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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/03/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FOX JOSEPH SALERNO,) No. 1 CA-CV 11-0470
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
CHARLES RYAN; STACEY CRABTREE;) (Not for Publication -
ROBERT PATTON; CARSON) Rule 28, Arizona Rules of
McWILLIAMS; ERNEST TRUJILLO; and) Civil Appellate Procedure
STEPHEN MORRIS,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-096631

The Honorable Larry Grant, Judge

AFFIRMED

Fox Joseph Salerno
Appellant *in Propria Persona*

Florence

Thomas C. Horne, Attorney General
By Michele L. Forney, Assistant Attorney General
Attorneys for Defendants/Appellees

Phoenix

T I M M E R, Presiding Judge

¶1 Fox Salerno appeals the superior court's dismissal of his complaint against a number of prison employees for purportedly defaming him. For the following reasons, we affirm.

BACKGROUND

¶2 On August 9, 2010, Salerno filed a complaint in superior court alleging fifteen individual Arizona Department of Corrections ("Department") officials and employees engaged in a conspiracy to defame him in retaliation for writing a newspaper article criticizing Department operations. On October 25, two of the defendants filed a motion to dismiss the complaint pursuant to Arizona Rule of Civil Procedure 12(b)(6) because Salerno had not filed his complaint against the State as required by Arizona Revised Statutes ("A.R.S.") section 31-201.01(F) (West 2012).¹ Three other defendants joined in the motion. On June 1, 2011, the court entered final judgment granting the defendants' motion.² This timely appeal followed.

DISCUSSION

¶3 Motions to dismiss test a complaint's legal sufficiency. *Moretto v. Samaritan Health Sys.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997). The superior court properly

¹ Absent material revision after the date of the events at issue, we cite a statute's current version.

² The judgment also dismissed the complaint against nine other defendants solely because Salerno failed to serve them with process within the time limit set forth in Ariz. R. Civ. P. 4(i). Salerno does not challenge the efficacy of that ruling.

dismisses a complaint only when it can be certain the plaintiff cannot prove facts entitling it to relief. *Fid. Sec. Life Ins. Co. v. State, Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998) (stating that dismissal for failure to state a claim is appropriate only if "as a matter of law . . . plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof"). We review the grant of a motion to dismiss for an abuse of discretion. *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006). "A trial court abuses its discretion when it misapplies the law or predicates its decision on incorrect legal principles." *State v. Jackson*, 208 Ariz. 56, 59, ¶ 12, 90 P.3d 793, 796 (App. 2004).

¶4 Salerno initially argues the superior court erred by dismissing his complaint because A.R.S. § 31-201.01(L), which prohibits inmates from seeking damages or equitable relief from the State or Department personnel unless the claim is authorized by federal statute or they can allege "serious physical injury," is unconstitutional by denying inmates equal protection of the law. But the court dismissed the complaint based on subsection (F) rather than subsection (L).³ Consequently, the constitutionality of subsection (L) is not properly before us,

³ Salerno erroneously asserts the defendants argued dismissal was also warranted based on A.R.S. § 31-201.01(L). Neither the motion to dismiss nor the reply mentions subsection (L).

and we do not address Salerno's arguments. See *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 377, ¶ 9, 199 P.3d 629, 632 (App. 2008) (citing *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Svcs.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985)) (noting our courts observe a policy of "'prudential or judicial restraint' to ensure that we do not issue advisory opinions, address moot cases, or deal with issues that have not been fully developed by true adversaries").

¶15 Salerno next argues the court erred by dismissing the complaint pursuant to A.R.S. § 31-201.01(F), which provides:

Any and all causes of action which may arise out of tort caused by the director, prison officers or employees of the [D]epartment, within the scope of their legal duty, shall run only against the state.

See also *Tripati v. State*, 199 Ariz. 222, 224, ¶ 5, 16 P.3d 783, 785 (App. 2000) (emphasizing that § 31-201.01(F) "specifies who may be named as a defendant in an inmate's lawsuit based on allegations of tortious acts by Department . . . personnel"). Thus, § 31-201.01(F) limits liability to the State for torts committed by Department personnel. Nevertheless, without authority, Salerno argues that failure to adhere to § 31-201.01(F) is not a fatal defect because (1) the State necessarily assumes liability for its employees' actions and is not required to be named as a defendant, (2) the State waived this defect because the Attorney General accepted service of the

complaint and filed answers on behalf of the defendants, and (3) the court erred by failing to allow Salerno to file an amended complaint. We address each argument in turn.

¶16 First, even assuming the State is liable for defendants' alleged defamation, Salerno could not obtain a judgment against the State without naming it as a defendant. Naming the proper defendant in a complaint is necessary for the court to acquire jurisdiction over that defendant. *Ariz. Land & Stock Co. v. Markus*, 37 Ariz. 530, 537, 269 P. 251, 253 (1931). Moreover, even assuming Salerno could comply with § 31-201.01(F) by naming the individuals as defendants in their official capacities, he did not do so. The complaint explicitly states Salerno "is suing [the defendants] as individuals," for "defamatory statements [and] actual malice by all defendants . . . in their individual capacity."

¶17 Second, we fail to discern how accepting service of a complaint that has not been reviewed by a defendant is inconsistent with that party's later act in challenging the sufficiency of that complaint. See *Jones v. Cochise County*, 218 Ariz. 372, 379, ¶ 23, 187 P.2d 97, 104 (App. 2008) ("Waiver by conduct must be established by evidence of acts inconsistent with an intent to assert the right.") (citation omitted). And the defendants responded to the complaint by filing the motion

to dismiss rather than answering the complaint, thereby raising the statutory defense at the earliest opportunity.

¶18 Third, and finally, the superior court did not err by failing to allow Salerno to file an amended complaint. Arizona Rule of Civil Procedure 15(a)(2) requires a plaintiff who moves to amend a complaint to attach a copy of the proposed amended complaint to the motion and highlight the proposed changes. Salerno did not comply with this rule.

¶19 In summary, Salerno violated A.R.S. § 31-201.01(F) by suing Department personnel for allegedly defaming him. Such tort actions must be filed against the State. Because Salerno did not name the State as a defendant, the superior court properly dismissed the complaint.⁴

CONCLUSION

¶10 For the foregoing reasons, we affirm the superior court's judgment dismissing Salerno's complaint.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
Patricia K. Norris, Judge

/s/
Donn Kessler, Judge

⁴ Salerno also argues A.R.S. § 31-201.01(F) is unconstitutional. But Salerno waived this argument by raising it for the first time in his reply brief, which deprived appellees the opportunity to address it. *Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 7, n.3, 119 P.3d 467, 471 n.3 (App. 2005).