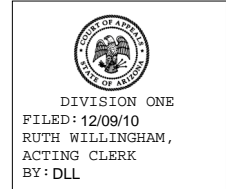


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



ARAYA WOLDE-GIORGIS,) 1 CA-CV 10-0145
)
Plaintiff-Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
DR. LORRETTA MCCARTHY, NEXTCARE) Not for Publication
URGENT CARE; DR. LORI A. KEMPER,) (Rule 28, Arizona Rules
SOUTHWEST PRIMARY CARE) of Civil Appellate Procedure)
ASSOCIATES, LLC; JIM SEXTON,)
BURTON CAGEN, JOHN HALL &)
ASSOCIATES, INC.,)
)
Defendants-Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-010666

The Honorable Jeanne Garcia, Judge
The Honorable Harriett E. Chavez, Judge

APPEAL DISMISSED IN PART; AFFIRMED IN PART

Araya Wolde-Giorgis, Appellant
In *Propria Persona* Scottsdale

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by Neal B. Thomas
Attorneys for Jim Sexton,
Burton Cagen & John Hall & Associates

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Michael R. Golder
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Dr. John Shufeldt and Nextcare Urgent Care

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Sharon A. Briggs
Attorneys for Lori A. Kemper,
DO and Southwest Primary Care Associates

Phoenix

W E I S B E R G, Judge

¶1 Araya Wolde-Giorgis appeals from the trial court's dismissal of his complaint against John Hall & Associates, Jim Sexton, and Burton Cagen (collectively, "Hall Defendants"); Dr. Lori Kemper and Southwest Primary Care Associates (collectively, "Kemper Defendants"); and Dr. Loretta McCarthy and Nextcare Urgent Care (collectively, "McCarthy Defendants").¹ For the following reasons, we dismiss the appeal as to McCarthy Defendants for lack of jurisdiction, but affirm the other two judgments.

PROCEDURAL BACKGROUND

¶2 On June 29, 2007, Wolde-Giorgis filed a complaint against various defendants, some of which are not parties to this appeal, alleging many instances of discrimination in unrelated contexts, and requesting actual, consequential,

¹In their answering brief, McCarthy Defendants include defendant Dr. John Shufeldt as a party to this appeal. Dr. Shufeldt is not included in any of McCarthy Defendants' pleadings, but is included in the final judgment in their favor. Whether this was proper, however, is irrelevant because we lack jurisdiction over this judgment. See ¶ 10, *infra*.

compensatory, and punitive damages. Wolde-Giorgis later filed multiple amended complaints.

¶13 In September 2008, Hall Defendants filed a motion to dismiss based on Wolde-Giorgis's failure to serve the summons and complaint within 120 days pursuant to Arizona Rule of Civil Procedure ("Rule") 4(i). Kemper Defendants and McCarthy Defendants filed separate answers to Wolde-Giorgis's amended complaint. A discovery dispute arose and Wolde-Giorgis claimed he did not receive discovery requests sent by Kemper Defendants. The court held a status conference on October 15, 2008 during which the court ordered Wolde-Giorgis to properly serve all defendants by November 15 and to respond to "re-sen[t]" interrogatories. The court stated that it would consider a motion to dismiss if Wolde-Giorgis did not comply with disclosure and discovery rules within thirty days.

¶14 In November 2008, the case was reassigned to a different judge because another defendant had filed a notice of change of judge as a matter of right pursuant to Rule 42(f)(1). Wolde-Giorgis then filed a notice of change of judge pursuant to Rule 42(f)(1), and in December 2008, the case was reassigned to Judge Garcia. In April 2009, Wolde-Giorgis filed a motion to disqualify Judge Garcia for cause "because of bias and prejudice." See Ariz. R. Civ. P. 42(f)(2). The presiding judge denied Wolde-Giorgis's motion. In June 2009, Judge Garcia

granted Hall Defendants' motion to dismiss. She found that service of process by mail was insufficient and that Wolde-Giorgis had failed to properly serve the defendants as ordered.

¶15 In August 2009, Kemper Defendants filed a motion to dismiss the amended complaint because it failed to state a claim upon which relief could be granted, and because Wolde-Giorgis failed to participate in discovery. McCarthy Defendants joined in the motion. After Judge Garcia disqualified herself, the case was reassigned to Judge Chavez, and in December of 2009, she granted the motion to dismiss on both grounds.

¶16 Thereafter, Wolde-Giorgis filed a second notice of change of judge as a matter of right, which Judge Chavez denied. Wolde-Giorgis filed a motion for new trial/reconsideration, which she also denied. The court entered three separate judgments dismissing Wolde-Giorgis's complaint against Hall Defendants, Kemper Defendants, and McCarthy Defendants. Having previously filed a premature notice of appeal from an unsigned minute entry, Wolde-Giorgis filed a timely amended notice of appeal from those judgments.

DISCUSSION

¶17 Before addressing the substantive issues Wolde-Giorgis raises on appeal, we first consider our jurisdiction to consider them.

Appellate Jurisdiction

¶8 This court has an independent duty to determine whether it has jurisdiction over this appeal. *Sorensen v. Farmers Ins. Co.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997). Rule 54(b) provides that in a multi-party action, the superior court may enter a final appealable judgment as to one or more parties, but fewer than all, provided the court makes an "express determination that there is no just reason for delay" and expressly directs entry of judgment. Accordingly, to be appealable, the judgments were required to contain Rule 54(b) language. See *Snell v. McCarty*, 130 Ariz. 315, 317, 636 P.2d 93, 95 (1981) ("Rule 54(b) determination is required in multi-party actions without which there is no final judgment on which to base appellate jurisdiction."). The judgments as to Hall Defendants and Kemper Defendants contain Rule 54(b) language and we have jurisdiction over them pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(B), (F)(1).² The judgment as to McCarthy Defendants, however, does not contain Rule 54(b)

²Wolde-Giorgis argues that the trial court lacked jurisdiction to grant the motion to dismiss because he had filed a notice of appeal from a Rule 54(b) judgment dismissing his complaint as to another defendant. Although that notice of appeal divested the trial court of jurisdiction to consider a motion relating to that defendant, the court retained jurisdiction over the remaining defendants.

language. We therefore, lack jurisdiction over that judgment and dismiss the appeal as to those defendants.

Bias and Prejudice of Judges

¶9 Wolde-Giorgis argues that Judges Garcia and Chavez were biased, discriminated against him, committed judicial misconduct, and denied Wolde-Giorgis his due process and equal protection rights under the Fourteenth Amendment.³ Nothing in the record supports these allegations.

¶10 A judge is presumed to be free of bias and prejudice. *State v. Ramsey*, 211 Ariz. 529, 541, ¶ 38, 124 P.3d 756, 768 (App. 2005). To overcome this presumption, a party must prove bias or prejudice by a preponderance of the evidence. *State v. Hurley*, 197 Ariz. 400, 404-05, ¶ 24, 4 P.3d 455, 459-60 (App. 2000). Adverse rulings alone are insufficient to establish judicial bias and prejudice. *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997). *see also Smith v. Smith*, 115 Ariz.

³Kemper Defendants ask this court to dismiss the appeal because the opening brief and Wolde-Giorgis's failure to serve it upon them did not comply with the Arizona Rules of Civil Appellate Procedure. *See Adams v. Valley Nat'l Bank*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (dismissing appeal based on the deficient briefs filed). We agree that Wolde-Giorgis's opening brief is deficient because it fails to refer to portions of the record or cite legal authority supporting the allegations. ARCAP 13(a)(6). Failure to do so constitutes abandonment or waiver of a claim. *Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62, 211 P.3d 1272, 1289 (App. 2009). In our discretion, however, we decline to strike Wolde-Giorgis's brief or dismiss the appeal.

299, 303, 564 P.2d 1266, 1270 (App. 1977) ("the bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source and not from what the judge has done in his participation in the case").

¶11 Wolde-Giorgis first contends that Judge Garcia made inappropriate remarks, told Kemper Defendants' attorney what to say, and "clearly sid[ed] with the defendants" and then refused to recuse herself. Wolde-Giorgis's argument appears to arise from a status conference held on April 13, 2009 during which the court denied Wolde-Giorgis's motion to waive Rule 5(a) service requirements; directed counsel to observe proper motion practice; ordered Wolde-Giorgis to mail his documents on the date cited in his certificates of mailing; and un-designated the matter as an e-file case as to Wolde-Giorgis.

¶12 In an affidavit filed after that conference, Wolde-Giorgis alleged "the defendants . . . were bringing rumours [sic] which are not supported by the facts and telling the judge to order Wolde-Giorgis what not to do" and Judge Garcia "was ordering Wolde-Giorgis in accordance [with] what she was told to do by the 3 attorneys." Wolde-Giorgis has failed to file a transcript of this hearing and we have no record of what occurred. See ARCAP 11(b)(1) (appellant is responsible for providing all relevant transcripts). We therefore presume that whatever transpired below is supported by the record. *Johnson*

v. *Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998). In any event, a party's subjective observations of a judge's tone of voice or expressions are insufficient to show bias or prejudice. *Henry*, 189 Ariz. at 546, 944 P.2d at 61.⁴

¶13 Wolde-Giorgis also argues that Judges Garcia and Chavez violated his due process rights. Due process requires notice and a meaningful opportunity to be heard. *Huck v. Haralambie*, 122 Ariz. 63, 65, 593 P.2d 286, 288 (1979). Wolde-Giorgis had notice of and responded to both motions to dismiss. Each judge considered all of Wolde-Giorgis's responses before it ruled on the respective motions. Judge Chavez also considered Wolde-Giorgis's motion for new trial/reconsideration. Because Wolde-Giorgis had notice and an opportunity to be heard, there was no due process violation. Wolde-Giorgis's related claim that his equal protection rights were violated is not supported by any legal authority nor is it evident from the record. Accordingly, we reject that argument. *State Farm. Mut. Auto Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990).

⁴In his motion to disqualify, Wolde-Giorgis complained about Judge Garcia's judicial assistant because she denied his request to appear telephonically at the status conference after the judge ordered all parties to appear in person, but one attorney appeared telephonically. As the presiding judge explained in his minute entry denying the motion, a judicial assistant "has no power to overrule the orders of a judge [and] the judicial assistant did the only thing she could under the circumstances reported."

¶14 Wolde-Giorgis next complains because Judge Chavez denied his second notice of change of judge as of right filed in 2009. This claim is wholly without merit. An order denying a peremptory change of judge is not appealable and must be reviewed by special action. *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223, 921 P.2d 21, 23 (1996). Further, Wolde-Giorgis was only entitled to one change of judge as of right under Rule 42(f)(1)(A), and waived the alleged right under Rule 42(f)(D) because Judge Chavez had ruled on his motions. Finally, Wolde-Giorgis argues that Judges Chavez and Garcia conspired against him and committed judicial misconduct. Wolde-Giorgis fails to support this argument with citations to the record and legal authority and we decline to consider it. *Novak*, 167 Ariz. at 370, 807 P.2d at 538.⁵

¶15 Kemper Defendants request attorneys' fees on appeal pursuant to A.R.S. § 12-349 (2003). We deny their request for

⁵Wolde-Giorgis does not argue on appeal that the trial court erred in granting Kemper Defendants' motion to dismiss on substantive grounds. We note, however, that in their motion to dismiss for failure to state a claim, and in this appeal, Kemper Defendants rely upon the "notice pleading standard" set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). That standard was rejected by the Arizona Supreme Court in *Cullen v. Auto Owners Ins. Co.*, 218 Ariz. 417, 420, ¶ 14, 189 P.3d 344, 347 (2008). Nonetheless, even if Wolde-Giorgis's allegations are sufficient to withstand a motion to dismiss for failure to state a claim under *Cullen*, the trial court also granted the motion to dismiss based on Wolde-Giorgis's failure to comply with discovery, and we find no abuse of discretion in that ruling.

attorneys' fees, but award Kemper Defendants and Hall Defendants their costs on appeal.

CONCLUSION

¶16 For the foregoing reasons, we dismiss the appeal as to McCarthy Defendants. We affirm the judgments as to Hall Defendants and Kemper Defendants, and award them their costs on appeal, subject to compliance with Rule 21, Arizona Rules of Civil Appellate Procedure.

/s/
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/
PHILIP HALL, Presiding Judge

/s/
PETER B. SWANN, Judge