DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202 720-865-8301 **Plaintiff(s):** WARD CHURCHILL **Defendant(s):** UNIVERSITY OF COLORADO and BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate Patrick T. O'Rourke #26195 Special Assistant Attorney General Office of University Counsel 1800 Grant Street, Suite 700 Denver, Colorado 80203 303-860-5691 303-860-5650 – fax Patrick.orourke@cu.edu	Case Number: 06 CV 11473

UNIVERSITY'S RESPONSE TO MOTION TO AMEND JUDGMENT

The University of Colorado and the Board of Regents of the University of Colorado respectfully submit their brief opposing Professor Churchill's Motion to Amend Judgment.

Introduction

In his Motion to Amend, Professor Churchill provides no new or compelling arguments demonstrating that the Court's ruling was improper, choosing instead to repackage the same arguments the Court already rejected. The Motion to Amend amounts to little more than a publicity stunt where Professor Churchill claims that the Court's Order somehow amounts to a "crucifixion" and that "this country is less free as a result of this Court's holding." Stripped of its exaggerations and insults designed to provoke the Court toward an emotional response, the Motion to Amend is an empty pleading.

Standard of Review

Although couched as a Motion to Amend, Professor Churchill does not identify any specific errors in the form of the judgment and essentially asks the Court to reconsider its decisions. Post-trial motions under Rule 59 are "not to be regarded as a routine or perfunctory matter" and instead are designed to afford the trial court with "an intelligent last look" at the controversy before it. *Hamilton v. Gravinsky*, 474 P.2d 185, 188 (Colo. App. 1970). What is clear, however, is that a post-trial motion is not proper where a litigant merely complains about the decision rendered against him.

> The Court has before it plaintiff's post-judgment motions which seek to obtain that which was denied in the judgment. Plaintiff's argument in support of the post-judgment motion points out certain advantages which will accrue to plaintiff if the judgment is vacated. . . .

> I do not conceive of [a post-trial motion] as serving the office of providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment. . .
>
> Yet if it be held that [a post-trial motion] can be used to file a brief in opposition to the judge's opinion in rendering final judgment, the rule becomes a mischief-maker rather than a means for quickly correcting mistakes in the form or provisions of a judgment or even a mistake in the entry of the judgment itself . . .

Johnson v. City of Richmond, 102 F.R.D. 623, 623 (D.C. Va. 1984).

Professor Churchill's Motion to Amend is essentially "a brief in opposition to the judge's opinion in rendering final judgment." Faced with a similar situation, one federal court observed, "Since the plaintiff has brought up nothing new . . . this Court has no proper basis upon which to alter or amend the judgment previously entered. The judgment may indeed be based upon an erroneous view of the law, but, if so, the proper recourse is appeal – not reargument." *Durkin v. Taylor*, 444 F.Supp. 879, 889 (E.D. Va. 1977). Professor Churchill has already filed a Notice of Appeal, and his arguments should be addressed to the Colorado Court of Appeals.

Discussion

I. No Judgment Could Have Entered Against the Regents in Their Official Capacities

A. Professor Churchill Disregards the Plain Language of the Stipulation

Professor Churchill first argues that he continues to possess official capacity claims against the Regents, stating on Page 6 of his Motion to Amend, "This Court has ignored the fact that at no time did Professor Churchill ever dismiss any official capacity defendants from this case . . ." (emphasis in original). This is an interesting statement, especially considering that Paragraph 5(a) of the parties' Stipulation explicitly states, "Professor Churchill shall dismiss all official capacity and individual capacity claims currently pled against the individual Regents of the University of Colorado with prejudice." (emphasis added) The Regents were not parties to the lawsuit in any capacity.

B. The University is Potentially Liable Only to the Same Extent that a Judgment Could Have Entered Against the Regents

Upon the dismissal of the claims against the Regents, the University agreed in Paragraph 6(b) of the parties' Stipulation that it would waive its Eleventh Amendment immunity "to permit the same recovery [against the University] that might otherwise be had against any of its officials or employees acting in their official or individual capacities." (emphasis added) Professor Churchill admits that the "University was standing in precisely the shoes previously occupied by the Regents in their individual and official capacities." He did not gain any additional claims and can hold the University liable under the Stipulation only if a judgment "might otherwise" have entered against a Regent.

Answering this question of whether a judgment "might otherwise" have entered against a Regent requires the University to discuss the difference between official capacity claims and individual capacity claims. Unless Professor Churchill can demonstrate that he "might otherwise" have been able to sustain an official capacity claim against a Regent, the Stipulation does not create liability on the part of the University.

Although an official capacity suit is brought against a particular person, those suits are a method of pleading "an action against an entity of which an officer is an agent." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690, n.55 (1978). For an official capacity suit to succeed, the "entity's policy or custom must have played a part in the violation of federal law." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Professor Churchill never based any claim on a "policy or custom," did not present any evidence of a "policy or custom," never tendered any jury instruction related to "policy or custom," and failed to even present any argument related to "policy or custom." A party may not use a Rule 59 motion to introduce a new theory of the case after failing to present any argument or evidence related to it throughout the proceedings. *See Bowlen v. Federal Deposit Ins. Corp*., 815 P.2d 1013, 1015-16 (Colo. App. 1991) (stating that an "error of law" does not exist where the post-trial motion asks the trial court "to consider new theories asserted for the first time in that motion); *Graven v. Vail Associates, Inc.*, 888 P.2d 310, 316(Colo. App. 1994) (stating that a trial court "need not entertain new theories on a motion to reconsider following the grant of summary judgment").

In contrast to official capacity actions based upon an entity's "policy or custom," individual capacity suits seek to impose personal liability upon a government official for actions he took under color of state law. *Graham*, 473 U.S. at 165 (1985). Under this lower burden of proof, "it is enough to show that the official, acting under color of state law caused the deprivation of a federal right." *Graham*, 473 U.S. at 165 (1985). This was the only type of claim for which Professor Churchill presented any evidence, tendered any jury instructions, or presented any argument at trial.

Because official capacity claims and individual capacity claims are subject to different standards of liability and are targeted at different assets, they are subject to different defenses. For example, because an official capacity judgment is collected against a governmental entity, such a judgment cannot enter where the law would not allow a judgment to enter directly against the government. *Graham*, 473 U.S. at 169. Because an individual capacity claim "can be executed only against the official's personal assets," the right of recovery is subject to any personal immunity that the defendant might claim from liability. *Graham*, 473 U.S. at 165.

i. Application to Award of Damages

Beyond his failure to present any evidence of a policy or custom that would support an official capacity claim, Professor Churchill's post-trial motion begins with a faulty premise, which is that the Regents are subject to official capacity claims for damages. State officers, such as the Regents, are not subject to official capacity claims for damages. *See*

Graham, 473 U.S.at 169 (stating that "an official capacity action for damages could not have been maintained against Commissioner Brandenburgh in federal court"). Because Professor Churchill never possessed an official capacity claim for damages against the Regents, no award "might otherwise" have been sought against them in that capacity. The parties' Stipulation does not somehow create liabilities that do not otherwise exist.

The only monetary recovery that Professor Churchill "might otherwise" have been able to collect was against the Regents in their individual capacities. *Graham*, 473 U.S.at 165. The University waived its Eleventh Amendment immunity to permit Professor Churchill to bring such an individual capacity claim directly against it, but simultaneously acquired "the same defenses" available in individual capacity lawsuits, including quasi-judicial immunity. When the Court granted the University quasi-judicial immunity from the $1 award, it applied an appropriate defense to an individual capacity claim. Professor Churchill has not demonstrated that the Court misapplied the parties' Stipulation, the law governing official capacity claims, or the law governing quasi-judicial immunity.

ii. Application to Injunctive Relief

The University admits that injunctive relief can be ordered against some official capacity defendants when there is evidence of a "policy or custom" and that traditional quasi-judicial immunity does not apply to official capacity claims. Beyond Professor Churchill failure to present any evidence that would support such a claim, however, injunctive relief cannot enter in Professor Churchill's favor under the facts of this case.

The parties' Stipulation limits the University potential liabilities to those that "might otherwise be had" against the Regents, Injunctive relief is not a remedy that "might otherwise be had" against the Regents under *42 U.S.C. §1983*, which states, "[I]n any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . ." When the Court determined: (1) that the Regents acted in a quasi-judicial capacity; and (2) that the statutory prohibition against injunctive relief extends to quasi-judicial officers, Professor Churchill lost his ability to seek injunctive relief against the Regents in either their individual or official capacities.

C. Professor Churchill's Authorities Do Not Apply

On Pages 5 and 6 of the Motion to Amend, Professor Churchill cites some authority for the proposition that quasi-judicial immunity and other common law immunities do not prevent judgments from entering in official capacity lawsuits under *42 U.S.C. §1983*.

One of these authorities addressed the official capacity liabilities of employees of local governments, such as municipalities, counties, and local governing boards. *See e.g. Moss v. Kopp,* 559 F.3d 1155, 1166 (10th Cir. 2009) (action against county sheriff). Under *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 (1978), a plaintiff can bring claims official capacity claims against non-state employees or direct claims against local governments. *Moss* provides no assistance to Professor Churchill because he never possessed a viable official capacity claim for damages against the Regents. *Graham*, 473 U.S. at 165.

Only one case cited in Professor Churchill's brief concerns an official capacity claim against a state employee. *VanHorn v. Oelschlager*, 502 F.3d 775 (8th Cir. 2007) did not allow state officials to take an interlocutory appeal from a trial court's decision denying quasi-judicial immunity as a defense to an official capacity claim for injunctive relief. Notably, however, the *VanHorn* trial court determined that the state officials were not entitled to claim the protections of *42 U.S.C. §1983*'s provisions prohibiting injunctive relief "in any action brought against a judicial officer." *VanHorn*, 502 F.3d at 777. The Court has correctly reached a different conclusion and determined *42 U.S.C. §1983* does not permit any injunctive relief against the Regents. *VanHorn* does not alter the outcome of this case or require the Court to grant the Motion to Amend.

II. The Court Properly Denied the Motion for Reinstatement

Beginning on Page 8 of his brief, Professor Churchill argues that the Court improperly denied his Motion for Reinstatement. He provides no new arguments over the next 8 pages, choosing instead to reargue the evidence that the Court has already rejected, which is sufficient grounds in itself for the Court to deny the Motion to Amend. If the Court is inclined to address these arguments, however, it will quickly find they lack merit.

A. <u>The Court Did Not Misapply the Law Related to An Award of Nominal Damages</u>

The majority of Professor Churchill's arguments relate to the Court's finding that he is not entitled to reinstatement or other relief because of the jury's award of nominal damages reflects that he suffered no actual damages.

Professor Churchill argues that the Court is making "unprecedented new law" that reinstatement is not appropriate when only nominal damages are awarded. The Court already rejected this argument. In reasserting it without providing any new legal authority, Professor Churchill conveniently overlooks the Court's citations to Tenth Circuit precedent stating that a trial court "is bound both by a jury's explicit findings of fact and those findings that are necessarily implicit in the jury's verdict." *Bartee v. Michelin North America, Inc.,* 374 F.3d 906, 910 (10th Cir. 2006) (emphasis added). The Court also recognized that where "the jury verdict by necessary implication reflects the resolution of a common factual issue . . . the district court may not ignore that determination." *Ag Services of America, Inc. v. Nielsen,* 231 F.3d 726, 732 (10th Cir.2000).

Recognizing those limitations upon the Court's discretion in awarding equitable remedies, Professor Churchill next reargues his belief that the Court's Order is inconsistent with the jury's finding that Professor Churchill was harmed by the University's actions. What he cannot escape, however, is the fact that the jury's finding of harm did not quantify the harm in any manner. Instead, the best understanding of the extent of any harm that befell Professor Churchill is reflected in the jury's award of damages shortly after the Court issued the following instruction: If you find in favor of the plaintiff, but do not find any actual damages, you shall nonetheless award him nominal damages in the sum of one dollar." *Court's Response to Jury Question 1* (emphasis added).

The jury's verdict and award of nominal damages ultimately "signif[ies] that the plaintiff's rights were technically invaded even though he could not prove any loss or damage." *Griffith v. State of Colorado Division of Youth Services,* 17 F.3d 1323, 1327 (10th Cir. 1994). Where the jury's award necessarily indicates that Professor Churchill failed to establish any actual economic or non-economic damages, the Court appropriately followed the United States Supreme Court's clear statement that "nominal damages, and not damages based upon some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Memphis Community School District v. Stachura,* 477 U.S. 299, 308 n11 (1986) (emphasis added).

Try as he might, Professor Churchill has been unable to escape the jury's award of nominal damages and continues to be unable to cite a single case indicating that a trial court should grant equitable relief in the absence of any actual damages. It naturally follows that a Court should not grant prospective equitable relief in the absence of actual damages, rather than a technical violation that the jury has declined to compensate through an award of economic or non-economic damages.

Perhaps recognizing that the jury's actual verdict does not support his position, Professor Churchill has solicited an affidavit from one of the jurors, in which she attempts to recast the verdict in her own terms. With all due respect and appreciation to Ms. Newill for her service on the jury, Professor Churchill knows that *Colo. R. Evid. 606(b)* categorically prohibits this type of collateral attack.

Rule 606(b) states that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. . . A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying." (emphasis added) Rule 606(b)'s "exclusionary principle reaches everything which relates to the jury's verdict, unless one of the exceptions applies." *Stewart v. Rice*, 47 P.3d 316, 321 (Colo. 2002). No exception applies to Ms. Newell's affidavit and Professor Churchill does not offer any.

Applying these principles, the Colorado Court of Appeals even prohibited a juror from submitting an affidavit stating that the other jurors had yelled at her and coerced her into reaching a particular verdict. *People v. Ferrero,* 874 P.2d 468, 474 (Colo. App. 1993). As the Colorado Supreme Court noted less than a year ago, "Colorado does not allow verdict by affidavit." *People v. Richardson*, 184 P.3d 755, 765 (Colo. 2008).

Filing an inadmissible affidavit of no legal effect, attaching charts showing where the Court adopted the University's correct legal arguments, and dropping a footnote suggesting that the "Court is so biased against Professor Churchill that it should recuse itself" while lacking any legal basis to seek recusal, all "suggest that this motion has less to do with the processes of the litigation in this Court than in the court of public opinion." *Palomar Medical Technologies, Inc. v. Cutera, Inc.*, 2005 WL 419685, *2 (D. Mass. 2005). While "advocacy in

the court of public opinion is now a fixture on the legal scene," and can done appropriately, it remains true that "lawyers advocating in the court of public opinion therefore have a duty not to mislead the public about the law." Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion,* 95 Columbia L. Rev. 1811, 1854, 1856 (1995). If Professor Churchill thought it was in his best interests to use his pleadings as a press release expressing his disagreements with the Court's ruling, that was his choice to make, but the Court need not give any credence to half-hearted recusal arguments, citations to inapplicable legal authorities, or arguments founded upon inadmissible evidence.

B. The Court Did Not Misapply the Law Related to Reinstatement

Professor Churchill next suggests that the Court was required to reinstate Professor Churchill because "reinstatement will usually be granted when a plaintiff prevails in a wrongful discharge case under Section 1983." *Jackson v. City of Albuquerque*, 890 F.2d 225, 233 (10th Cir. 1989). Notwithstanding this presumption, Professor Churchill's Motion to Amend appropriately acknowledges that reinstatement is not appropriate where there is undue hostility or that a working relationship would be impossible.

Based upon its review of the evidence, the Court found that Professor Churchill's comments demonstrated undue hostility and that there was only a miniscule possibility that Professor Churchill's return to the workplace would be amicable and productive. Professor Churchill may disagree with these findings, but his personal evaluation of the evidence is irrelevant. "Where the record presents conflicting evidence on some matters, it is the trial

court's province to judge the credibility of the witnesses, the sufficiency, probative effect and weight of the evidence, and the inferences and conclusions to be drawn from the evidence." *People in Interest of M.S.H.*, 656 P.2d 1294, 1298 (Colo. 1983).

The same principles govern the remainder of Professor Churchill's arguments, such as that the Court did not give proper weight to his witnesses' testimony or that the Court misunderstood his insults as attempts to "poke fun" at the University. The Court explained its basis for denying reinstatement in clear terms and with specific reference to the evidence before it. None of Professor Churchill's arguments change that evidence or in any way undermine the Court's order determining that reinstatement was an inappropriate remedy. Surely Professor Churchill is well within his rights to disagree with the Court's ruling, and he is free to make his arguments at the Court of Appeals, but his Motion to Amend presents no compelling argument why the Court should reverse its prior decisions or restore him to a faculty position that he is unfit to hold.

Dated this 17th day of August, 2009.

OFFICE OF UNIVERSITY COUNSEL

s/ Patrick T. O'Rourke

Patrick T. O'Rourke

CERTIFICATE OF SERVICE

I certify that on the 17th day of August, 2009, true and accurate copies of the foregoing Brief in Opposition to Motion for Reinstatement, were served on all other counsel of record through electronic filing or United States mail, including:

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