

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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EVAN ZIMMERMAN,

Plaintiff,

MEMORANDUM AND ORDER

v.

06-C-085-S

CITY OF EAU CLAIRE, ERIC LARSEN,  
DONN ADAMS, GARY FOSTER and  
TODD TRAPP,

Defendants.

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On February 13, 2006 plaintiff Evan Zimmerman commenced this civil rights action against defendants City of Eau Claire, Eric Larsen, Donn Adams and Gary Foster seeking both compensatory and punitive damages. On May 15, 2006 plaintiff amended his complaint by naming Todd Trapp as an additional defendant. Plaintiff alleges defendants are liable under 42 U.S.C. § 1983 for violations of his constitutional rights. Additionally, plaintiff alleges defendants are liable under state law for malicious prosecution, civil conspiracy, intentional infliction of emotional distress, and false arrest/false imprisonment. Jurisdiction is based on 28 U.S.C. § 1331 and 28 U.S.C. § 1367. The matter is presently before the Court on plaintiff's motion to reconsider the Court's July 19, 2006 order declining to exercise supplemental jurisdiction over plaintiff's legal malpractice claim against his former attorney Mr. William Schembera. The following facts relevant to plaintiff's motion are undisputed.

## BACKGROUND

On February 13, 2006 plaintiff Evan Zimmerman filed his original complaint in this action against defendants City of Eau Claire, Eric Larsen, Donn Adams and Gary Foster. Plaintiff commenced this action under 42 U.S.C. § 1983 to redress alleged violations of his constitutional rights. Specifically plaintiff alleged that defendants "engaged in a conspiracy to frame [him] ... for a heinous murder with which he had absolutely no involvement," by: (1) coaching testimony from a witness named Mr. Brice Rene, (2) fabricating the statement of a witness named Ms. Maureen Horne, (3) planting dog hair evidence on the victim's clothing; and (4) manufacturing false police reports.

On May 15, 2006 plaintiff amended his complaint by naming Todd Trapp and Mr. Schembera as additional defendants. Defendant Trapp is a former City of Eau Claire police officer and Mr. Schembera served as plaintiff's defense counsel during his first criminal trial. While plaintiff's civil rights claims under both state law and 42 U.S.C. § 1983 remained, his amended complaint added a state law legal malpractice claim against Mr. Schembera. Specifically, plaintiff alleged that Mr. Schembera breached his fiduciary duty by failing to exercise the "degree of care, skill and judgment ... usually exercised under like or similar circumstances by lawyers licensed to practice" law in the State of Wisconsin.

On July 12, 2006 Mr. Schembera filed a motion requesting that

the Court decline to exercise supplemental jurisdiction over plaintiff's legal malpractice claim. Mr. Schembera argued that said claim was not part of the same case or controversy as plaintiff's underlying civil rights claims against the state-actor defendants. On July 19, 2006 the Court granted Mr. Schembera's motion and dismissed him as a party defendant. On July 26, 2006 plaintiff filed his motion to reconsider.

#### MEMORANDUM

Plaintiff asserts his legal malpractice claim against Mr. Schembera comprises the same case or controversy as his civil rights claims against the police officer defendants<sup>1</sup> because he will introduce identical physical evidence to prove both claims. Additionally, plaintiff asserts the same witnesses will testify concerning both his civil rights claims and his legal malpractice claim. Accordingly, plaintiff argues supplemental jurisdiction exists because all his claims derive from a common nucleus of operative fact. Further, plaintiff argues the Court must exercise supplemental jurisdiction because none of the exceptions enumerated in 28 U.S.C. § 1367(c) are present in this action.

Mr. Schembera asserts plaintiff's state law legal malpractice claim is not so related to his civil rights claims that they form

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<sup>1</sup> For the sake of clarity, defendants City of Eau Claire, Eric Larsen, Donn Adams, Gary Foster and Todd Trapp will be collectively referred to as the police officer defendants throughout this memorandum and order.

part of the same case or controversy because his claims against the police officer defendants allege a conspiracy to prosecute him for murder while his legal malpractice claim is entirely void of such an allegation. Accordingly, Mr. Schembera argues the Court cannot exercise supplemental jurisdiction over plaintiff's legal malpractice claim. Additionally, Mr. Schembera argues should supplemental jurisdiction exists, the Court should decline to exercise such jurisdiction because exceptional circumstances are present and plaintiff's claim raises a complex issue of state law.

Under the circumstances of this action the Court's jurisdiction over plaintiff's legal malpractice claim against Mr. Schembera cannot be predicated on the presence of a federal question because such a claim concerns a purely state law issue. See 28 U.S.C. § 1331. Additionally, the Court's jurisdiction cannot be rooted in diversity because plaintiff and Mr. Schembera are both citizens of the State of Wisconsin. See 28 U.S.C. § 1332. Accordingly, the Court lacks jurisdiction over plaintiff's legal malpractice claim unless said claim is within the Court's supplemental jurisdiction.

A district court's supplemental jurisdiction is governed by 28 U.S.C. § 1367 which states in relevant part as follows:

...in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution....

28 U.S.C. § 1367(a). Section 1367 confers supplemental jurisdiction to the limits permitted by Article III of the United States Constitution authorizing federal courts to hear all claims that "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." Ammerman v. Sween, 54 F.3d 423, 424 (7<sup>th</sup> Cir. 1995) (quoting 28 U.S.C. § 1367(a)). Accordingly, judicial power to hear both state and federal claims exists where such claims derive from a common nucleus of operative facts. See Myers v. County of Lake, Ind., 30 F.3d 847, 850 (7<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 1058, 115 S.Ct. 666, 130 L.Ed.2d 600 (1994).

A common nucleus of operative fact will generally exist if "considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). Additionally, a plaintiff's state and federal law claims need not be identical as a loose factual connection between such claims is generally sufficient. Ammerman, at 424 (citing 13B Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 3567.1, at 117 (2d ed. 1984)). However, claims that are simply tangentially related cannot be considered part of the same case or controversy when in reality such claims truly are separate and distinct. See Chaney v. City of Chicago,

901 F.Supp 266, 270 (N.D.Ill. 1995). Plaintiff's legal malpractice claim is separate and distinct from his civil rights claims. Accordingly, the Court cannot exercise supplemental jurisdiction over plaintiff's legal malpractice claim against Mr. Schembera.

According to allegations contained within plaintiff's amended complaint the police officer defendants engaged in numerous acts of misconduct. First, plaintiff alleges defendant Adams improperly coached a witness named Mr. Brice Rene to recall that he observed a woman (fitting the exact description of the victim) in plaintiff's van at the time of the murder. Additionally, plaintiff alleges the police officer defendants fabricated the statement of a witness named Ms. Maureen Horne. Further, plaintiff alleges the police officer defendants manufactured false police reports by stating that plaintiff lied about his alibi. Finally, plaintiff alleges defendant Larsen planted dog hair evidence on the victim's clothing after his conviction was reversed on appeal.

However, plaintiff does not allege that Mr. Schembera engaged in any similar acts of misconduct. Additionally, all of plaintiff's civil rights claims concern intentional acts allegedly committed by the police officer defendants while his legal malpractice claim against Mr. Schembera is entirely void of any allegation of intentional conduct. Accordingly, plaintiff's claims truly are separate and distinct. See Id.

Additionally, plaintiff alleges the police officer defendants were involved in a conspiracy to frame him for murder. However, plaintiff does not allege that Mr. Schembera was involved in any such conspiracy. Rather, plaintiff only alleges that Mr. Schembera breached his fiduciary duty by failing to exercise the degree of "care, skill, and judgment which is usually exercised under like or similar circumstances by lawyers licensed to practice" law in the State of Wisconsin. Accordingly, the facts underlying plaintiff's civil rights claims are distinct from those underlying his legal malpractice claim. As such, plaintiff would not ordinarily be expected to try his civil rights claims and his legal malpractice claim in one judicial proceeding. United Mine Workers of Am., at 725, 86 S.Ct. at 1138. Accordingly, plaintiff's civil rights claims and his legal malpractice claim do not derive from a common nucleus of operative fact. See Myers, at 850.

While plaintiff's civil rights claims and his legal malpractice claim are certainly tangentially related such claims truly are separate and distinct. See Chaney, at 270. Additionally, plaintiff's civil rights claims and his legal malpractice claim do not derive from a common nucleus of operative fact. See Myers, at 850. Accordingly, the Court cannot exercise

supplemental jurisdiction over plaintiff's legal malpractice claim against Mr. Schembera and his motion to reconsider is denied.<sup>2</sup>

ORDER

IT IS ORDERED that plaintiff Evan Zimmerman's motion to reconsider the Court's July 19, 2006 order declining to exercise supplemental jurisdiction over his legal malpractice claim against Mr. William Schembera is DENIED.

Entered this 29<sup>th</sup> day of August, 2006.

BY THE COURT:

/s/

JOHN C. SHABAZ

District Judge

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<sup>2</sup> Even if supplemental jurisdiction existed under 28 U.S.C. § 1367(a) the Court would decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(4) because compelling reasons exist for declining jurisdiction. For example, the final pre-trial conference in this action is scheduled for October 4, 2006 and trial is scheduled for November 6, 2006. Accordingly, Mr. Schembera would have only two months to prepare for trial which would substantially prejudice his ability to prepare a meaningful defense to plaintiff's legal malpractice claim.