UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

KELVIN WELLS

CIVIL ACTION

VERSUS

No. 03-58-D-M3

DOUG WELLBORN, CLERK OF COURT 19TH JDC, ET AL

RULING ON MOTION FOR SUMMARY JUDGMENT

Pending before the court are cross-motions for summary judgment filed by Kelvin Wells ("Plaintiff") (doc. 43) and Doug Welborn, Clerk of Court of East Baton Rouge Parish and his employees, Tracy Viola and Debra Bell ("Defendants") (doc. 38). Plaintiff seeks to recover for damages incurred when Defendants allegedly deprived him of his equal protection and due process right to access the courts and discriminated against him because of his race. Plaintiff's claims are being brought under 42 U.S.C. § 1983; therefore, jurisdiction is proper under 28 U.S.C. § 1331. In regard to Plaintiff's claims arising under the Louisiana Constitution, the court declines to exercise supplemental jurisdiction . There is no need for oral argument. For the reasons provided below, Defendants' motion for summary judgment is granted and Plaintiff's motion for summary judgment is denied.

BACKGROUND

Plaintiff's claims arise from two cases brought in the Baton Rouge Family

Court.

I. Wells v. Wells; The Family Court

On July 17, 1998 Kelvin Wells filed a Petition for Divorce from Cecille Wells, with whom he had two minor children.[1] Two years later Mr. Wells filed a Motion on that suit to Proceed In Forma Pauperis, which was granted by the Family Court judge.[2] With pauper status, Mr. Wells filed a Motion and Order to Finalize Divorce and Establish Custody, in which he requested joint custody of his two children.[3] Mr. Wells also asked for visitation with his children every other weekend, alternating on major holidays, and the entire summer.[4]

On August 23, 2000, a Judgment of Divorce was rendered. Mr. Wells was granted joint custody of the minor children with visitation as he had requested. Mr. Wells and Cecille Wells were cast for court costs in the divorce proceeding.[5] Subsequently, Mr. Wells filed a Motion to Modify Support, in which he claimed the income assessment previously provided to the court was incorrect because he was involuntarily unemployed due to work related injuries. In addition, Mr. Wells represented that he had two other minor children in his care who were not included

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[1] Defendants' Statement of undisputed facts , Exhibit A.1.

[2] Id., Exhibit A.9.

[3] Id., Exhibit A.10.

[4] Id.

[5] Id., Exhibit A.11.

in the income assessment. A hearing on the matter was set for December 5, 2000.[6] On the date of his child support modification hearing, Mr. Wells faxed a request to the Clerk of Court's office for service of a subpoena on a witness to testify at the hearing.[7] The Clerk of Court's office notified Mr. Wells that no further action would be taken on the pleadings until the $133.70 assessed to Mr. Wells in the August 23 Judgment of Divorce was received. It is unclear to this court whether that hearing ever took place.

Seven months later, on July 3, 2001, Mr. Wells filed a motion to hold Cecille Wells in contempt because he claimed that Cecille Wells had denied him any summer visitation with their children and that the children had been relocated without permission of the court. On the same day, the Clerk of Court's office notified Mr. Wells that $198.77 was now owed for filing the motion and that no action would be taken until receipt of the amount due.

On December 11, 2002 Mr. Wells faxed a Motion to Proceed In Forma Pauperis. His pauper motion was accompanied by several other motions including the motion in which he claimed Cecille Wells had denied him his visitation rights. The Clerk of Court's office did not process Mr. Wells' pleadings and asserted that the fees must be forwarded to the Clerk of Court's office before further processing would occur. A few days later, on December 18, 2002, Mr. Wells attempted again

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[6] Id., Exhibit A.12.

[7] Id., Exhibit A.13.

to file a Motion to Proceed in Forma Pauperis and the motion regarding his visitation rights with his children. Again, the Clerk of Court's office returned the pleadings to Mr. Wells without processing them because he had not paid the amount due from the Judgment of Divorce.

Over a year later, on January 14, 2003, Mr. Wells inquired as to the status on the motions he previously filed. The Clerk of Court's office responded by faxing Mr. Wells an invoice stating "that nothing will be filed in this case until outstanding costs are paid."[8] Mr. Wells attempted to file a "Motion for Appeal to the First Circuit Court of Appeals, Assignment of Errors, and Request for Return Date," along with a "Motion for Expedited Stay Order" on January 16, 2003. The Clerk of Court's office did not process these motions and again notified Mr. Wells that nothing would be processed until he paid the $197.71 that was due. When Mr. Wells inquired about whether his appeal had been processed, the Clerk of Court's office mailed him a letter which again stated that his pleadings would not be processed until the Clerk of Court's office received his outstanding costs.[9] Mr. Wells' pleadings were finally processed on February 4, 2003 when he paid the money due.[10]

II. Wells v. Banks; The Family Court

On March 15, 2000 Mr. Wells was granted pauper status to file a petition to

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[8] Id., Exhibit A.31.

[9] Id., Exhibit A. 36.

[10] Id., Exhibit A. 38.

establish sole custody of the children he had with Geneva Banks. A few days later Geneva Banks filed a Petition for Domestic Abuse Protection against Mr. Wells in which she alleged that Mr. Wells had physically abused her. The next day Mr. Wells filed a Petition for Domestic Abuse Protection on behalf of his children. Mr. Wells alleged that Geneva Banks had physically abused their infant son by aggressively shaking him. Mr. Wells was allowed to proceed in forma pauperis on this matter. Mr. Wells signed an agreement that he could not dismiss the matter after it began without paying court costs which was made part of the protection order. Mr. Wells dismissed the matter and was assessed with costs as a result. Apparently, once Mr. Wells was assessed with costs, he lost his pauper status. Mr. Wells then signed an agreement with the Clerk of Court's office to pay $50 per month toward his debt, but he did not honor the agreement. When Mr. Wells attempted to file more pleadings, the Clerk of Court's office refused to process them until he paid the money he owed.[11]

After Mr. Wells made some $50 payments he filed another request to proceed as a pauper on January 14, 2001, which was granted by the court on January 25, 2001.[12] On April 18, 2001 Mr. Wells filed another abuse prevention order against Ms. Banks. Again he dismissed it, causing him to be cast with courts costs.[13] Mr.

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[11] Defendants' Mem. in Supp. of Mot. for Summary Judgment, 3; Exhibit B.6.

[12] Defendants' Mem. in Supp. of Mot. for Summary Judgment, 3.

[13] Defendants' Mem. in Supp. of Mot. for Summary Judgment, 3; Exhibit B. 38, B.39.

Wells thereafter filed a series of pleadings in district and appellate court seeking pauper status, which was never again granted.[14] After his motions were denied, Mr. Wells filed writs to the Louisiana First Circuit Court of Appeal and the Supreme Court of Louisiana in which he alleged the lower courts and the Clerk of Court had violated his rights under the law. Mr. Wells also brought suits against the Judges of the Family Court and the Clerk of Court and his employees.[15] On January 24, 2003, Mr. Wells filed a complaint with this court alleging that the actions of the Clerk of Court and his employees deprived him of his right to access the courts in violation of the Due Process and Equal Protection clauses of the United States Constitution.[16] Mr. Wells is appearing before the Court pro se.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter

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[14] Defendants' Statement of Facts, 68,71,72,76,80,87; Exhibit B.40, B.43, B.44, B.48, B.53, B.61.

[15] Defendants' Statement of Facts, 81; Exhibit B.54.

[16] Additionally, Mr. Wells alleges that he was denied access to the courts because of his race. However, Mr. Wells has failed to put any evidence whatsoever that he was discriminated against because of his race. In fact, the evidence put forth shows that it was the policy of the Clerk of Court that once a litigant who has been allowed to proceed without the payment of costs is cast in judgment, he becomes immediately responsible for whatever he was cast with. Mr. Wells cannot show he was treated differently from persons outside of his protected class. Therefore, summary judgment is granted with respect to Plaintiffs's race claim.

of law.[17] When the burden at trial rests on the non-moving party the moving party need only demonstrate that the record lacks sufficient evidentiary support for the non-moving party's case.[18] The moving party may do this by showing that the evidence is insufficient to prove the existence of one or more elements essential to the non-moving party's case.[19]

Although this Court considers the evidence in the light most favorable to the non-moving party, the non-moving party may not merely rest on allegations set forth in the pleadings. Instead, the non-moving party must show that there is a genuine issue for trial.[20] Conclusory allegations and unsubstantiated assertions will not satisfy the non-moving party's burden.[21] If, once the non-moving party has been given the opportunity to raise a genuine factual issue, no reasonable juror could find for the non-moving party, summary judgment will be granted for the moving party.[22]

SUMMARY OF ARGUMENTS AND APPLICABLE LAW

I. §1983 Claims Against State Officials in Their Official Capacities

With respect to Plaintiff's constitutional claims, which presumably are brought pursuant to 42 U.S.C. §1983, Defendants argue they are immune from damage

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[17] Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

[18] Id.

[19] Id.

[20] Anderson v. Liberty Lobby, 477 U.S. 242, 248-49 (1986).

[21] Grimes v. Tex. Dep't of Mental Health, 102 F.3d 137, 139-40 (5th Cir. 1996).

[22] Celotex, 477 U.S. at 322; see also FED. RULE CIV. P. 56(c).

liability. In 1989 the Supreme Court held that neither a state, nor its officials acting in their official capacities, are "persons" within the meaning of 42 U.S.C. § 1983.[23] Therefore, this court finds that each of the named defendants in his or her official capacity are entitled to judgment as a matter of law for claims arising under § 1983.

II. §1983 Claims Against State Officials In Their Individual Capacities

Plaintiff's claims against the named defendants in their individual capacities remain. Defendants argue that in general court clerks and their employees may obtain absolute immunity from suit under §1983 when acting under command of court decrees or explicit instructions of a judge.[24] The Fifth Circuit has found that court clerks are entitled to absolute immunity when they are "[p]erforming a ministerial function at the direction of the judge."[25] Although the Family Court judge cast Plaintiff with costs, the judge did not direct Defendants to refuse to take further action on Plaintiff's pleadings until Plaintiff paid the money owed. Rather, Defendants used discretion in returning Plaintiff's pleadings without processing them. Louisiana Revised Statutes 13:842(A) provides that "[T]he clerk *may* refuse to perform any further function in the proceedings until the additional costs for the function have been paid in accordance with the fees set forth."[26] Since Defendants'

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[23] Will v. Michigan Dept.of State Police, 491 U.S. 58, 71 (1989).

[24] Defendants' Mem. in Supp. of Mot. for Summary Judgment, 13.

[25] Williams v. Wood, 612 F.2d 982, 985 (5th. Cir. 2003).

[26] La. Rev. Stat. Ann.§ 13:842(A) (West 1996) (emphasis added).

actions were neither ministerial nor at the direction of the judge, they are not entitled to absolute immunity from damages.[27]

Claims against individual public officials under § 1983, however, are subject to the defense of qualified immunity.[28] Public officials are entitled to qualified immunity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[29] The Supreme Court has made clear that the initial inquiry in a qualified immunity analysis is whether the conduct alleged by the plaintiff, if proved, would constitute a violation of his constitutional rights.[30]

A. Access to Courts Violation

In regard to Plaintiff's access to the courts claim, the issue that must be resolved is whether state officials, consistent with the obligations imposed on them by the Due Process and Equal Protection clauses of the Fourteenth Amendment, may require an indigent to pay a filing fee before allowing the individual to access state courts in child-custody matters. Both the Supreme Court and the Fifth Circuit have recognized access to the courts as being one of the fundamental rights under

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[27] See Williams, 612 F.2d at 985.

[28] Foley v. University of Houston System, 355 F.3d 333, 338 (5th Cir. 2003) (citing Todd v. Hawk, 72 F.3d 443, 445 (5th Cir. 1995) and Wicks v. Mississippi State Employment Services, 41 F.3d 991, 996 (5th Cir. 1995)).

[29] Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[30] Saucier v. Katz, 533 U.S. 194, 201 (2001).

the Constitution.[31] The right of access to the courts is protected by the Due Process clause of the Fourteenth Amendment.[32] Under some circumstances, the Supreme Court has found that the Due Process clause has required states to afford civil litigants a "meaningful opportunity to be heard" by removing obstacles to litigants' full participation in judicial proceedings.[33] An analysis of the applicable law is necessary in order to determine whether the instant case is one of those circumstances.

In Griffin v. Illinois, the Supreme Court established a doctrine regarding indigents' right to access the courts.[34] The Court held that denying the poor a transcript needed to appeal a felony conviction denied due process and equal protection.[35] In Griffin, the petitioners were tried together and convicted of armed robbery.[36] After their convictions, the petitioners filed a motion asking that they be furnished with a transcript of the proceedings without cost. They alleged they were "[p]oor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal."[37] Writing for the Court, Justice Black made clear that, "In criminal trials, a State can no more discriminate on

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[31] Ryland v. Shapiro, 708 F.2d 967, 971-72 (5th1983).

[32] Tennessee v. Lane, 124 S.Ct. 1978, 1988 (2004).

[33] Id. at 1988 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

[34] See 351 U.S. 12 (1956).

[35] Griffin, 351 U.S. at 14-17.

[36] Id. at 13.

[37] Griffin, 351 U.S. at 13.

account of poverty than on account of religion, race, or color."[38] The Court invoked both equal protection and due process, stating that, "Our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discrimination between persons and different groups of persons."[39] The Griffin Court emphasized the importance of "[a]ffording equal justice to all and special privileges to none in the administration of criminal law."[40] The Court did not acknowledge a fundamental right under the Constitution to appeal a conviction; however, "[o]nce a State affords that right, the State may not bolt the door to equal justice."[41]

The Supreme Court extended Griffin's holding to cover appeals in non-felony cases in Mayer v. City of Chicago, demonstrating that Griffin was not limited to cases in which a defendant faced incarceration.[42] At issue in Mayer was a court rule interpreted by the Illinois Supreme Court as only allowing defendants in felony convictions to petition the court for a transcript of proceedings without costs.[43] The Court clarified the Griffin principle: "Griffin does not represent a balance between

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[38] Id. at 17.

[39] Id.

[40] Griffin, 351 U.S. at 19.

[41] M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996) (quoting Griffin v. Illinois, 351 U.S. at 24 (1956) (Frankfurter, J., concurring)).

[42] Mayer, 404 U.S. 189, 197 (1971).

[43] See id. at 191.

the needs of the accused and the interests of society, its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way...."[44]

Another case helpful to the analysis is Boddie v. Connecticut, in which the Supreme Court held that Fourteenth Amendment due process prevents the state from conditioning a divorce on a party's ability to pay a filing fee.[45] In Boddie, several welfare recipients attempted to file divorce actions, but the Clerk of Court returned their papers on the ground that they could not be processed until a $60 filing fee was paid. In its reasoning, the Court focused on the importance of the marriage relationship and the fact that the state civil court process was the only means by which parties could obtain a divorce.[46] Although the majority tied its analysis to fundamental rights, Justice Douglas viewed the filing fee requirement as a pure denial of equal protection. He wrote, "An invidious discrimination based on poverty is adequate for this case." [47] Justice Brennan's concurring opinion, on the other hand, made clear his belief that the filing fee requirement implicated both the Due Process and Equal Protection clauses.[48]

The Supreme Court has not extended Boddie to interests that do not rise "[t]o

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[44] Id. at 197-98.

[45] 401 U.S. 371, 383 (1971).

[46] See Boddie, 401 U.S. at 375.

[47] Id. at 386 (Douglas, J., concurring).

[48] See id. at 388-89 (Brennan, J., concurring).

the same constitutional level [as] [t]he marital relationship [and] [t]he associational interests that surround the establishment and dissolution of that relationship."[49] In United States v. Kras, the Supreme Court held that requiring an indigent to pay a fee in order to obtain a discharge in bankruptcy did not violate due process or equal protection.[50] In concluding that Boddie was not controlling, the Court distinguished bankruptcy, which it stated was "in the area of economics and social welfare," from fundamental rights such as marriage and its concomitant associational interests.[51] The opinion also emphasized the existence of alternatives to the judicial remedy of bankruptcy, such as negotiating with creditors.[52] The Court again declined to extend Boddie in Ortwein v. Schwab, in which it held that the requirement that indigents seeking appeal of adverse welfare decisions pay a fee did not violate equal protection or due process.[53] In Ortwein, the Court reiterated that the applicable standard when evaluating regulation in the area of economics and social welfare was rational justification.[54]

The most recent Supreme Court based on the principles established in Griffin

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[49] United States v. Kras, 409 U.S. 434, 444 (1973).

[50] Id. at 446.

[51] Id.

[52] Id.

[53] See Ortwein, 410 U.S. 656, 661 (1973).

[54] Id. at 660.

was M.L.B. v. S.L.J.[55] In M.L.B., a divorced mother of two sought to appeal a Mississippi court decision terminating her parental rights.[56] The mother's appeal was dismissed because of her inability to pay the required record preparation fees of $2,352.36.[57] The Court found that Mississippi violated the Equal Protection and Due Process clauses of the Fourteenth Amendment by withholding a record necessary to permit appellate consideration of the mother's claims.[58] The Court explained that a precise rationale had not been composed for resolving the Court's Griffin-line of cases but that "most decisions in this area" rested on an "equal protection framework."[59] The Court made clear that Griffin did not extend to all civil cases and was limited to those "involving state controls or intrusions on family relationships."[60] The Court stated, "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect. "[61]

Defendants offer nothing to undermine the doctrinal force of these cases.

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[55] See M.L.B. v. S.L.J., 519 U.S. 102, 116-28 (1996).

[56] Id. at 107.

[57] Id.

[58] See M.L.B., at 127-28.

[59] Id. at 120 (quoting Bearden v. Georgia, 461 U.S. 660, 666 (1983)).

[60] Id. at 116.

[61] Id.

Defendants rely on several Louisiana Court of Appeal cases to support their contention that "An indigent may be cast with costs in the event he is unsuccessful in prosecuting his demand."[62] They further address Mr. Wells' access to courts claim by citing more Louisiana cases that have interpreted Louisiana statutes not to "[g]rant an indigent an indefinite period of time to litigate without payment of costs."[63] Mr. Wells' access to courts claim is based on the United States Constitution. Therefore, neither Louisiana statutes nor Louisiana cases interpreting them are dispositive of Mr. Wells' claim.

As evidence that Mr. Wells "received substantial due process," Defendants offer the fact that Mr. Wells had "[s]ubstantial state remedies that were afforded to him and of which he took advantage."[64] Additionally, Defendants maintain that Plaintiff's claim is not actionable under §1983 unless there was no adequate post-deprivation remedy available under state law.[65] The law cited by Defendants is applicable to procedural due process claims. However, Plaintiff's claim is based on substantive due process. Lack of an adequate state remedy is not a requirement in a §1983 claim based on denial of substantive due process.[66] Consequently, it is not

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[62] See Defendants' Mem. in Supp. of Mot. for Summary Judgment, 8 (relying on Crowe v. Howard, 372 So. 2d 1057 (La. Ct. App. 1978)).

[63] See Defendants' Mem. in Supp. of Mot. for Summary Judgment, 7 (relying on LeDuff v. Prudential Ins. Co. of America, 345 So. 2d 72 (La. Ct. App. 1976)).

[64] See Defendants' Mem. in Supp. of Mot. for Summary Judgment, 9-10.

[65] See id., 10.

[66] See Monroe v. Pape, 365 U.S. 167 (1961).

necessary that Plaintiff establish that the state failed to provide a remedy. The Parrat v. Taylor elements cited by Defendants are not applicable for the same reason.[67]

By refusing to process Plaintiff's request to proceed in forma pauperis on a motion to hold his ex-wife in contempt for allegedly moving their children and denying him visitation, Defendants denied Plaintiff access to the courts in matters involving "family life and the upbringing of children."[68] Plaintiff was denied this access simply because he lacked the ability to pay the costs assessed to him. Based on the principles established in Griffin, Boddie and M.L.B., when a party files a Motion to Proceed In Forma Pauperis in a family court matter, it is constitutionally impermissible for the Clerk of Court to refuse to process the motion. Therefore, Defendants' actions on the 11th and 18th of December 2002, if proved, denied Plaintiff access to the courts in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

B. Was the Constitutional Right Clearly Established?

The determination that the Equal Protection and Due Process clauses have been violated does not end the qualified immunity analysis. The second question is whether "[t]he contours of the constitutional right in question were sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that

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[67] See Defendants' Mem. in Supp. of Mot. for Summary Judgment, 10, (citing Parrat v. Taylor, 451 U.S. 527, 535 (1981)).

[68] See M.L.B., at 116.

right."[69] It is unnecessary that the very action in question has been previously held unlawful; however, the unlawfulness of the action must be apparent in light of pre-existing law.[70] At the time of Defendants' actions, it was clearly established that due process and equal protection guarantees prevented states from conditioning a divorce on a party's ability to pay a filing fee.[71] It was also clearly established that requiring indigents to pay a fee in order to access the court in parental termination proceedings violated the Constitution.[72] In M.L.B., the Court clearly established that indigents cannot be required to pay a fee in cases "involving state controls or intrusions on family relationships."[73] However, no Supreme Court case has held that the Constitution prevents a state from conditioning access to its courts on the ability to pay a fee in all family court matters. Consequently, whether the right in the instant case was clearly established depends on the degree of specificity required in defining the right.

In Wilson v. Layne, the Supreme Court found that police officers violated the Fourth Amendment when they brought members of the media into a private home while executing a search warrant.[74] The plaintiffs in Wilson maintained that the

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[69] Anderson v. Creighton, 483 U.S. 635, 638-40 (1987).

[70] Pierce v. Smith, 117 F.2d 866, 890 (5th Cir.1997).

[71] See Boddie, 401 U.S. at 379.

[72] See M.L.B., at 127-28.

[73] Id. at 116.

[74] 526 U.S. 603, 614 (1999).

police officers did not have qualified immunity because the officers violated a clearly established right.[75] The Wilson plaintiffs urged that the right was clearly established because it was clearly established that the Fourth Amendment applied to police officers.[76] The Supreme Court held that it was not clearly established that bringing members of the media into private homes violated the Fourth Amendment. In its reasoning, the Court explained that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."[77] The Court focused on the fact that "the constitutional question presented by [the] case was by no means open and shut."[78] The Court relied on the fact that at the time of the police officers' actions, "there were no judicial opinions holding that this practice [was] unlawful." [79] The Court also pointed out that the police officers' conduct was consistent with the policy of the United States marshals and that the officers relied on this policy in bringing the media into private homes.[80] The Court made clear that if judges "disagree on a constitutional question, it is unfair to subject the police to money damages for picking the losing side of the

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[75] Id. at 615-616.

[76] Id.

[77] Id. at 615.

[78] Id. at 615.

[79] Id. at 616.

[80] Id. at 617.

controversy."[81]

In Pierce v. Smith, the Fifth Circuit adopted the Eleventh Circuit's view that "[F]or qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances.*" [82] Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[83]

In the instant case, the Supreme Court has made it clear that indigents' right to access the courts without payment is not required by the Fourteenth Amendment in all civil proceedings.[84] Defendants' actions have been condoned by both the Louisiana legislature and Louisiana courts.[85] There have been no Supreme Court cases specifically addressing the conduct at issue. Thus, applying Wilson and Pierce

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[81] Id. at 618.

[82] 117 F.3d at 882 (quoting Lassiter v. Alabama A & M University, 28 F.3d 1146, 1150 (11th Cir. 1994) (emphasis added)). In Pierce, the Fifth Circuit included an example of when the right is sufficiently clear, which provides: Where the complained of conduct is a law enforcement warrantless search of a residence, qualified immunity turns not only on whether it was then clearly established that such a search required probable cause and exigent circumstances. But also on whether it was then clearly established that the circumstances with which the officer was confronted did not constitute probable cause and exigent circumstances.117 F.3d at 871.

[83] See Anderson, 438 U.S. at 638 (quoting Malley v. Briggs, 475 U.S. 335, 344-345 (1986)).

[84] See M.L.B., at 116.

[85] See LeDuff v. Prudential Ins. Co. of America, 345 So.2d 72, 73 (1976); La. Code Civ. Proc. Ann. art. 5181 (West 2003).

to the instant case, this court cannot find that Defendants should have known their conduct violated Plaintiff's constitutional rights. Therefore, this court finds that each of the named defendants in his or her individual capacity is entitled to judgment as a matter of law for Plaintiff's claims arising under § 1983. Plaintiff's claims arising under the Louisiana Constitution are dismissed without prejudice. Defendants' request that Plaintiff be cast with the costs of this proceeding is denied.

CONCLUSION

Accordingly, IT IS ORDERED that Defendants' motion for summary judgment (doc. 38) is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment (doc. 43) is **DENIED**.

Baton Rouge, Louisiana, October 29, 2004.

s/ James J. Brady
JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA