mut. Ins. Co., 54 Ark. App. 262, 924 S.W.2d 494 (1996).

3. It is agreed by the Plaintiffs and Defendant Maggio that "Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." Stump v. Sparkman, 435 U.S. 349, 355-356 (1978) (citing Bradley v. Fisher, 80 U.S. 335, 351 (1872)). Both the Plaintiffs and Defendant Maggio agree that there are two exceptions to this general rule.

4. First, a judge will be subject to liability only when he has acted in the "clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 355-356 (1978) (citing Bradley v. Fisher, 80 U.S. 335, 351 (1872)). Whether a defendant judge is immune from suit depends on whether he had jurisdiction over the subject matter before him at the time he took the challenged action. Id. at 356.

5. There is no dispute that Defendant Maggio is a former circuit judge in the 20th Judicial Circuit, Second Division, a member of the judiciary, that Defendant Maggio entered the judgment in favor of the Plaintiffs in the Bull case; and that Defendant Maggio granted a motion for remittitur and entered an Order. (Complaint ¶¶ 11, 23, 31, and 32). Based on a liberal construction of the facts presented in the Plaintiffs' own Complaint, there is no question as a matter of law that Defendant Maggio had jurisdiction to enter orders in the Bull case as the presiding circuit court judge with original jurisdiction over the Plaintiffs' 2012 claims.

6. The second exception to judicial immunity is that a judge is not entitled to immunity for actions which are not "judicial acts". In this context, to determine whether an act by a judge is a "judicial" one, the first factor to consider is "the nature of the act itself, i.e., whether it is a function normally performed by a judge". Stump v. Sparkman, 435 U.S. 349, 360, 361 (1978) *See also* McAlester v. Brown, 469 F. 2d 1280, 1282 (1972)). The second factor to review are "the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." Id. This factor is broadly construed.

7. The Plaintiffs allege that extrajudicial activities of soliciting campaign contributions impacted Defendant Maggio's decision in reducing the jury's award. However, the pivotal event that gave rise to the Plaintiffs' Complaint for money damages was the entry of the Order reducing the damages awarded to the Plaintiffs from $5.2 million to $1 million.

8. Assuming the Plaintiffs' allegations are true for purpose of deciding this pending Motion and even if the remittitur was the fruit of a bribe, the other activities that occurred aside from the entry of the Order did not cause the Plaintiffs to bring this action. The Plaintiffs candidly admit that they probably would not be here if the Order reducing the jury's award had not been entered.

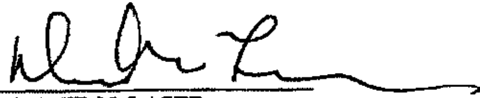
9. The Court finds that the act of entering the *Order on Defendants' Motion for New Trial or Remittitur* is a "judicial" act as defined by the United States Supreme Court.

10. The Court finds that Defendant Maggio had jurisdiction to enter the *Order on Defendants' Motion for New Trial or Remittitur*.

11. The Court hereby dismisses Defendant Maggio without prejudice and grants his Motion to Dismiss Pursuant to Rule 12(b)(6).

12. Because the doctrine of judicial immunity is dispositive of the issues presented, the Court does not address whether the Court has subject matter jurisdiction to hear this matter.

IT IS SO ORDERED.

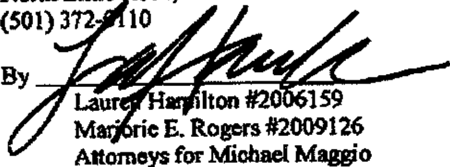


HON. DAVID N. LASER,
SPECIAL JUDGE

4/6/2015
DATED

APPROVED AS TO FORM:

HILBURN, CALHOON, HARPER,
PRUNISKI & CALHOUN, LTD.
P. O. Box 5551
North Little Rock, Arkansas 72119
(501) 372-0110

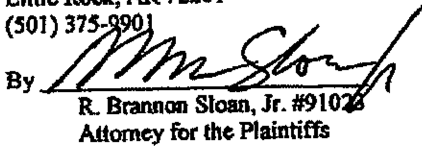


By ______
Lauren Hamilton #2006159
Marjorie E. Rogers #2009126
Attorneys for Michael Maggio

LAW OFFICES OF THOMAS G. BUCHANAN
217 West Second Street, Ste. 115
Little Rock, AR 72201
(501) 296-8920

By ______
Thomas G. Buchanan #2003037
Attorney for the Plaintiffs

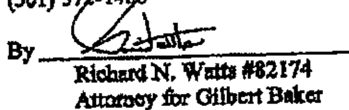
DODDS, KIDD, & RYAN
313 West Second Street
Little Rock, AR 72201
(501) 375-9901



By ______
R. Brannon Sloan, Jr. #91028
Attorney for the Plaintiffs

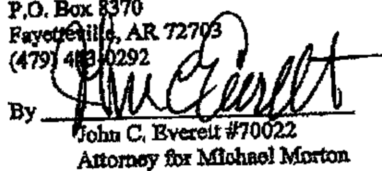
WATTS, DONOVAN & TILLEY, P.A.

200 River Market Avenue, Ste. 200
Little Rock, AR 72201
(501) 372-1406



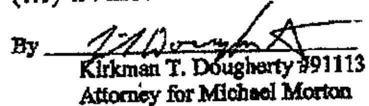
By ______________________
Richard N. Watts #82174
Attorney for Gilbert Baker

EVERETT, WALES & COMSTOCK
P.O. Box 8370
Fayetteville, AR 72703
(479) 443-0292



By ______________________
John C. Everett #70022
Attorney for Michael Morton

HARDIN, JESSON & TERRY, PLC
P.O. Box 10127
Fort Smith AR 72917
(479) 454-2200



By ______________________
Kirkman T. Dougherty #91113
Attorney for Michael Morton

AFFIDAVIT

The State of Arkansas
County of Faulkner

I, Susan McGehee, of Conway, Arkansas, make and hereby state that:

I was employed as a certified court case manager for the 20th Judical District.

At the time of the below statement I was a certified court case manager for the 20th Judicial District.

That on or about September 2013 that Attorney Brian Brooks, who was the Appealate attorney for the Estate of Martha Bull, CV 12-125, and was present during the jury trial, did state in my presence, as well as others, that:

On the date of the jury verdict , May 17 2013, in the Martha Bull case he told the other plaintiff lawyers that "the jury award would be remitted and the amount would be 1million dollars. "
I also remember other statements regarding the proper monetary amount was ordered by the Judge.
He also stated "that Judge Maggio was proper and fair in all rulings and management of the trial" and that he looked forward to the next time he was in his court. That there was no reason to appeal the decision of remittitur.

SUBSCRIBED AND SWORN TO BEFORE ME, on this date 21st of March 2016.

____
Notary Public

My commission expires:__________________________

AFFIDAVIT

The State of Arkansas
County of Faulkner

I, Art Noel, of Conway, Arkansas, make and hereby state that:

I was and currently am employed as a certified court security officer for Faulkner County Sheriff Office.

At the time of the below statement I was a certified court security officer for Faulkner County Sheriff Office.

That on or about September 2013 that Attorney Brian Brooks, who was the Appealate attorney for the Estate of Martha Bull, CV 12-125, and was present during the jury trial, did state in my presence, as well as others, that:

On the date of the jury verdict , May 17 2013, in the Martha Bull case he told the other plaintiff lawyers that "the jury award would be remitted and the amount would be 1million dollars. "
I also remember other statements regarding the proper monetary amount was ordered by the Judge.
He also stated "that Judge Maggio was proper and fair in his handling of the trial."
That there was no reason to appeal.

SUBSCRIBED AND SWORN TO BEFORE ME, on this date 17th of March 2016.

____
Notary Public

My commission expires:__________________________