

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOEL KENTON BARR,) 1 CA-CV 12-0285
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
STATE OF ARIZONA; ARIZONA) Rule 28, Arizona Rules
DEPARTMENT OF CORRECTIONS,) of Civil Appellate
) Procedure)
Defendants/Appellees.)
)
_____) **FILED 2/12/2013**

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-080331

The Honorable Colleen L. French, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Michael E. Gottfried, Assistant Attorney General
Attorneys for Appellee

Joel Kenton Barr Florence
Plaintiff/Appellant *in propria persona*

SCHNEIDER, Judge

¶1 Joel Kenton Barr ("Barr") appeals from a judgment
dismissing with prejudice his complaint against the Arizona

Department of Corrections ("ADOC") and the State (collectively, the "State"). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Barr, an incarcerated pro per appellant, requested ADOC to notarize his signature on a General Durable Power of Attorney ("Power of Attorney"), which he needed to collect federal government benefits. ADOC deemed the request a "non-qualified . . . non-legal matter" and required Barr to pay a \$1.00 notary fee. Barr's inmate account was over \$5,000 overdrawn, however, and ADOC refused to further encumber his account with a request it deemed unassociated with a qualified legal claim.

¶3 According to Department Order 902.06 § 1.1, only a service request related to a qualified legal claim¹ "shall be provided . . . regardless of the inmate's ability to pay." If

¹ "Qualified legal claims" are:

In the direct appeal, any claim of error; in the Post Conviction Relief proceeding, any non-precluded claim set forth in Ariz. R. Crim. P. 32; and in federal court, any claim of error based on a violation of the federal constitution or law. Forms include the Notice of Appeal from the Superior Court (Ariz. R. Crim. P. 31.2(a); Notice of Post-Conviction Relief, Request for Preparation of Post-Conviction Relief Record, and Petition for Post-conviction Relief (Ariz. R. Crim. P. 32); Petition for Review (Ariz. R. Crim. P. 32.9(C)); Petition for Review (Ariz. R. Crim. P. 31.19 and 32.9(g)); Petition for a Writ of Habeas Corpus in state or federal court; and a civil rights action or condition of confinement claim (42 U.S.C. ' 1983).

funds are not available, the inmate's account is placed on hold. An inmate with insufficient funds to pay for a non-qualified legal claim service, on the other hand, shall be denied the service. Department Order 902.07 § 1.1. Yet, Department Order 902.06 § 1.7 notes that "[n]otaries related to statute or court required purposes shall be treated the same as qualified legal claims." In denying Barr's notary request due to his inability to pay the \$1.00 fee, ADOC quoted the definition of "qualified legal claims" in Department Order 902. That definition, quoted in footnote one, does not address notary public services.

¶4 Barr brought a civil tort action against ADOC and the State alleging they "proceeded without or in excess of jurisdiction or legal authority." He argued that because his Power of Attorney must be "executed and attested . . . before a notary public" pursuant to Arizona Revised Statutes ("A.R.S.") section 14-5501(D)(4) (West 2013), his notary request was "related to statute" (within the meaning of Department Order 902.06 § 1.7) and ADOC therefore was required to treat it as a qualified legal claim.² Barr sought significant monetary damages or, alternatively, "an order to the Director of the [ADOC] by which the ADOC is required to provide the notarization of plaintiff's signature."

² Absent revisions after the relevant date, we cite a statute's current version.

¶15 The State filed a motion to dismiss for failure to state a claim under Arizona Rule of Civil Procedure 12(b)(6), arguing ADOC was a non-jural entity incapable of being sued and Barr's claim was precluded by A.R.S. § 31-201.01(L) (West 2013) (incarcerated individual may not bring action for damages or equitable relief against the State or its agencies for injuries suffered in custody unless the individual suffered serious physical injury or the claim is authorized by federal statute). In the conclusion section of that motion, the State requested that Barr "not be permitted an opportunity to amend his complaint as amendment is futile due to statutory preclusion." In the body of its motion, however, the State did not develop the concept asked for in the conclusion; that is, whether disallowing an amendment equated to dismissal with prejudice or something less. In his response, Barr requested that the court treat his complaint as a special action petition. He ignored the State's request in the conclusion of its motion that he be precluded from amending his complaint.

¶16 In its reply to Barr's response, the State expressly used the term "with prejudice" for the first time, and requested that Barr's suit be dismissed with prejudice because "whether a standard tort claim or special action, both fail for the reasons identified in" its motion to dismiss. Although not discussed by either party, whether "with prejudice" is synonymous with the

language in the State's motion raises interesting issues. If the two concepts are not synonymous, then asking for dismissal with prejudice for the first time in the reply would be untimely and unfair to Barr because he would not have had the opportunity to be heard in opposition. If they are synonymous, then by ignoring the issue, Barr would be deemed to have waived the argument. In either event, the superior court granted "Defendants' Motion to Dismiss this matter with prejudice for the reasons stated in that Motion."

¶7 Barr timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (West 2013), -2101 (West 2013).

DISCUSSION

A. The Superior Court Did Not Abuse Its Discretion in Denying Barr Special Action Relief.

¶8 Barr concedes the superior court properly dismissed his tort claim. He asserts, however, that the court erred in dismissing his special action because the State's "arguments for dismissal of a tort claim are not applicable to a special action." When the superior court rules on the merits of a special action, "we determine whether it abused its discretion in granting or denying special action relief." *Files v. Bernal*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App. 2001). Denial of relief is highly discretionary and we will uphold the superior

court's decision for any valid reason disclosed by the record. *Carrington v. Ariz. Corp. Comm'n*, 199 Ariz. 303, 305, ¶ 6, 18 P.3d 97, 99 (App. 2000).

1. Treatment of the complaint as a special action petition.

¶9 When a complaint qualifies in substance as a special action, the superior court may treat it as such irrespective of its technical denomination. See *Clark v. State Livestock Sanitary Bd.*, 131 Ariz. 551, 555, 642 P.2d 896, 900 (App. 1982) (case remanded because court should have considered whether any of the complaint's claims could be reviewed as a special action); *Sheppard v. Ariz. Bd. of Pardons & Paroles*, 111 Ariz. 587, 588, 536 P.2d 196, 197 (1975) (court "will consider any application 'which states sufficient facts to justify relief'" (citation omitted)); *State ex rel. Ariz. State Bd. of Pardons & Paroles v. Superior Court (Judd)*, 12 Ariz. App. 77, 82, 467 P.2d 917, 922 (1970) (complaint may proceed by special action because prisoner "made allegations in her complaint which would vest jurisdiction in the Superior Court under the Rules of Procedure for Special Actions").

¶10 Here, Barr's complaint alleged sufficient facts to be considered a special action claim for relief. Mirroring the language in Rule of Procedure for Special Actions ("Rule") 3(b), Barr asserted ADOC "proceeded without or in excess of

jurisdiction or legal authority" in disregarding its Department Order mandating that notaries related to statute be treated as qualified legal claims. Moreover, by seeking to have the court order ADOC to notarize his Power of Attorney, Barr sought a writ of mandamus, one of the traditional forms of relief achieved through a special action. *Circle K. Convenience Stores, Inc. v. City of Phoenix*, 178 Ariz. 102, 103, 870 P.2d 1198, 1199 (App. 1993).

¶11 Though silent on the matter, it is implicit in the superior court's minute entry that it treated Barr's complaint as a special action and accepted jurisdiction, but declined relief by dismissing the entire suit. The signed minute entry provides that Barr's action was dismissed only for the reasons in the State's motion to dismiss, but it also notes that the court reviewed all filings in the matter, including Barr's response asserting his complaint conformed to the Rules of Procedure for Special Actions and the State's reply to that argument on the merits. Furthermore, as discussed below, the State's arguments supporting its motion to dismiss Barr's tort claim likewise provided the court with a basis to deny special action relief. Thus, we assume the superior court considered these arguments and exercised its discretion to accept special action jurisdiction and dismiss the suit, effectively denying relief.

2. Dismissal of the special action.

¶12 Barr asserts his complaint presented appropriate questions for a special action under Rules 3(a) and (b). He argues that because A.R.S. § 14-5501(D)(4) requires a power of attorney be executed before a notary public, his request was "related to" that statute and ADOC thereby was required to treat his notary request as a qualified legal claim.³ The State, on the other hand, argues Rule 3(c) provides the only relevant question under which Barr could bring a special action. And under Rule 3(c), ADOC's denial of Barr's notary request clearly was not "arbitrary and capricious or an abuse of discretion" because the definition of qualified legal claims does not include notarizing a power of attorney.

¶13 There is no authority interpreting the Department Order language that "[n]otaries related to statute . . . shall be treated the same as qualified legal claims." One interpretation of Department Order 902.06 § 1.7 is that this language creates a non-discretionary right for an inmate to require ADOC to provide free notary services simply because a statute requires some document to be notarized. Under this interpretation, the purpose of the notarization - whether a power of attorney, deed of

³ The State asserts Barr "failed to identify the applicable 'statute' upon which he relies in either his initial Complaint, his Response, or his Opening Brief." But Barr consistently argued in all three filings that A.R.S. § 44-5501(D)(4) requires notarization of his Power of Attorney.

conveyance or application for a barber's license, etc. - would make no difference, so long as some statute required a notarized signature. Another interpretation of the language would apply a narrower approach and require "notaries related to statute" to be limited to situations where there is a "claim" relating to the inmate's conviction, incarceration, appeal or post-conviction relief. This interpretation is reached by noting that Department Order 902.06 § 1.7 by its own terms incorporates the defined concept of "qualified legal claims." Under this approach, free notary services are not allowed in any and all circumstances where a statute simply requires a notarized signature.

¶14 Notwithstanding the above discussion, the result for Barr is ultimately the same because like his tort claim, Barr's special action cannot survive A.R.S. § 31-201.01(L). That statute provides,

A person who is convicted of a felony offense and who is incarcerated while awaiting sentence or while serving a sentence imposed by a court of law may not bring a cause of action seeking damages or *equitable relief* from the state or its political subdivisions, agencies, officers or employees for injuries suffered while in the custody of the state or its political subdivisions or agencies unless the complaint alleges specific facts from which the court may conclude that the plaintiff suffered *serious physical injury* or the claim is authorized by a federal statute.

A.R.S. § 31-201.01(L) (emphasis added). The superior court could properly dismiss Barr's action for his failure to allege any facts from which the court could conclude he suffered a serious physical injury or that his claim was authorized by federal statute, required by § 31-201.01(L). The superior court, therefore, did not abuse its discretion in denying Barr special action relief.

¶15 Barr's special action falls squarely within the purview of § 31-201.01(L). First, that provision applies to actions for all "injuries suffered while incarcerated," not only physical injuries. See *Tripati v. State*, 199 Ariz. 222, 225, ¶¶ 7, 9, 16 P.3d 783, 786 (App. 2000) (holding that a deprivation of property claim against ADOC and the State must also allege "serious physical injury"). Barr's allegations related solely to a monetary injury - his inability to access government benefits - stemming from ADOC's refusal to notarize his Power of Attorney. He alleged no additional facts from which the court could conclude he suffered serious physical injury. Additionally, his claim was not authorized by federal statute; for example, he did not assert that his constitutional rights were violated. See 42 U.S.C. § 1983 (West 2013).

¶16 Moreover, § 31-201.01(L) applies to actions for damages or equitable relief. Contrary to Barr's assertion that "a Special Action seeks neither damages nor equitable relief," his

request that the court order ADOC to notarize his Power of Attorney amounts to a purely equitable request for relief. See *Brewer v. Burns*, 222 Ariz. 234, 242, ¶ 41, 213 P.3d 671, 679 (2009) ("Mandamus is based on equitable principles."); *Hess v. Purcell*, 229 Ariz. 250, 254, ¶ 10, 274 P.3d 520, 524 (App. 2012) ("mandamus relief implicates equitable principles, including the maxim that 'equity will not permit a wrong to be without a remedy'" (citation omitted)).

¶17 Thus, because Barr failed to allege that he suffered a serious physical injury as required by § 31-201.01(L) to bring an action against the State or ADOC, the superior court acted properly by dismissing the suit on the merits.

B. The Superior Court Did Not Err in Dismissing the Action with Prejudice.

¶18 Barr argues that even if the superior court properly dismissed his claim, it nonetheless erred in dismissing it with prejudice. We review de novo a superior court's dismissal of a complaint. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012).

¶19 Motions to dismiss are not favored, so they are properly granted only when it is certain, based on allegations in the complaint, that there is no basis for relief under any theory given the facts alleged. See *Logan v. Forever Living Products Int'l, Inc.*, 203 Ariz. 191, 193, ¶ 7, 52 P.3d 760, 762

(2002). Also, dismissal with prejudice is appropriate when amending the complaint could not cure its legal defects. See *Wigglesworth v. Mauldin*, 195 Ariz. 432, 439, ¶¶ 26-27, 990 P.2d 26, 33 (App. 1999); see also *Walls v. Ariz. Dep't of Public Safety*, 170 Ariz. 591, 597, 826 P.2d 1217, 1223 (App. 1991) (if the amended pleading could still be defeated, granting leave to amend would be a futile gesture).

¶20 As noted above, it is not clear whether the language in the conclusion of the State's motion is synonymous with a request that the dismissal be with prejudice. If synonymous, then the trial court did not err in granting the request. If not synonymous, then it was error to dismiss with prejudice if the request was made untimely in the reply.⁴

¶21 The issue of whether Barr's action should have been dismissed with or without prejudice now has been fully addressed by both parties on appeal. It would no longer be unfair to Barr for a tribunal to consider the issue. We agree with the State's argument and affirm the superior court's dismissal with prejudice because, given the effect of A.R.S. § 31-201.01(L) discussed above, we cannot surmise that Barr could have cured the legal defects in his complaint.

⁴ The State will hopefully appreciate that this confusion could have been easily avoided if it had fully developed its position and expressed it with greater clarity.

CONCLUSION

¶22 For the reasons set forth above, we affirm dismissal of Barr's complaint with prejudice.

/s/

BARRY C. SCHNEIDER, Judge Pro Tempore*

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

PETER B. SWANN, Judge

*The Honorable Barry C. Schneider, Judge (Retired) of the Maricopa County Superior Court, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (West 2013).