COLORADO COURT OF APPEALS

DATE FILED: October 3, 2019
CASE NUMBER: 2018CA1467

Court of Appeals No. 18CA1467
Larimer County District Court No. 18CV140
Honorable Gregory M. Lammons, Judge

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Kendra Musgrave,

Plaintiff-Appellant,

v.

Geri R. Joneson,

Defendant-Appellee.

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JUDGMENT AFFIRMED

Division II
Opinion by JUDGE BROWN
Dailey and Richman, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**
Announced October 3, 2019

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Kendra Musgrave, Pro Se

Wells, Anderson & Race, LLC, Cathy Havener Greer, Katherine M.L. Pratt, Denver, Colorado, for Defendant-Appellee

¶ 1 Plaintiff, Kendra Musgrave, appeals from the district court's order denying her motion for summary judgment and granting the motion to dismiss of defendant, Geri R. Joneson. We affirm.

## I. Background

¶ 2 Musgrave filed a complaint under C.R.C.P. 106(a)(2) for mandamus relief related to a municipal court case in which she was the defendant. In her complaint, Musgrave asked the district court to order the municipal court to (1) allow her to represent herself; (2) issue a final judgment; (3) serve the final judgment on her personally; and (4) vacate any outstanding subpoenas. She also asserted that Judge Joneson, the municipal court judge and named defendant, should be sanctioned for failing to perform her duties.

¶ 3 Joneson moved to dismiss under C.R.C.P. 12(b)(1) and (5). Joneson asserted that she issued a final judgment on September 6, 2016, dismissing the case with prejudice in Musgrave's favor. This judgment was served on Musgrave's attorney of record. Joneson also asserted that the claim was barred by her absolute judicial immunity and by Musgrave's failure to comply with the notice requirements of the Colorado Governmental Immunity Act (CGIA).

¶ 4 The district court granted the motion to dismiss. Musgrave appeals.

## II. Discussion

¶ 5 Although Musgrave asserts numerous issues for appellate review, several of them appear to restate the same alleged error. We understand her arguments to be that the district court erred by (1) dismissing her C.R.C.P. 106 petition for failure to state a claim; (2) finding that her claims were barred by judicial immunity; (3) construing her claim as a tort claim subject to the CGIA's notice requirements, with which she failed to comply; (4) violating article VI, section 3 of the Colorado Constitution; and (5) creating the appearance of impropriety. Musgrave also requests that we review her mandamus claim de novo, regardless of any errors in the district court. And finally, she asserts that Joneson's counsel should be sanctioned for violating various ethical rules.

¶ 6 We perceive no basis for reversing the district court's order and decline to address the request for sanctions.

### A. Dismissal for Failure to State a Claim

¶ 7 Musgrave contends that the district court erred when it dismissed her complaint for failure to state a claim upon which relief may be granted under C.R.C.P. 12(b)(5). We disagree.

¶ 8 We review de novo a district court's order granting a motion to dismiss under C.R.C.P. 12(b)(5). *Patterson v. James*, 2018 COA 173, ¶ 16. We apply the same standards as the district court, accepting the well-pleaded factual allegations in the complaint as true and viewing those allegations in the light most favorable to the plaintiff. *Id.*

¶ 9 A motion to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim tests the formal sufficiency of a plaintiff's complaint. *Dwyer v. State*, 2015 CO 58, ¶ 43. The court must decide whether the allegations of the complaint are sufficient to raise a right to relief above the speculative level and provide plausible grounds to support the cause of action asserted. *Warne v. Hall*, 2016 CO 50, ¶ 9.

¶ 10 On September 6, 2016, the municipal court dismissed the case against Musgrave with prejudice. The municipal court sent a copy of its order to Musgrave's attorney of record. That same day,

Musgrave filed a motion to represent herself pro se, which the municipal court never ruled on.

¶ 11 In her C.R.C.P. 106 complaint, Musgrave argued that, in light of her motion to represent herself, the September 6 order was void because it was not served on her personally. Thus, she asked the district court to compel the municipal court to enter a valid judgment and serve it on her personally. She also asked the district court to vacate all outstanding subpoenas issued by the municipal court.

¶ 12 On June 21, 2018, the district court dismissed the petition under C.R.C.P. 12(b)(5), reasoning that (1) service of the municipal court order on counsel of record did not void the order and (2) any outstanding subpoenas were moot as a result of the dismissal. We agree with the district court.

¶ 13 First, although Musgrave filed a motion to appear pro se, the municipal court never ruled on it because it dismissed the case the same day. There were no further proceedings for which Musgrave needed to appear. Accordingly, her attorney remained the counsel of record to whom the order was properly sent. *See* C.R.C.P. 5(b) ("Service under C.R.C.P. 5(a) on a party represented by an attorney

is made upon the attorney unless the court orders personal service upon the party."). In fact, personal service of a final order to a party who is represented by counsel is not required and may even be insufficient to satisfy the statutory requirements. *See In re Marriage of Cooper*, 113 P.3d 1263, 1265 (Colo. App. 2005) (Referencing federal cases interpreting an analogous statute, the division noted that "when service upon a party's counsel is required . . . , service upon the party himself or herself is insufficient.").

¶ 14 Second, once the municipal court entered final judgment in Musgrave's favor, any outstanding subpoenas became moot. *See In re Marriage of Tibbetts*, 2018 COA 117, ¶ 8 ("An issue is moot when a judgment, if rendered, would have no practical legal effect on the existing controversy." (quoting *In re Marriage of Dauwe*, 148 P.3d 282, 284 (Colo. App. 2006))). Thus, Musgrave had already received the relief that she sought in her C.R.C.P. 106 complaint, and there was no further remedy the district court could have provided.

¶ 15 We conclude that the district court did not err by dismissing Musgrave's complaint under C.R.C.P. 12(b)(5) because it failed to state a claim upon which relief could be granted. Because of our resolution of this issue, we need not address her contentions

regarding judicial and governmental immunity. *See Taylor v. Taylor*, 2016 COA 100, ¶ 31 ("An appellate court may . . . affirm on any ground supported by the record.").

B. Constitutional Violation

¶ 16 Musgrave contends that the district court's dismissal of her C.R.C.P. 106 complaint violated article VI, section 3 of the Colorado Constitution. We disagree.

¶ 17 Article VI, section 3 provides that

> [t]he supreme court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be provided by rule of court with authority to hear and determine the same; and each judge of the supreme court shall have like power and authority as to writs of habeas corpus. The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decision of said court.

This section establishes the supreme court's original jurisdiction to hear certain types of cases. It does not speak to a district court's authority to hear a complaint filed pursuant to C.R.C.P. 106.

¶ 18 Instead, article VI, section 9 of the Colorado Constitution establishes the jurisdiction of the district courts, which includes original jurisdiction in all civil cases. *See Marks v. Gessler*, 2013 COA 115, ¶ 71 ("The district courts in Colorado are courts of general jurisdiction and have wide latitude in hearing and deciding issues of law. . . . These provisions of the Colorado Constitution confer unrestricted and sweeping jurisdictional powers in the absence of limiting legislation." (quoting *In re A.W.*, 637 P.2d 366, 373 (Colo. 1981))).

¶ 19 We conclude that the district court's dismissal of Musgrave's request for mandamus relief under C.R.C.P. 106 was within the broad jurisdiction granted a district court and did not violate the Colorado Constitution.

C. Judicial Bias

¶ 20 Although it is difficult to discern the basis for her argument, Musgrave contends that the professional relationship between District Court Judge Gregory Lammons and Municipal Court Judge Geri Joneson created the appearance of impropriety. We decline to address this contention.

¶ 21 "It is axiomatic that in civil cases, issues not raised in or decided by the trial court generally will not be addressed for the first time on appeal." *Brown v. Am. Standard Ins. Co. of Wis.*, 2019 COA 11, ¶ 21.

¶ 22 From the record we have on appeal, it does not appear that Musgrave raised any concerns about the professional relationship between the district court judge and the municipal court judge in the district court proceedings. She did not ask Judge Lammons to recuse or file any other motion that would alert the court to her concerns regarding any alleged bias or impropriety

¶ 23 Accordingly, we decline to address this contention.

D. Attorney Misconduct

¶ 24 Finally, Musgrave contends that Joneson's counsel repeatedly violated the rules of professional conduct and should be sanctioned. We decline to address this contention.

¶ 25 C.R.C.P. 251.18(b)(1) provides that "[a]ll hearings on complaints seeking disciplinary action against [an attorney] shall be conducted by a Hearing Board," subject to certain exceptions not applicable here. Accordingly, any complaint alleging attorney misconduct should be filed with the Disciplinary Hearing Board.

And "[t]he Supreme Court reserves the authority to review any determination made in the course of a disciplinary proceeding and to enter any order with respect thereto." C.R.C.P. 251.1(d).

¶ 26 Thus we, as the intermediate appellate court, do not have the authority to rule on allegations of attorney misconduct as an initial matter or even to review such decisions on appeal. *See In re Attorney F.*, 2012 CO 57, ¶ 19 (disciplinary decisions are reached by analyzing the facts on a case-by-case basis); *Martinez v. Reg'l Transp. Dist.*, 832 P.2d 1060, 1061 (Colo. App. 1992) ("There is no principle more fundamental to appellate jurisprudence than the maxim that an appellate court does not decide the facts and may not substitute its judgment for that of the fact-finder.").

¶ 27 Therefore, we decline to address this contention.

## III. Conclusion

¶ 28 The judgment is affirmed.

JUDGE DAILEY and JUDGE RICHMAN concur.

# Court of Appeals

**STATE OF COLORADO**
**2 East 14th Avenue**
**Denver, CO 80203**
**(720) 625-5150**

**PAULINE BROCK**
**CLERK OF THE COURT**

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: December 27, 2018

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