

23CA1322 Sturgell v CDPHE 08-08-2024

COLORADO COURT OF APPEALS

DATE FILED

August 8, 2024

CASE NUMBER: 2023CA1322

Court of Appeals No. 23CA1322
City and County of Denver District Court No. 22CV32956
Honorable Kandace C. Gerdes, Judge

Frank Sturgell,

Plaintiff-Appellant,

v.

Colorado Department of Public Health and Environment, the State Health Department; Jill Ryan, in her official capacity; Randy Kuykendall, in his official capacity; Jeff Beckman, in his official capacity; Eric France, in his official capacity; Shelley Sanderman, in her official capacity; and Monica Wilkerson, in her official capacity,

Defendants-Appellees.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
VACATED IN PART, AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE SCHUTZ
Freyre and Lipinsky, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced August 8, 2024

Springsteen Law Firm, LLC, Anita Springsteen, Denver, Colorado, for Plaintiff-Appellant

Phillip J. Weiser, Attorney General, Jennifer L. Weaver, First Assistant Attorney General, Justine M. Pierce, Senior Assistant Attorney General, Haar Katta, Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

¶ 1 Plaintiff, Frank Sturgell, appeals the district court’s order dismissing his complaint against the Colorado Department of Public Health and Environment (CDPHE) and Jill Ryan, Ryan Kuykendall, Jeff Beckman, Eric France, Shelley Sanderman, and Monica Wilkerson, each of whom worked for CDPHE (collectively, defendants). Sturgell also argues that the court erred by denying his motion to file a third amended complaint and that its order of dismissal demonstrated bias against him. We affirm in part, reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. Background

¶ 2 In his second amended complaint, Sturgell pleaded claims under the Colorado Open Records Act (CORA), sections 24-72-200.1 to -206, C.R.S. 2023, and for a declaratory judgment and injunctive relief concerning the Emergency Medical Practice Advisory Council (EMPAC). Accepting the allegations in the second amended complaint as true, Sturgell has asserted the following facts.

¶ 3 Sturgell was disturbed by the deaths of individuals who were injected with ketamine by paramedics. Based on these concerns, he began to investigate EMPAC’s ketamine waiver program, as

described further below. During his investigation, he submitted more than four hundred CORA requests to multiple agencies, including CDPHE. Sturgell was unhoused and unable to pay some of the fees associated with his CORA requests.

¶ 4 EMPAC is an advisory committee that issues waivers to various entities in Colorado to authorize their paramedics to use ketamine in emergency situations without the direct oversight of a physician. CDPHE oversees EMPAC, and Wilkerson acts as CDPHE's custodian of records. Sturgell asserted that EMPAC was not legally created, and, even if it was legally created, EMPAC had no authority to act as of July 2020 because it had not been through a required "Sunset Review." Based on the lack of a "Sunset Review," Sturgell asserted that EMPAC's recent ketamine waivers were invalid.

¶ 5 While investigating the legitimacy of EMPAC, Sturgell submitted numerous CORA requests to CDPHE, including requests for the ketamine waivers that EMPAC issued. Some of Sturgell's requests were broad and vague, and many contained abusive language. His requests were met with mixed results. Sometimes, CDPHE and the Attorney General's office responded that they had

no responsive documents or that they had already provided responsive documents to him.

¶ 6 At one point, CDPHE provided Sturgell with an expired waiver free of charge, explaining it had taken less than an hour to locate and produce it. That same day, Sturgell followed up by requesting “all waivers for ketamine . . . that have been approved according to statute” — approximately forty-nine waivers. CDPHE estimated that it would take its staff approximately twenty hours to fulfill Sturgell’s request and that he would need to pay a \$600 deposit before it would begin work on the request.

¶ 7 Sturgell then submitted separate CORA requests for each of the forty-nine waivers. Because he had received the expired waiver for free, Sturgell believed he could avoid the fees and deposit by breaking down his initial request into dozens of smaller requests. But CDPHE refused to provide Sturgell with any of the individual waivers until he paid the \$600 deposit. Sturgell refused to do so and instead filed a notice stating his intention to file a CORA case to compel disclosure of the documents without payment of the requested deposit.

¶ 8 Fourteen days after he sent the notice of intent to sue, Sturgell filed a complaint in Denver District Court alleging that CDPHE’s decision to require a \$600 deposit before producing the ketamine waivers was pretextual and amounted to a de facto denial of his CORA request. In his second amended complaint, Sturgell asserted fifty claims for relief, alleging denials of his various CORA requests. Sturgell also asserted two declaratory judgment claims requesting a declaration that EMPAC was an illegal entity and that any ketamine waivers it issued were invalid.

¶ 9 The district court granted defendants’ motion to dismiss Sturgell’s complaint on the basis that he lacked standing to bring suit because he did not allege a personal injury, his claims were moot following the passage of House Bill 21-1251, and he failed to state viable claims for relief. *See* Ch. 450, secs. 1-2, §§ 25-3.5-103, -209, 2021 Colo. Sess. Laws 2957-59 (prohibiting the use of ketamine by emergency personnel to treat “excited delirium” and limiting its use in other contexts).

¶ 10 The district court’s dismissal order inadvertently referenced a person who was not a party to this lawsuit. The order also stated that Sturgell asserted only three claims for relief, which is

consistent with the original and amended complaints but inconsistent with the second amended complaint. Thereafter, the district court issued an amended dismissal order clarifying that these references in the original order were made in error. Sturgell alleges that the errors in the initial order reflect the district court's bias against him. He requests that we order a different judge be assigned to hear any issues on remand.

II. Tone and Tenor of Sturgell's Briefs

¶ 11 As a threshold matter, we note that Sturgell's briefs on appeal are replete with inflammatory and conclusory allegations that are irrelevant to the issues presented. For example, he claims that (1) the doctors and regulators involved in the ketamine waiver program allowed "medical licenses to be pimped out to paramedics"; (2) the Attorney General's office is "complicit" in Elijah McClain's death; (3) the prosecutors who litigated the cases addressing McClain's homicide "got away with murder"; (4) and Sturgell's cases are being assigned to the same district judge to be "rubber stamped" and dismissed.

¶ 12 In a recent pro se appeal, the division expressed concerns regarding Sturgell's use of similar language in his briefs. *Sturgell v.*

Holmes, slip op. at ¶¶ 17-18 (Colo. App. No. 23CA0983, July 11, 2024) (not published pursuant to C.A.R. 35(e)). As that division noted, such rhetoric hinders the court’s ability to decide the merits of a party’s contention and may lead to the summary dismissal of an appeal. *Id.* at ¶ 18; *see, e.g., Martin v. Essrig*, 277 P.3d 857, 860 (Colo. App. 2011).

¶ 13 Moreover, Sturgell’s appellate briefs fail to comply with the Colorado Rules of Appellate Procedure, including the failure to cite where arguments were preserved in the record and to provide appropriate citations to the record supporting his factual and legal arguments. *See* C.A.R. 28(a)(7)(A), (B).

¶ 14 While such conduct is never excusable, it is particularly problematic in this case because Sturgell was represented by counsel in the district court and on appeal. A central role of counsel is to provide dispassionate, reasoned analysis distilled through the lens of professional and ethical arguments. The failure to adhere to these standards diminishes the rule of law, the reputation of counsel, and the legal merits of a party’s position. Sturgell and his counsel are warned that such future conduct may result in the summary dismissal of the subject appeal.

III. CORA Claims

A. Standard of Review and Relevant Case Law

¶ 15 Because it is a question of law, we review the issue of standing de novo. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004).

Standing is construed broadly in Colorado. *Id.* at 855. In order to attain standing, a plaintiff must establish that (1) he suffered an injury in fact, and (2) his injury was to a legally protected interest.

Hickenlooper v. Freedom from Religion Found., 2014 CO 77, ¶ 8.

The injury-in-fact prong of the standing test requires “a concrete adverseness which sharpens the presentation of issues that parties argue to the courts.” *Ainscough*, 90 P.3d at 856 (quoting *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000)). Although both tangible and intangible injuries may be sufficient to satisfy the injury-in-fact requirement, “an injury that is overly “indirect and incidental” to the defendant’s action’ will not convey standing, nor will the remote possibility of a future injury.” *Freedom from Religion Found.*, ¶ 9 (quoting *Ainscough*, 90 P.3d at 856).

¶ 16 A motion to dismiss for lack of standing is brought pursuant to C.R.C.P. 12(b)(1) and impacts a court’s subject matter

jurisdiction. *See Pueblo Sch. Dist. No. 60 v. Colo. High Sch. Activities Ass'n*, 30 P.3d 752, 753 (Colo. App. 2000) (“A court does not have subject matter jurisdiction if a plaintiff lacks standing to invoke its judicial power.”). If, as in this case, a district court elects to resolve the motion without conducting a hearing, the court must accept as true all material allegations in the operative complaint. *See Reeves-Toney v. Sch. Dist. No. 1*, 2019 CO 40, ¶ 20; *see also Rome v. Reyes*, 2017 COA 84, ¶¶ 8-9 (applying this standard in resolving motion to dismiss for lack of personal jurisdiction under C.R.C.P. 12(b)(2)).

¶ 17 There is not an abundance of case law addressing the standing requirements for asserting a CORA claim. But the statute provides that it is “the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law.” § 24-72-201, C.R.S. 2023. Interpreting this language in 1974, the supreme court reasoned that “[t]his statement of policy clearly eliminates any requirement that a person seeking access to public records show a special interest in those records in order to be permitted access thereto.” *Denver Publ’g Co. v. Dreyfus*, 184 Colo. 288, 292, 520 P.2d 104, 106 (1974).

¶ 18 A division of this court reached a similar conclusion in interpreting Colorado’s Open Meeting Laws (OML), which, like CORA, broadly authorize any person who has been denied rights under the OML the ability to bring suit to enforce those rights. See *Roane v. Elizabeth Sch. Dist.*, 2024 COA 59, ¶¶ 35, 38, 40 (holding that the OML conferred a protected interest to every member of the public, without regard to their personal interest in the subject matter of their claim); see also § 24-6-402(9)(a), C.R.S. 2023 (“Any person denied or threatened with denial of any of the rights that are conferred on the public by [the OML] has suffered an injury in fact and, therefore, has standing to challenge the violation of this part 4.”).

¶ 19 As the court reasoned in *Roane*, “the scope of the legally protected interest also informs what constitutes an injury to that particular interest.” *Roane*, ¶ 35. CORA, like the OML, defines a broad protected interest to persons denied a CORA request:

[A]ny person denied the right to inspect any record covered by this part 2 . . . may apply to the district court . . . for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record; except that, at least fourteen days prior to filing an application with the

district court, the person who has been denied the right to inspect the record shall file a written notice with the custodian who has denied the right to inspect the record informing the custodian that the person intends to file an application with the district court. During the fourteen-day period before the person may file an application with the district court . . . the custodian who has denied the right to inspect . . . shall either meet in person or communicate on the telephone with the person who has been denied access to the record to determine if the dispute may be resolved without filing an application with the district court.

§ 24-72-204(5)(a), C.R.S. 2023. The scope of this broadly protected interest also informs what constitutes an injury in fact to that particular interest. *See Roane*, ¶ 35.

B. Analysis

¶ 20 The district court dismissed Sturgell’s CORA claims based on the following analysis:

The Court does not have subject matter jurisdiction over the claims presented by [Sturgell] because [Sturgell] does not have standing to bring these claims. There has been no alleged personal injury to [Sturgell].

Simply put, [Sturgell] plead[s] no allegations of fact or law with respect to [defendants]. Here there are no factual or legal allegations, so there is no plausible claim for relief. Where the facts do not permit the court to infer more

than the mere possibility of misconduct, the pleader is not entitled to relief. Accordingly, under Rule 12(b)(5), [Sturgell] fails to state a claim to which relief can be granted.

¶ 21 It is difficult to discern the precise basis for the court's conclusion that it lacked standing. But we respectfully disagree with the court's conclusion that Sturgell's claims lack sufficient factual and legal allegations to establish standing. The second amended complaint covers forty-eight pages and contains 228 paragraphs asserting the factual background and applicable legal standards. These allegations set forth in detail (perhaps unnecessarily so) the facts and legal authorities explaining the legal interest on which Sturgell relies and the basis for his assertion that he suffered injury because of defendants' alleged violation of that interest.

¶ 22 By way of summary, Sturgell alleged that (1) he made his CORA requests for bona fide purposes; (2) the requests were not unduly vague; (3) CDPHE and the individual defendants did not follow CORA when responding to his requests; (4) the estimated \$600 fee was excessive; and (5) the records custodian demanded a \$600 deposit for pretextual reasons to prevent him from accessing

what he contends were illegally issued ketamine licenses. Sturgell also set forth the specific statutory rights and obligations that provided the legal basis for his CORA claims.

¶ 23 We turn now to consider whether the district court erred by concluding that these allegations failed, as a matter of law, to establish that Sturgell had standing to pursue the CORA claims.

1. C.R.C.P. 12(b)(1)

¶ 24 The district court did not explain the rationale for its conclusion that “there has been no alleged personal injury to [Sturgell].” If this analysis was intended to suggest that Sturgell failed to allege an injury in fact, we disagree. Given the broad protected interest in obtaining public records, and the express policies that underlie that interest, we conclude that Sturgell has asserted facts that, if established, would demonstrate that he suffered an injury in fact to a legally protected interest. *See Hickenlooper*, ¶ 8.

¶ 25 Though not addressed by the district court, defendants argue that Sturgell was never denied access to the documents, but rather, CDPHE simply requested the advance payment of a deposit to cover the estimated fees, which it contends is permitted under section 24-

72-204(5)(a). But Sturgell alleged in his second amended complaint that he has limited economic means and that the imposition of this deposit was a pretext designed to prevent him from accessing the records. Sturgell also alleged that the requested documents total less than a hundred pages, and based on past responses to similar requests, defendants should have been able to access these records in less than one hour, or at least in substantially less than twenty hours.

¶ 26 We also note that Sturgell alleged that, after he filed his notice of intent to sue, CDPHE failed to abide by its obligation under section 24-72-204(5)(a), requiring that within fourteen days of such notice, “the custodian who has denied the right to inspect the record shall either meet in person or communicate on the telephone with the person who has been denied access to the record to determine if the dispute may be resolved without filing an application with the district court.” By using the word “shall” the General Assembly specified that this obligation is mandatory. See *In re Estate of Gonzalez*, 2024 COA 63, ¶ 37 (“When the General Assembly uses the term ‘shall’ in a statute, we construe this to be mandatory, not permissive.”). If established, this allegation may

provide additional support for Sturgell’s contention that the imposition of the \$600 deposit was pretextual.

¶ 27 CDPHE cites *Mountain-Plains Investment Corp. v. Parker Jordan Metropolitan District*, 2013 COA 123, to support its imposition of the requirement that a deposit be paid before fulfilling a CORA request. *See also* § 24-72-205(1)(b), C.R.S. 2023 (“[T]he custodian shall notify the record requester that a copy of the record is available but will only be sent to the requester once the custodian either receives payment or makes arrangements for receiving payment for all costs associated with records transmission and for all other fees lawfully allowed . . .”).

¶ 28 In *Mountain-Plains*, the plaintiffs made two CORA requests for a large amount of material relating to an improvement project on land that they had sold to a special district. *Mountain-Plains*, ¶¶ 15-16. The records custodian estimated that it would cost \$16,025 to fulfill their request and required the plaintiffs to pay a \$2,500 deposit before it would produce any documents. *Id.* at ¶¶ 16-17. On appeal, the division affirmed the district court’s determination that the fee was reasonable. *Id.* at ¶ 45.

¶ 29 But as Sturgell points out, the plaintiffs in *Mountain-Plains* were asking for a massive amount of information and were able to pay the deposit. *Mountain-Plains* expressly limited its holding based on these two factors: “There was no indication that plaintiffs were unable to pay the deposit. In the absence of such a circumstance, and given the potentially massive volume of the documents requested, we conclude that charging an advance deposit in a reasonable amount was not a violation of CORA.” *Id.* at ¶ 46.

¶ 30 In contrast to the situation in *Mountain-Plains*, Sturgell alleged that his request for the forty-nine waivers would encompass less than one hundred pages. And at the time of his requests, Sturgell alleged that he was unhoused and unable to pay the deposit. See 24-72-205(1)(b) (“[T]he custodian shall notify the record requester that a copy of the record is available but will only be sent to the requester once the custodian either receives payment or makes arrangements for receiving payment for all costs associated with records transmission and for all other fees lawfully allowed, *unless recovery of all or any portion of such costs or fees has been waived by the custodian.*”) (emphasis added). Finally, in *Mountain-Plains*, the deposit was a fraction of the estimated cost, unlike here, where

CDPHE required that Sturgell pay the entire fee up front before it would do any work. *Mountain-Plains*, ¶¶ 6-7.

¶ 31 We recognize that Sturgell’s allegations are just that — allegations — not proven facts. But at this stage of the proceedings, the district court was obligated to accept these allegations as true for purposes of resolving whether Sturgell had standing to pursue his CORA claims. See *Reeves-Toney*, ¶ 20; *Rome*, ¶ 20. And accepting these allegations as true, we conclude that Sturgell asserted sufficient facts that, if established at a hearing or trial, would support the conclusion that he suffered injury in fact to a legally protected interest. Thus, we conclude that the district court erred by dismissing the CORA claims at this stage of the proceedings based on a lack of standing.¹

¹ We note that during oral argument, defendants’ counsel asserted that Sturgell failed to provide fourteen days’ advance written notice of his intent to file an application with the district court, as section 24-72-204(5)(a), C.R.S. 2023, requires. But Sturgell alleged in his second amended complaint that he did provide such notice. This factual dispute cannot be resolved on appeal but rather must be resolved by the district court after an appropriate hearing.

2. C.R.C.P. 12(b)(5)

¶ 32 Defendants argue that Sturgell failed to appeal the district court’s ruling under C.R.C.P. 12(b)(5) and urge us to affirm the district court’s dismissal of the CORA claims on that basis. But as previously noted, if Sturgell lacked standing — as the district court concluded — then the district court was without jurisdiction to further address Sturgell’s CORA claims. *See Pueblo*, 30 P.3d at 753. “Standing is a threshold issue that must be satisfied in order for a court to decide a case on the merits.” *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008). Because the C.R.C.P. 12(b)(5) dismissal was entered after the court concluded that it lacked subject matter jurisdiction, we vacate the district court’s order dismissing Sturgell’s CORA claims pursuant to C.R.C.P. 12(b)(5). *See Golden Run Ests., LLC v. Town of Erie*, 2016 COA 145, ¶ 2 (“Because we conclude that the trial court did not have subject matter jurisdiction . . . we vacate that part of the judgment”); *In re Support of E.K.*, 2013 COA 99, ¶ 8 (“[A] judgment rendered without subject matter jurisdiction is void.”).

IV. Declaratory Judgment and Injunctive Relief Claims

¶ 33 As with the CORA claims, the district court dismissed Sturgell’s declaratory judgment claims and associated requests for injunctive relief for lack of standing. The court also dismissed these two claims as moot and for failure to state a claim.

¶ 34 As best we understand his allegations, Sturgell bases these claims on an alleged flaw in EMPAC’s formation and the Department of Regulatory Agencies’ failure to conduct a “Sunset Review” of EMPAC. Sturgell argues that the bill creating EMPAC contained two separate subjects, in violation of article 5, sections 17 and 21 of the Colorado Constitution, which prohibit altering the original purpose of a legislative bill and restricting bills to a single subject. Sturgell also argues that entities like EMPAC are required to undergo a “Sunset Review” every ten years or forfeit their legislative mandate, and because EMPAC was not subjected to such a review, its actions after July 1, 2020, were illegal.

¶ 35 On appeal, Sturgell claims he has standing to assert his claims regarding EMPAC in his capacity as a taxpayer and as a citizen in danger of being subjected to the use of ketamine in emergency situations. CDPHE argues that Sturgell’s taxpayer

standing argument is not preserved and that both arguments are inconsistent with Colorado case law.

A. Standard of Review

¶ 36 We review the district court’s conclusion that Sturgell lacked standing to bring the declaratory judgment claims under the same standards we applied when assessing the district court’s dismissal of the CORA claims for lack of standing. But unlike the CORA claims, Sturgell does not point to a particular statute that gives him the right to bring an action to challenge the formation and continued existence of EMPAC. Rather, Sturgell’s standing argument is predicated on section 2-3-1203(1)(a), C.R.S. 2023, which provides that “the life of a newly created advisory committee may not exceed ten years, and the statutory authorization for the committee must include a corresponding repeal provision.” But section 2-3-1203 does not create a private right of action to enforce its terms.

¶ 37 Similarly, section 24-34-104(7), C.R.S. 2023, and article 5, sections 17 and 21 of the Colorado Constitution, which Sturgell cited in support of his argument that EMPAC was invalidly created, do not authorize a private right of action to enforce their terms.

¶ 38 Nor does Sturgell develop an argument that C.R.C.P. 57, which governs claims for declaratory relief, gives him standing to pursue his claims regarding EMPAC. *See Cacioppo v. Eagle Cnty. Sch. Dist. Re-50J*, 92 P.3d 453, 467 (Colo. 2004) (“A declaratory judgment action requires the plaintiff to assert present and cognizable rights and ‘calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.’” (quoting *Farmers Ins. Exch. v. Dist. Ct.*, 862 P.2d 944, 947 (Colo. 1993))). Thus, on appeal, Sturgell is forced to argue generally that he has either taxpayer standing or has standing because he is a person at risk of being injected with ketamine. Even if we assume, without deciding, that these arguments are adequately preserved, they fail on the merits.

B. Analysis

¶ 39 Sturgell first argues that his status as a taxpayer satisfies the injury-in-fact prong of the standing test because he pays taxes and tax revenue is used to fund “per diem payments to board members, office space, office supplies, technology, support staff, and even defense costs in the present matter.” But the supreme court has rejected this type of broad taxpayer standing argument. *See*

Freedom from Religion Found., ¶ 15 (“Even assuming that the Governor used public funds to pay for the paper, hard-drive space, postage, and personnel[,] . . . such incidental overhead costs are not sufficiently related to Respondents’ financial contributions as taxpayers to establish the requisite nexus for standing.”).

¶ 40 Sturgell next argues that he has standing because he is in danger of being injected with ketamine. But the supreme court rejected a similar argument in *Ainscough*, holding that “the remote possibility of a future injury” does not convey standing. 90 P.3d at 856. Therefore, Sturgell’s standing arguments regarding his EMPAC claims fail even if he preserved them.

¶ 41 The district court did not err by dismissing Sturgell’s declaratory judgment claims and associated request for injunctive relief for lack of standing. Having reached this conclusion, we need not address the district court’s alternative conclusion that the passage of H.B. 21-1251 rendered these claims moot by or whether they state a viable claim for relief.

V. Motion to Amend

A. Standard of Review

¶ 42 A party may move for leave to amend their complaint at any time, and the decision whether to grant the motion is entrusted to the court's discretion. *Civ. Serv. Comm'n v. Carney*, 97 P.3d 961, 966 (Colo. 2004); *see also* C.R.C.P. 15(a) ("A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it any time within 21 days after it is filed."). Accordingly, we generally review a district court's decision whether to grant a motion for leave to amend for an abuse of discretion. *Carney*, 97 P.3d at 966.

¶ 43 A district court must consider the totality of the circumstances when considering whether to grant a motion for leave to amend. *Id.* The district court's discretion ends, however, when a final judgment enters. *Id.* at 967 ("Once there is a final judgment, motions to amend a complaint may no longer be entertained.").

B. Analysis

¶ 44 Sturgell filed his second amended complaint in February 2023. While the record is not clear whether the district court entered an order expressly permitting Sturgell to file his second amended complaint, both parties and the district court treated the second amended complaint as the controlling pleading. Thus, the court’s original dismissal order dated June 5, 2023, is captioned “Order: Motion to Dismiss Second Amended Complaint and Motion for Injunctive Relief.” While the original order contained some ambiguities, on June 21, 2023, the court entered an amended order clarifying those ambiguities and confirming that the original June 5 order dismissed all Sturgell’s claims.

¶ 45 On June 9, Sturgell filed a motion for leave to file a third amended complaint. But by that time the court had already entered the June 5 order dismissing all Sturgell’s claims. This was a final order that completely resolved the parties’ claims and defenses, save any issues related to an award of costs. Therefore, the rationale of *Carney* controls. *See id.* at 966-67. Accordingly, because the June 5 dismissal order was issued first, the district court was without authority to grant the motion to amend, and it

therefore did not abuse its discretion by denying the motion. See *id.*

VI. Judicial Bias

A. Standard of Review and Relevant Case Law

¶ 46 We review de novo a motion to disqualify a judge based on allegations of bias. *People v. Jennings*, 2021 COA 112, ¶ 27. “[A] defendant asserting bias on the part of a trial judge must establish that the judge had a substantial bent of mind against him or her.” *Id.* at ¶ 28 (quoting *People v. Drake*, 748 P.2d 1237, 1249 (Colo. 1988)). The moving party must clearly establish the alleged bias; speculative allegations do not meet this burden. *Id.*

¶ 47 A motion to disqualify may be waived if not timely filed. *People v. Garcia*, 2024 CO 41M, ¶ 1. Generally, “when the grounds for disqualification are known, a motion to disqualify should be filed prior to taking any other steps in the case.” *Johnson v. Dist. Ct.*, 674 P.2d 952, 957 (Colo. 1984).

B. Analysis

¶ 48 On appeal, Sturgell argues that the district court demonstrated bias by inadvertently referencing a party to his previous lawsuit in its order of dismissal. As best we understand

his contention, Sturgell argues the district court's error demonstrates that the court did not objectively consider his claims and the related motion to dismiss, but rather, summarily denied the motion because of its experience in presiding over other Sturgell claims.

¶ 49 However, Sturgell did not file a motion to disqualify in the district court, and therefore the judge never had the opportunity to address the issue and make appropriate findings. Accordingly, the argument is not preserved.

¶ 50 Sturgell argues that we should forgive his failure to preserve because he did not know about the court's error until the court entered the June 5 dismissal order. Thus, he argues, we should treat this case as one of the rare instances in which a judge's bias is so pronounced that we should order that a new judge hear the case on remand. *See Guy v. Whitsitt*, 2020 COA 93, ¶ 37 (requests to appoint a new judge on remand are extraordinary and should be granted only when there is proof of personal bias or other extreme circumstances). We disagree.

¶ 51 Sturgell cites no authority, and we are aware of none, that would permit disqualification simply because the court made an

error by referencing a party involved in a prior proceeding. As a matter of law, we conclude that such allegations are insufficient to warrant disqualification of the judge.

VII. Disposition

¶ 52 We reverse the district court's judgment dismissing Sturgell's CORA claims for lack of standing under C.R.C.P. 12(b)(1), and we vacate its order granting defendants' motion to dismiss the CORA claims pursuant to C.R.C.P. 12(b)(5). In all other respects, we affirm the district court's judgment of dismissal. We remand the case to the district court for further proceedings consistent with this opinion.

¶ 53 On remand, the district court shall conduct a hearing to resolve the factual disputes regarding the asserted reasonableness of the estimated \$600 fee and corresponding deposit, whether Sturgell provided fourteen days' advance written notice of his intent to sue, and whether defendants met their obligation to contact Sturgell to attempt to resolve the disputes regarding the reasonableness of the estimated fee and demanded deposit during the fourteen-day period. If the court concludes Sturgell does not have standing, the CORA claims must be dismissed. If the court

concludes that Sturgell has established standing, the court may address the merits of the CORA claims, subject to any defenses that may be asserted.

JUDGE FREYRE and JUDGE LIPINSKY concur.

Court of Appeals

STATE OF COLORADO
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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: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties: You may be able to obtain help for your civil appeal from a volunteer lawyer through the Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at <https://www.cobar.org/Appellate>