COLORADO COURT OF APPEALS

DATE FILED: November 25, 2020
CASE NUMBER: 2019CA1412

Court of Appeals No. 19CA1412
City and County of Denver District Court No. 19CV31
Honorable David H. Goldberg, Judge

Eric St. George,

Plaintiff-Appellant,

v.

Denver Post; Kiernan Nicholson; KUSA-TV/9News; 1st Judicial District Attorney's Office; Peter Weir, District Attorney; Michael Freeman, Deputy District Attorney; and Katherine Decker, Deputy District Attorney,

Defendants-Appellees.

ORDERS AFFIRMED

Division I
Opinion by JUDGE GRAHAM*
Grove and Welling, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced November 25, 2020

Eric St. George, Pro Se

Ballard Spahr, LLP, Steven D. Zansberg, Denver, Colorado, for Defendants-Appellees Denver Post, Kiernan Nicholson, and KUSA-TV/9News

Kimberly S. Sorrells, County Attorney, Rebecca P. Klymkowsky, Assistant County Attorney, Rachel Bender, Assistant County Attorney, Golden, Colorado, for Defendants-Appellees 1st Judicial District Attorney's Office, Peter Weir, Michael Freeman, and Katherine Decker

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 Eric St. George, pro se, appeals the district court's orders dismissing his complaint against the First Judicial District Attorney's Office (district attorney), KUSA-TV/9News, *The Denver Post*, and a *Post* reporter, Kieran Nicholson, (collectively, the media defendants) for publishing allegedly libelous news articles about St. George's criminal trial. We affirm.

I. Background

¶ 2 In February 2018, St. George was tried and convicted of crimes arising from a 2016 incident involving St. George and a sex worker who St. George hired to dance at his home. After he became too physical with her and she left under protest, St. George followed her out of his house carrying a shotgun. The police arrived, and St. George engaged in a shootout with the responding officers.

¶ 3 On February 20, 2018, three articles covering St. George's convictions were published: one press release from the district attorney and news articles from KUSA 9News and *The Denver Post*.[1] About a month later, St. George wrote a letter to the media

[1] Defendant Kiernan Nicholson authored the *Denver Post* article.

defendants complaining that certain aspects of the news articles were false and therefore libelous.

¶ 4 In July 2018, St. George allegedly mailed three notices, pursuant to the notice requirements of the Colorado Governmental Immunity Act, section 24-10-109, C.R.S. 2019, in an attempt to alert the district attorney that it had defamed St. George by publishing false statements in its press release. St. George addressed the three notices to the Colorado attorney general, the City of Lakewood, and the Jefferson County District Court. He did not send a notice to the First Judicial District attorney's office.

¶ 5 In January 2019, St. George filed his libel complaint against the district attorney and the media defendants. All of the defendants filed motions to dismiss, and the court granted those motions in two written orders. The first order dismissed the claims against the media defendants pursuant to C.R.C.P. 12(b)(5). The second order dismissed the claims against the district attorney pursuant to C.R.C.P. 12(b)(1).

II. This Court Has Jurisdiction Over This Appeal

¶ 6 We first address whether the district court's dismissal of the complaint against the media defendants without prejudice can be reviewed. We conclude that review is appropriate.

¶ 7 Our jurisdiction is limited to review of final, appealable judgments or orders. § 13-4-102(1), C.R.S. 2019; C.A.R. 1(a). "An order is final if it ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceeding." *People in Interest of S.C.*, 2020 COA 95, ¶ 6 (quoting *Marks v. Gessler*, 2013 COA 115, ¶ 15). A final, appealable order is one that prevents further proceedings or effectively terminates the proceedings. *S.C.*, ¶ 6. "In determining whether an order is final, we look to the legal effect of the order rather than its form." *Marks*, ¶ 15 (citation omitted).

¶ 8 "Ordinarily, a dismissal without prejudice is not a final, appealable order." *S.C.*, ¶ 8 (citing *Scott v. Scott*, 2018 COA 25, ¶ 11). However, where the circumstances "indicate that the action cannot be saved and that the district court's order precludes further proceedings, dismissal without prejudice qualifies as a final

judgment for the purposes of appeal." *Avicanna Inc. v. Mewhinney*, 2019 COA 129, ¶ 1, n.1. One "common situation where a complaint 'cannot be saved' occurs when further proceedings would be barred by a statute of limitations." *S.C.*, ¶ 9 (quoting *DIA Brewing Co. v. MCE-DIA, LLC*, 2020 COA 21, ¶ 32).

¶ 9 The statute of limitations for a defamation claim is one year. § 13-80-103(1)(a), C.R.S. 2019. St. George's claim against the media defendants accrued in February in 2018 and the district court's dismissal occurred approximately one and a half years later. Consequently, the statute of limitations has expired, rendering the district court's dismissal final and reviewable.

III. Fair Report Doctrine

¶ 10 St. George first contends the district court erred when it dismissed his libel claims against the media defendants by ruling that the fair report doctrine afforded an absolute privilege that barred St. George's claims. We disagree.

A. Facts

¶ 11 The district attorney's press release provided the following basic facts:

- St. George had hired a sex worker to dance for him at his house;
- the sex worker protested when he began to grope her and she left the house;
- "[h]e followed her outside and began to fire shots;"
- upon arriving at the scene, Lakewood police tried to call St. George on his phone;
- "[s]ix attempts at a phone conversation were not successful;"
- St. George fired a weapon at police but missed;
- police shot back at St. George, hitting him;
- [a]fter a jury deliberated for some amount of time, St. George was found guilty.

¶ 12 The two news articles provided the same basic set of facts,[2] differing only in that both news articles stated St. George used three different guns during the incident. In contrast, the press release

[2] St. George quibbles about nuanced differences in the facts. Those minor differences do not affect our ruling here and are irrelevant for purposes of our analysis.

states that St. George raised a shotgun and "fired three shots" at police.

¶ 13 St. George takes particular issue with the following alleged "falsities" in the press release and the news articles:

- The press release incorrectly reported the amount of time the jury spent deliberating (that the jury deliberated far longer than the reported two hours);
- The press release incorrectly reported which of the six phone calls went unanswered (because St. George asserts he answered some of the phone calls);
- The headline of one of the news articles, titled "Man who fired gun at exotic dancer, Lakewood police is convicted of felonies" is incorrect because (1) he never fired his gun "at" the sex worker and he was not convicted of the charges relating to that fact; (2) she is not an "exotic dancer" but an "escort," and (3) that Lakewood police were never convicted of any felonies;
- Both news articles incorrectly stated that St. George used three different weapons but St. George only used a shotgun.

B. Law

¶ 14 We review a dismissal under C.R.C.P. 12(b)(5) de novo. *See, e.g.*, *Hess v. Hobart*, 2020 COA 139, ¶ 11. When considering a motion to dismiss, the court may consider documents that are referred to in the complaint, but not attached to it, without converting the motion into one for summary judgment. *Yadon v. Lowry*, 125 P.3d 332, 336 (Colo. App. 2005).

¶ 15 "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Warne v. Hall*, 2016 CO 50, ¶ 1 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

¶ 16 A claim may be dismissed under C.R.C.P. 12(b)(5) if the substantive law does not support it, *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008), or if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief, *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

¶ 17 Defamation by libel is a communication that holds an individual up to contempt or ridicule thereby causing him to incur injury or damage. *SG Interests I, Ltd. v. Kolbenschlag*, 2019 COA 115, ¶ 19.

> The elements for a cause of action for defamation are (1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by publication.

Id., ¶ 20.

¶ 18 The tort of defamation consists of two types of communication, libel and slander, where libel is usually a written communication and slander is usually an oral communication. *Keohane v. Stewart*, 882 P.2d 1293, 1297 n.5 (Colo. 1994).

¶ 19 Substantial truth is a complete defense to defamation. *Id.*, ¶ 21. A defendant need only show that "the substance, the gist, the sting of the matter is true." *Id.* (quoting *Gordon v. Boyles*, 99 P.3d 75, 81 (Colo. App. 2004)). Thus, the inquiry is whether the written statement produces a different effect upon the reader than that which would be produced by the literal truth of the matter. *Id.* (quoting *Gomba v. McLaughlin*, 180 Colo. 232, 236, 504 P.2d 337, 339 (1972)).

¶ 20 Under the fair report doctrine, a media outlet such as a newspaper is protected if it publishes articles containing

defamatory statements that were originally made in a judicial or otherwise public proceeding so long as the report of the proceeding is fair and substantially correct. *See Wilson v. Meyer*, 126 P.3d 276, 279-80 (Colo. App. 2005); *Tonnessen v. Denver Publ'g Co.*, 5 P.3d 959, 964 (Colo. App. 2000). This is because "the public properly relies on news media to report actions that affect the public interest." *Wilson*, 126 P.3d at 280.

¶ 21 Press releases from public officials are also covered by the fair report privilege. *Id.* at 279-80. As discussed below, the district attorney's office is a public entity and thus its actions, including defamation, are also protected by statute. *See* § 24-10-108, C.R.S. 2019 ("[S]overeign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort.").

¶ 22 Thus, the law in Colorado protects a media company's published news articles that echo press releases from the district attorney's office from defamation claims, so long as the report of the proceeding is fair and substantially correct. *Wilson*, 126 P.3d at 279-80.

C. Analysis

¶ 23 St. George initially argues that the media defendants' news articles were not a fair and substantially accurate summary of the publicly held trial as the gist of the news articles was necessarily different owing to the different facts contained in the articles. The media defendants correctly respond that their articles are reproductions of the district attorney's *press release*, not the trial, and, since the media defendants' news articles are substantially true, they argue, the articles are protected by the fair report doctrine. We agree with the media defendants.

¶ 24 St. George focuses his argument on the differences between the evidence adduced at trial, the press release's version of the events at trial, and the news articles. In that St. George may only bring an action against the media defendants for their news articles echoing the district attorney's press release,[3] we need not concern

[3] St. George can only argue this because he does not assert that these particular media defendants were present at his trial, and, even though he asserts that he invited the media defendants to attend his sentencing, he does not assert their actual presence. Thus, St. George does not assert that these media defendants got the information for their news articles from attending any part of the trial itself.

ourselves with the minor differences in the two reports because the "gist" of both remains the same. St. George hired a sex worker, when she protested about his groping and left, he followed and fired a weapon, and when police arrived, a shootout ensued. Based on these events, a jury convicted him of crimes. The amount of jury deliberation is irrelevant because the result of the convictions is the core of the claimed libel. Whether the sex worker was an "exotic dancer" or an "escort" is also irrelevant because the "gist" of inviting her to his house was to exchange sexual acts for money. Even though St. George was acquitted of some of the charges (he never aimed the weapon directly "at" the sex worker), that detail does not change the fact that he brandished a weapon in response to her rejecting his advances. And, very clearly, the news article's title is not essentially false because he fired a weapon in the vicinity of the sex worker *and at* Lakewood police. St. George — not the police — was then convicted of the felonies.[4] St. George offers no other facts that would substantially change the gist of the news articles. Thus,

[4] A quick grammatical change to the title might read: "Man, who fired gun near exotic dancer and Lakewood police, is convicted of felonies."

the news articles are substantially correct and fall squarely with the protection of the fair report doctrine.

¶ 25 We also reject St. George's arguments concerning knowledge of falsity by the media. Even though St. George was acquitted of the charges relating to firing a weapon "at" the sex worker, it does not necessarily follow that the media defendants reasonably knew that the district attorney's press release describing that action was false. The record before us discloses nothing to suggest the media defendants had such knowledge.

¶ 26 Nor are we persuaded that having access to the media's website constituted harm by continuous publication and republication. Since the information was not libelous in the first instance, St. George's complaints about continuous publication and republication are unavailing.

¶ 27 Consequently, we are left to conclude that the district court did not err in dismissing St. George's complaint against the media defendants.

IV. The CGIA

¶ 28 St. George next contends that the district court erred when it dismissed his tort claims against the district attorney under

C.R.C.P. 12(b)(1) because he failed to comply with the CGIA's notice requirements. We disagree.

A. Law

¶ 29 We review de novo a trial court's dismissal of a complaint under C.R.C.P. 12(b)(1) for lack of jurisdiction. A motion to dismiss alleging immunity under the CGIA raises a jurisdictional issue. *Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1180 (Colo. 2001); *see also* § 24-10-109(1), C.R.S. 2019 ("Compliance with the provisions of this section shall be a jurisdictional prerequisite."). The plaintiff has the burden of demonstrating jurisdiction. *Padilla*, 25 P.3d at 1180.

¶ 30 The CGIA requires:

> Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment, whether or not by a willful and wanton act or omission, shall file a written notice as provided in this section within one hundred eighty-two days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury.

§ 24-10-109(1). The notice shall contain the following:

> (a) The name and address of the claimant and the name and address of his attorney, if any;

> (b) A concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;
>
> (c) The name and address of any public employee involved, if known;
>
> (d) A concise statement of the nature and the extent of the injury claimed to have been suffered;
>
> (e) A statement of the amount of monetary damages that is being requested.

§ 24-10-109(2), C.R.S. 2019. Concerning the proper recipient of the notice,

> [i]f the claim is against the state or an employee thereof, the notice shall be filed with the attorney general. If the claim is against any other public entity or an employee thereof, the notice shall be filed with the governing body of the public entity or the attorney representing the public entity. Such notice shall be effective upon mailing by registered or certified mail, return receipt requested, or upon personal service.

§ 24-10-109(3)(a), C.R.S. 2019.

¶ 31 Where subsection (1) creates a jurisdictional prerequisite to asserting a claim, subsection (3) provides only a statutory defense. *Finnie v. Jefferson Cty. Sch. Dist. R-1*, 79 P.3d 1253, 1256 (Colo. 2003).

¶ 32 As a statutory defense, section 24-10-109(3) requires substantial compliance. *Finnie*, 79 P.3d at 1255-56. To determine whether a plaintiff has substantially complied, a district court may consider principles of agency and equity and the purposes of the notice statute. *Id.* at 1257-58. This determination requires a case-by-case analysis. *Id.* One of the purposes of the statute is to provide the public entity an opportunity to investigate claims, remedy conditions, and prepare defense of claims. *Id.* at 1258.

¶ 33 Whether St. George has substantially complied with section 24-10-109(3) is a mixed question of law and fact. *See Mesa Cty. Valley Sch. Dist. No. 51 v. Kelsey*, 8 P.3d 1200, 1204 (Colo. 2000). "Unless clearly erroneous, we will defer to the trial court's findings of fact." *Id.* Legal conclusions are subject to de novo review. *See City and Cty. of Denver v. Crandall*, 161 P.3d 627, 633 (Colo. 2007).

¶ 34 St. George alleged that he timely "notif[ied] the Office of the Attorney General and the Office of the Jefferson County District Attorney of his intent to bring suit, pursuant to CRS §24-10-109."

¶ 35 Claiming to have not received any such notice, the district attorney moved to dismiss, asserting St. George (1) failed to comply

with the timeliness requirement of 180 days and (2) that the district attorney was immune from tort claims.

¶ 36 In response, St. George attached a copy of the prison's outgoing "Mail Log," showing that three letters were mailed on July 3, 2018, addressed to the attorney general, the City of Lakewood, and the Jefferson County district court.

¶ 37 In granting the district attorney's motion to dismiss, the district court determined:

- St. George "failed to produce any documentation of notice let alone any evidence that the alleged notice included a concise statement of factual basis of the claim, a statement of the nature and extent of injury claimed, or the amount of monetary damages requested";
- that notice is effective only "upon mailing by registered or certified mail, return receipt requested, or upon personal service," under section 24-10-109(3)(a) and because St. George failed to provide any record of those kinds of mailing, St. George failed to fulfill the notice requirements;

- because no proper letter was shown to be mailed to the district attorney within the 180-day limitations period, St. George's complaint was required to be dismissed for lack of jurisdiction.

B. Analysis

¶ 38 On appeal, St. George asserts that his notice sent to the attorney general was sufficient notice because the attorney general is "counsel" to the district attorney. And, St. George asserts that his notices counted as registered mail because he registered it with the mail clerk at the prison with sufficient postage for first class mail.

¶ 39 In response, the district attorney contends (1) the attorney general is not "counsel," "the governing body," or an equivalent to the district attorney, and (2) even if the notice did somehow make it to the appropriate inbox, the district attorney is immune from tort actions. We agree with the district attorney that it is immune from tort actions, even if St. George was able to produce sufficient evidence of compliance with the statute.

¶ 40 St. George's claim was not dismissed for lack of effort of St. George's part. Unfortunately, the documents provided to the

district court and to us on appeal are insufficient to prove the basics of the notice requirement under sections 24-10-109(1)-(3). St. George was given an opportunity to provide that information in his response to the district attorney's motion to dismiss, and, at most, St. George was able to show that a letter of some kind was sent to the attorney general, the City of Lakewood, and the Jefferson County district court. However, the importance of having *registered* mail is to show receipt.[5] This gives the public entity an opportunity to investigate claims, remedy conditions, and prepare defense of claims. *Finnie*, 79 P.3d at 1258. Without it, St. George cannot prove the required substantial compliance.

¶ 41 Further, the only copy of any notice shown to the district court was the notice sent to the media defendants. Without any evidence other than the date on which the notice was sent to the district attorney, St. George has failed to establish the required contents of the notice, such as the statement of his claim, the extent of his injury, and monetary damages, see section 24-10-109(2), as well as

[5] We note that in this context, "registered" mail signifies obtaining a tracking number with the post office, not registering it with the mail clerk at the prison.

failing to establish that a proper notice was sent within the 180-day time limit, see section 24-10-109(1). Thus, the district court was without jurisdiction to hear St. George's claim and properly dismissed it under C.R.C.P. 12(b)(1).

¶ 42 But, even assuming, without deciding, that the record supports successful service of notice by St. George, district attorneys are immune for acts of alleged libel committed while performing in their official capacities. *See McDonald v. Lakewood Country Club*, 170 Colo. 355, 367 461 P.2d 437, 443 (1969); *see also* § 24-10-108 ("[S]overeign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort.").

V. Disposition

¶ 43 The district court's orders of dismissal are affirmed.

JUDGE WELLING and JUDGE GROVE concur.

Court of Appeals

STATE OF COLORADO
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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: March 5, 2020

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