IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

GREGORY BEST,
Plaintiff/Appellant,

v.

THE STATE OF ARIZONA, THOMAS HORNE, ATTORNEY GENERAL;
W. LLOYD BENNER AND JANE DOE BENNER, HUSBAND AND WIFE;
AND MARK BOOKHOLDER AND JANE DOE BOOKHOLDER,
HUSBAND AND WIFE,
Defendants/Appellees.

No. 2 CA-CV 2014-0064
Filed June 17, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Maricopa County
No. CV2012011437
The Honorable Douglas Gerlach, Judge
The Honorable George H. Foster, Jr., Judge

AFFIRMED

COUNSEL

Gregory Best, Phoenix
In Propria Persona

Thomas C. Horne, Arizona Attorney General
By Michael G. Gaughan, Assistant Attorney General, Phoenix
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Gregory Best appeals from the trial court's order dismissing his claim against appellees W. Lloyd Benner and Mark Bookholder with prejudice for failure to serve a notice of claim on them as public employees pursuant to A.R.S. § 12-821.01. He argues the court erred because his notice of claim against the state was sufficient and, in any event, he was not required to personally serve them with a notice. Best also argues the court erred by finding he had not served Benner and Bookholder with the summons and complaint and by denying his motions for alternative service and to begin discovery. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 "In reviewing a trial court's decision to dismiss a claim, we accept as true all facts asserted in the complaint." *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 2, 160 P.3d 223, 225 (App. 2007). In 2006, the state filed a civil action (the "2006 lawsuit") against Best for consumer fraud and racketeering (cause number CV2006016293). The parties agreed to settle the 2006 lawsuit pursuant to a stipulated judgment entered in June 2010. The stipulated judgment provided that it was "not intended to have any [e]ffect on any litigation or dispute other than th[at] case."

¶3 In 2011, Best filed a lawsuit against the state, the City of Phoenix, and others (the "2011 lawsuit") for wrongful institution of the 2006 lawsuit (cause number CV2011009088). The defendants responded by filing a joint motion to dismiss, arguing the claims

were foreclosed by virtue of the stipulated judgment entered in the 2006 lawsuit. The trial court granted the motion, and this court affirmed on appeal. *Best v. State ex rel. Horne*, No. 1 CA-CV 12-0145, ¶¶ 3, 8 (memorandum decision filed Apr. 16, 2013).

¶4 In January 2012, Best served the state with a notice of claim, alleging that the state, the City of Phoenix, and their attorneys had violated the terms of the stipulated judgment in the 2006 lawsuit by filing the joint motion to dismiss the 2011 lawsuit. In August 2012, Best filed this civil action for tortious interference with contract, aiding and abetting tortious conduct, breach of contract, and fraud (cause number CV2012011437). In his complaint, Best alleged, among other things, that state attorneys, Thomas Horne, W. Lloyd Benner, and Mark Bookholder, were liable because they had "filed, caused to be filed, . . . or agreed with the filing of [the] Joint Motion to Dismiss" the 2011 lawsuit and that "[t]he state [wa]s liable for the acts of its attorneys."[1]

¶5 In November 2012, Best hired a process server to serve Horne, Benner, and Bookholder with the summons, complaint, and certificate of compulsory arbitration. The process server delivered three copies of the set of documents to J. Williams, the "front[-]desk [c]lerk" at the Office of the Attorney General. Benner and Bookholder filed motions to dismiss on the grounds they had not been served with a notice of claim pursuant to § 12-821.01 and they had not been properly served with the summons and complaint pursuant to Rule 4.1(d), Ariz. R. Civ. P. In response, Best argued the January 2012 notice of claim served upon the state was sufficient and that, in any event, a notice of claim was not required "when a party by his own negligence causes the injuries," "when a government agency's employee is acting outside the normal scope of employment," or when the "damages [were] caused by conditions the employees personally created."

[1] The complaint also named the City of Phoenix and the attorneys who represented it in CV2011009088 as defendants. Those parties are not subject to this appeal.

¶6 In an unsigned ruling, the trial court dismissed Benner and Bookholder in June 2013. The following week, Best filed motions to serve Benner and Bookholder by alternative service and to begin discovery. The court ordered the defendants, in responding to Best's motion for alternative service, to submit an affidavit from Williams, addressing whether she was authorized to accept service on behalf of either Benner or Bookholder. The court subsequently affirmed its dismissal of the action against Benner and Bookholder and denied Best's request for alternative service after finding that Williams lacked authority to accept service on their behalf and that they already had been dismissed for failure to serve a notice of claim. The court then entered a signed judgment pursuant to Rule 54(b), Ariz. R. Civ. P., dismissing Benner and Bookholder from the case with prejudice.[2] Thereafter, the court denied Best's motion to begin discovery. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).[3]

Discussion

¶7 Best argues the trial court erred in dismissing Benner and Bookholder for his failure to serve them with a notice of claim pursuant to § 12-821.01. He contends § 12-821.01 does not apply to Benner and Bookholder and that, in any event, the January 2012 notice of claim served upon the state gave sufficient notice to these defendants.

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[2]In that judgment, the trial court also dismissed the state and Horne. However, Best does not argue on appeal that the court erred in dismissing those parties.

[3]Best's notice of appeal, filed on July 25, 2013, states that he is appealing "from the Signed Judgment entered . . . on 7/01/2013 in favor of Defendants." The only filing on that date is an unsigned order "entering judgment in accordance with the formal written Judgment signed by the [c]ourt on June 2[7], 2013, and filed (entered) by the [c]lerk on June 28, 2013." We therefore construe the notice of appeal to be from the June 28 judgment, which dismissed Benner and Bookholder. *See Hanen v. Willis*, 102 Ariz. 6, 9-10, 423 P.2d 95, 98-99 (1967) (finding jurisdiction despite notice of appeal citing date of minute entry rather than date of final judgment).

¶8 Generally, "[w]e review a trial court's grant of a motion to dismiss for an abuse of discretion." *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 11, 158 P.3d 232, 236 (App. 2007). However, a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to Rule 12(b)(6), Ariz. R. Civ. P., must be treated as a motion for summary judgment when "matters outside the pleading are presented to and not excluded by the court." Ariz. R. Civ. P. 12(b); *see Vasquez v. State*, 220 Ariz. 304, ¶ 8, 206 P.3d 753, 757 (App. 2008).

¶9 In this case, Benner and Bookholder cited Rules 12(b)(1) (lack of subject matter jurisdiction), (2) (lack of personal jurisdiction), and (4) (insufficiency of process) in their motions to dismiss, and the trial court did not specify which subsection it relied on when it granted their motions. Nevertheless, it is clear from the motions, Best's responses, and the court's order, that the core issue below, as on appeal, was whether Best complied with § 12-821.01. *See Rodriquez v. Williams*, 104 Ariz. 280, 283, 451 P.2d 609, 612 (1969) ("[W]e look to substance rather than to form."). Failure to comply with § 12-821.01 is an affirmative defense properly raised in a motion to dismiss pursuant to Rule 12(b)(6). *Pritchard v. State*, 163 Ariz. 427, 429-33, 788 P.2d 1178, 1180-84 (1990) ("compliance with [notice of claim statute] is not jurisdictional" even though "[t]he requirement of filing a claim with the state is mandatory and an essential requisite to plaintiff's cause of action"); *see also Lee v. State*, 225 Ariz. 576, ¶¶ 10, 13, 242 P.3d 175, 178 (App. 2010) (logic of *Pritchard* applies "equally to the current version of the statute"). And, because the trial court considered matters outside the pleading, the motion to dismiss is treated as one for summary judgment. *See Vasquez*, 220 Ariz. 304, ¶ 8, 206 P.3d at 757. Therefore, we review the court's ruling de novo and "construe all facts in favor of the nonmoving party and affirm only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, ¶ 9, 234 P.3d 623, 627 (App. 2010).

¶10 We begin our analysis with § 12-821.01(A), which states, in pertinent part:

> Persons who have claims against a public entity or a public employee shall file claims with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues.

A person who wishes to serve the state must deliver the notice of claim to the attorney general pursuant to Rule 4.1(h)(1), Ariz. R. Civ. P. However, to serve a public employee, the notice must be delivered

> . . . to that individual personally or by leaving copies thereof at that individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy . . . to an agent authorized by appointment or by law to receive service of process.

Ariz. R. Civ. P. 4.1(d); *see Crum v. Superior Court*, 186 Ariz. 351, 352, 922 P.2d 316, 317 (App. 1996). "Actual notice and substantial compliance do not excuse failure to comply with the statutory requirements of . . . § 12-821.01(A)." *Falcon ex rel. Sandoval v. Maricopa Cnty.*, 213 Ariz. 525, ¶ 10, 144 P.3d 1254, 1256 (2006). Thus, when a claimant fails to serve a public employee with a notice of claim pursuant to Rule 4.1(d), the claim against that employee is barred, regardless of whether the claimant had properly served the public-entity employer beforehand.[4] *See id.*; *Crum*, 186 Ariz. at 352, 922 P.2d at 317.

[4] Apparently relying on *Falcon ex rel. Sandoval v. Maricopa Cnty.*, 212 Ariz. 144, ¶ 17, 128 P.3d 767, 771 (App. 2006), Best asserts

¶11 Here, it is undisputed that Best did not include a notice of claim among the documents his process server delivered to Williams in November 2012. Therefore, even if we were to assume, as Best urges, that Williams was authorized to accept service on behalf of Benner and Bookholder, service in such manner nevertheless would have failed to satisfy § 12-821.01. And, although Best's January 2012 notice of claim served upon the state listed Benner and Bookholder as public employees who had "acted under color of law," the notice was only addressed to, and received by, the Office of the Attorney General. *See* Ariz. R. Civ. P. 4.1(d); *Crum*, 186 Ariz. at 352, 922 P.2d at 317.

¶12 In the alternative, Best argues that Benner and Bookholder were not acting as public employees and, therefore, the trial court erred by finding he was required to serve them with a notice of claim.[5] We disagree.

¶13 A notice of claim is only required if the claimant "asserts that [the] public employee's conduct giving rise to a claim for damages was committed within the course and scope of employment." *Crum*, 186 Ariz. at 352, 922 P.2d at 317. Conduct "is within the scope of employment if it is of the kind the employee is employed to perform, it occurs substantially within the authorized time and space limit, and it is actuated at least in part by a purpose to serve the master." *Love v. Liberty Mut. Ins. Co.*, 158 Ariz. 36, 38,

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that "[s]erving [a] single member of [a] county board satisfie[s the] claims filing requirement" and, by analogy, suggests that serving the notice of claim on the attorney general was sufficient notice to Benner and Bookholder. However, our supreme court vacated the applicable portion of that opinion on review. *Falcon*, 213 Ariz. 525, ¶¶ 34-35, 144 P.3d at 1260.

[5] To support this argument, Best cites an unpublished memorandum decision of this court. "[U]npublished decisions 'shall not be regarded as precedent nor cited in any court,'" *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 27, 122 P.3d 6, 14 (App. 2005), *quoting* Ariz. R. Civ. App. P. 28(c), and, for that reason, we will not consider it further.

760 P.2d 1085, 1087 (App. 1988). Contrary to Best's argument, his complaint alleges that Benner and Bookholder injured him when they "filed, caused to be filed, . . . or agreed with the filing of [the] Joint Motion to Dismiss" on behalf of the state in the 2011 lawsuit. He also asserted that their actions "were done, in part, for the purposes of furthering the interests of their employer, the State of Arizona." Although Best attempts on appeal to construe their conduct as outside the scope of employment, no fact in the record contradicts his original allegations. *See Simon*, 225 Ariz. 55, ¶ 9, 234 P.3d at 627. And, "because the material facts relevant to [the] scope of employment are undisputed," *Smithey v. Hansberger*, 189 Ariz. 103, 106, 938 P.2d 498, 501 (App. 1996), we can conclude as a matter of law that the acts to which Best assigns liability occurred within the scope of Benner's and Bookholder's employment.

¶14 Best nevertheless contends Benner's and Bookholder's conduct was "prohibited by [the] Rules of Professional [C]onduct and therefore cannot be assumed as acts done within the scope of employ." He suggests that, pursuant to Ethical Rule (ER) 1.2, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, "[a]n attorney has a legal duty to advise any entity wishing to break a contract . . . : (1) to not do it; and (2) to advise the entity wishing to break it of the legal consequences." And, Best argues that "Bookholder and . . . Benner violated their legal duties owed [to Best]" when they filed the motion to dismiss the 2011 lawsuit and, therefore, the acts fell outside the scope of their employment.

¶15 ER 1.2 governs the lawyer-client relationship, and subsection (d) prohibits the lawyer from counseling "a client to engage . . . in conduct that the lawyer knows is criminal or fraudulent." But Best has not explained how ER 1.2 imposes a legal duty on lawyers toward third parties, *see* Pmbl. ¶ 20, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42 ("Violation of a Rule should not . . . create any presumption . . . that a legal duty has been breached."), or why the joint motion to dismiss the 2011 lawsuit constituted "criminal or fraudulent" conduct, *see* A.R.S. § 13-201 (requirements for criminal liability); *Trollope v. Koerner*, 106 Ariz. 10, 19, 470 P.2d 91, 100 (1970) ("[A] breach of contract is not fraud."). *See also* Ariz. R. Civ. App. P. 13(a)(6) (appellant's brief shall contain argument); *In re*

Aubuchon, 233 Ariz. 62, ¶ 6, 309 P.3d 886, 888-89 (2013) (generally, "arguments not supported by adequate explanation, citations to the record, or authority" are waived).

¶16 Even if we were to assume that filing the joint motion to dismiss constituted an ethical violation, we fail to see how that violation would have any bearing on the issue whether Benner and Bookholder were acting in the scope of their employment. *See* Pmbl. ¶ 20, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 4 (rules "not designed to be a basis for civil liability"); *Stanley v. McCarver*, 208 Ariz. 219, n.6, 92 P.3d 849, 854 n.6 (2004). Best's reliance on ER 1.2 is therefore misplaced.

¶17 Relying on *Wisener v. State*, 123 Ariz. 148, 598 P.2d 511 (1979), and *Isbell v. Maricopa County*, 198 Ariz. 280, 9 P.3d 311 (2000), Best also argues § 12-821.01 does not apply "[i]f the employees caused the condition for which damage was a result" or "when a party by his own negligence causes the injuries." Both cases discuss a public entity's duty "to warn of danger[ous road conditions] of which the [entity] has actual or constructive notice." *Isbell*, 198 Ariz. 280, ¶ 12, 9 P.3d at 314, *citing Lowman v. City of Mesa*, 125 Ariz. 590, 593, 611 P.2d 943, 946 (1980); *see Wisener*, 123 Ariz. at 150, 598 P.2d at 513. These cases have no application to the notice of claim required pursuant to § 12-821.01. Thus, Best's reliance on *Isbell* and *Wisener* is also unavailing.

¶18 In sum, the trial court did not err in granting Benner's and Bookholder's motions to dismiss, *see Simon*, 225 Ariz. 55, ¶ 9, 234 P.3d at 627; Best's claims against them are barred by his failure to comply with § 12-821.01, *see Falcon*, 213 Ariz. 525, ¶ 10, 144 P.3d at 1256. And, because we reach that conclusion, we need not address his arguments that Williams was authorized to accept service of the summons and complaint on behalf of Benner and Bookholder or that the court erred in denying his motions for alternative service and to begin discovery, which he filed after the court first dismissed Benner and Bookholder.[6] *See Wertheim v. Pima Cnty.*, 211 Ariz. 422, ¶ 10, 122

[6]Moreover, we lack jurisdiction to consider Best's arguments regarding the trial court's denial of his motion to begin discovery. Generally, this court can only review matters that are identified in a

P.3d 1, 3 (App. 2005) ("We may affirm a trial court's ruling if it is correct for any reason.").

Disposition

¶19 For the reasons stated above, we affirm.

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notice of appeal. *Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 561, 578 P.2d 985, 990 (1978); *see* Ariz. R. Civ. App. P. 8(c) (notice of appeal must "designate the judgment or part thereof appealed from"). Best's notice of appeal states he is only appealing from the court's June 28 judgment. The court's denial of the motion to begin discovery, however, was filed nearly a month later, on July 25, 2013.