STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1371

Kevin Makowski, et al.,
Appellants,

vs.

Children's Minnesota,
Respondent,

The Children's Heart Clinic,
Respondent,

Children's Respiratory & Critical Care Specialists,
Respondent.

Filed August 23, 2021
Affirmed
Bratvold, Judge

Hennepin County District Court
File No. 27-CV-19-21339

Susan Shogren Smith, Shogren Smith Law, Brooklyn Center, Minnesota (for appellants)

Mark R. Whitmore, Leah Ceee O. Boomsma, Bassford Remele, P.A., Minneapolis, Minnesota (for respondent Children's Minnesota)

Julia J. Nierengarten, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent The Children's Heart Clinic, P.A.)

Paul C. Peterson, William L. Davidson, Matthew D. Sloneker, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent Children's Respiratory & Critical Care Specialists)

Considered and decided by Connolly, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellants challenge the district court's judgment dismissing their complaint with prejudice under Minn. R. Civ. P. 12.02. The complaint sued respondents healthcare providers and sought damages arising from a child's death after an extended hospital stay. Appellants argue that the district court erred by determining that (1) appellants failed to serve process on two respondents; (2) appellants lacked standing to bring a claim under the bias-offense statute, Minn. Stat. § 611A.79, subd. 2 (2020), because they are family members of the victim and not victims of the alleged bias offense; and (3) res judicata applied to preclude the complaint based on an earlier judgment dismissing similar claims. Respondents argue that the district court's reasoning was correct, and also contend that we may affirm on alternative grounds raised to, but not decided by, the district court. Because we conclude that the district court did not err by determining that appellants failed to serve process on two respondents and because appellants' complaint failed to state a claim upon which relief can be granted under the bias-offense statute, we affirm without reaching the res judicata issue.

FACTS

This appeal considers the third complaint arising from a child's death. The child had a disability that is not described in the appellate record and was first admitted to the emergency department at Children's Hospital in January 2012. The child was intermittently hospitalized for about 200 days until her death on November 16, 2013. For

context, we begin with the extended procedural history of appellants' claims against respondents.

The First Complaint

On November 7, 2016, appellant Susan Smith (mother), the adoptive mother of the deceased child, served the first complaint on defendants, including respondents Children's Minnesota (CM), The Children's Heart Clinic (TCHC), and Children's Respiratory & Critical Care Specialists (CRCCS) (collectively, respondents). The first complaint alleged that medical malpractice led to the child's wrongful death. Defendants, including respondents, moved to dismiss the complaint under Minn. R. Civ. P. 12(e) for failure to state a claim upon which relief could be granted.

In March 2017, the district court dismissed the first complaint without prejudice. The district court's order stated it agreed with the parties that mother lacked standing because she had not yet been appointed as a wrongful-death trustee.[1]

The Second Complaint

Two years later, in April 2019, after a district court appointed mother as the wrongful-death trustee for the child's heirs and next of kin, mother served a second complaint on respondents. The second complaint alleged, among other claims not relevant here, medical malpractice resulting in the child's wrongful death and bias offenses under

[1] The district court's order discussed the three-year wrongful-death statute of limitations, *see* Minn. Stat. § 573.02, subd. 1 (2020), but ultimately did not decide the timeliness of the first complaint. Mother argued that respondents' fraudulent misrepresentations tolled the statute of limitations, but the district court concluded that it had insufficient evidence to reach the tolling issue.

Minn. Stat. § 611A.79.[2] Respondents again moved to dismiss under Minn. R. Civ. P. 12.02(e).

In January 2020, the district court dismissed the second complaint with prejudice. The district court's order discussed four issues relevant to this appeal. First, the district court determined that the three-year statute of limitations under Minn. Stat. § 573.02 for wrongful-death claims applied and rejected mother's argument that her claim was saved by the statutory exception for wrongful death by murder.[3] Second, the district court determined that the second complaint failed to sufficiently allege facts for fraudulent concealment, therefore, the limitations period was not tolled. Third, the district court determined that, because the child died in November 2013, and mother did not serve the second complaint until April 2019, the three-year statute of limitations barred her wrongful-death claim. Fourth, the district court concluded that the second complaint failed to allege facts sufficient to state a bias-offense claim on behalf of the child against respondents under Minn. Stat. § 611A.79.

[2] The second complaint also alleged violations of the Minnesota Health Records Act, and violations of the Minnesota Patient Bill of Rights. The district court dismissed these claims after concluding that the statute of limitations barred any claim under the Minnesota Health Records Act, and that the Minnesota Patient Bill of Rights did not provide a private cause of action.

[3] The statute of limitations for wrongful-death claims, Minn. Stat. § 573.02, subd. 1, provides that "[a]n action to recover damages for a death caused by an intentional act constituting murder may be commenced at any time after the death of the decedent."

Mother appealed from the resulting judgment in March 2020, but failed to file an appellate brief. This court ultimately dismissed her appeal in July 2020. *Smith v. Children's Minnesota*, No. A20-0341 (Minn. App. July 9, 2020) (order).

The Third Complaint

Plaintiffs in the third complaint are the deceased child's biological and adoptive family, including mother. On November 18, 2019, while the second complaint was still pending, appellants served the third complaint against respondents, alleging bias offenses under Minn. Stat. § 611A.79.[4] Specifically, the third complaint alleged that respondents' healthcare personnel committed intentional acts constituting murder and causing the child's death; that healthcare personnel committed these acts because the child was disabled; and that appellants suffered damages as a result. As explained below, the record does not include a copy of the third complaint, so we are relying on descriptions of the third complaint, as found in the record.

Respondents moved to dismiss the third complaint for failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e). Specifically, respondents argued that appellants lacked standing to assert a claim under Minn. Stat. § 611A.79, their claims were untimely under the applicable statute of limitations, and their claims were

[4] The record indicates that the third complaint also alleged claims for violating the Minnesota Patient Bill of Rights, medical malpractice, negligent endangerment of the child, and first-degree murder. Before the third complaint was dismissed, appellants abandoned all claims except for their claim under section 611A.79, which is the only claim appellants pursue in this appeal.

precluded by res judicata and collateral estoppel. TCHC and CRCCS also moved to dismiss the third complaint for insufficient service of process.[5]

In May 2020, the district court issued an order continuing the rule 12 motions because of the COVID-19 pandemic. In this order, the district court also directed appellants to file the third complaint with the district court by May 29. Appellants failed to do so. At a June 2020 hearing on respondents' motions to dismiss, the district court ordered appellants to file proofs of service on TCHC and CRCCS within two weeks. Appellants submitted two affidavits of service.

On August 31, 2020, the district court dismissed appellants' third complaint with prejudice, taking judicial notice of the facts alleged by appellants because it did not have the third complaint. The district court first determined that appellants had not shown they had properly served process of the third complaint on TCHC and CRCCS under Minn. R. Civ. P. 4.03(c). The district court also concluded that the third complaint failed to state a claim upon which relief could be granted because appellants lacked standing to allege a bias offense under Minn. Stat. § 611A.79 and because the claims were precluded by res judicata. The district court did not reach the statute-of-limitations issue.

This appeal follows.

[5] All respondents also moved for sanctions under Minn. Stat. § 549.211, subd. 3 (2020) and Minn. R. Civ. P. 11.03 for violating Minn. R. Civ. P. 11.02. In its order, the district court concluded that "a competent attorney could make [appellants'] arguments in good faith" and declined to award sanctions. Respondents do not seek review of the district court's determination on appeal.

DECISION

Appellants argue that the district court erred by dismissing their claims under rule 12.02. An order dismissing a complaint under rule 12.02 is reviewed de novo and will be upheld when it is not "possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963); *see also Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010).

During oral argument, this court questioned whether it has an adequate record for review because the third complaint did not appear to be in the record. The parties agreed that the third complaint was not in the record. Minn. R. Civ. App. P. 110.01 provides that the "documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Here, the district court ordered appellants to file the third complaint, but appellants failed to do so.[6] Nor did respondents include a copy of the third complaint in their submissions to the district court. Thus, the third complaint is not in the record.

Still, appellants ask us to review the district court's judgment dismissing the third complaint under rule 12.02(e), which tests the sufficiency of the allegations in the complaint. The third complaint is thus central to our analysis. *Walsh v. U.S. Bank, N.A.*,

[6] Appellants do not dispute that they violated the district court's order by failing to file the complaint as directed. We note that a party generally is not required to file a complaint until one year after the action was commenced. Minn. R. Civ. P. 5.04(a). Here, respondents' motion to dismiss was filed and decided well before appellants had to file their complaint under rule 5.04(a). But the district court's order nonetheless required appellants to file the third complaint.

851 N.W.2d 598, 606 (Minn. 2014) (explaining that appellate courts review de novo whether a complaint alleges facts to set forth a legally sufficient claim).

The "appellant bears the burden of providing a record sufficient to show alleged errors." *Collins v. Waconia Dodge, Inc.*, 793 N.W.2d 142, 146 (Minn. App. 2011), *review denied* (Minn. Mar. 15, 2011). Appellate courts may decline to decide an issue when an appellant "has not provided an adequate record for appellate review." *Rew v. Bergstrom*, 845 N.W.2d 764, 801 (Minn. 2014). Because the third complaint is central to this appeal, we consider whether we have an adequate record to decide the issues raised.

The district court also confronted this issue. Its order notes that appellants did not file the third complaint and that its "recitation of the facts is based on those facts that the Court can take judicial notice of, and the allegations in the court file." This is troubling because a party's arguments are no substitute for the factual allegations in a complaint when it is the sufficiency of those allegations that is at issue on appeal. *See Olson v. Lesch*, 943 N.W.2d 648, 652 n.3 (Minn. 2020) ("On a motion to dismiss, the district court can rely only on the pleadings—the complaint and the documents referenced in the complaint. And when we review the denial of a motion to dismiss, we are also limited to those pleadings." (citation omitted)).

After careful review of the record and the issues raised by the parties, we conclude that the record is adequate to review two issues: whether appellants served process on TCHC and CRCCS, and whether the third complaint stated a claim for relief under the bias-offense statute, Minn. Stat. § 611A.79. Because we affirm on these two issues, and

they are dispositive, we need not decide whether appellants' claims are timely under the statute of limitations or precluded by res judicata.

I. Appellants did not serve process on TCHC and CRCCS.

Appellants argue that the district court erred by granting TCHC and CRCCS's motions to dismiss because of insufficient service of process. "A valid judgment cannot be rendered against a party without due service of process . . . ." *Lange v. Johnson*, 204 N.W.2d 205, 208 (Minn. 1973). "[S]ervice of process is the means by which a court obtains personal jurisdiction over a defendant . . . ." *McCullough & Sons, Inc. v. City of Vadnais Heights*, 883 N.W.2d 580, 590 (Minn. 2016). When a defendant challenges service of process, the plaintiff must submit evidence of effective service; once the plaintiff submits evidence of service, the defendant then has the burden of showing that the service was improper. *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 271 (Minn. 2016).

Both TCHC and CRCCS are corporations. Minn. R. Civ. P. 4.03(c) provides that a plaintiff may serve a summons and complaint upon a corporation "by delivering a copy to an officer or managing agent, or to any other agent authorized expressly or impliedly or designated by statute to receive service of summons." "Service of process in a manner not authorized by the rule is ineffective service." *Tullis v. Federated Mut. Ins. Co.*, 570 N.W.2d 309, 311 (Minn. 1997). "Whether service of process was effective, and personal jurisdiction therefore exists, is a question of law that [appellate courts] review de novo." *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008). "But in conducting this review, [this court] must apply the facts as found by the district court unless those factual findings are clearly erroneous." *Id.*

Appellants submitted affidavits of service of the summons and third complaint for TCHC and CRCCS. We separately consider each affidavit of service and the district court's related factual findings.

A. TCHC

Regarding TCHC, appellants' affidavit averred personal service of the summons and complaint by a third party on Marc Gorelick, president of Children's Health Care, which does business as Children's Heart Clinic. The district court concluded that appellants had failed to demonstrate that TCHC had been served because "[t]he entity that [appellants] served—Children's Health Care—is a different corporate entity than [TCHC]." Appellants argue that the district court erred because TCHC and Children's Health Care, doing business as Children's Heart Clinic, "are interconnected, and exist on the same campus. To patients, they are nearly indistinguishable. When inpatient, there is no separation between them."

The district court's determination is supported by the record, which includes an affidavit provided by the president of TCHC,[7] appellants' affidavit of service on Marc Gorelick (the president of Children's Health Care), and documents from the Minnesota

[7] The president of TCHC averred, "The Children's Heart Clinic, P.A., and Children's Minnesota have entered into a professional-service agreement under which The Children's Heart Clinic, P.A., provides professional healthcare services at Children's Minnesota. That same agreement permits Children's Minnesota the right to bill for the services, which The Children's Heart Clinic, P.A., provides, through an entity known as Children's Heart Clinic and other entities." The president also averred that Marc Gorelick does not serve on TCHC's board, nor is he an officer or managing agent of TCHC. Finally, the president averred that appellants had not served the third complaint on any officer or managing agent of TCHC, nor on anyone with express or implied authority to accept service on behalf of TCHC.

Secretary of State website showing that TCHC and Children's Health Care are separate corporate entities. Thus, the district court's finding that appellants did not serve process on TCHC is not clearly erroneous.

Appellants also contend that "[t]he point of service is to ensure the defendant is noti[fied] of a claim" and that TCHC was aware of the third complaint. Appellants, however, cite no caselaw in support of this contention. We do not address issues that are not supported by legal authority. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971) (explaining that assertions of error unsupported by authorities in appellant's brief are "waived . . . unless prejudicial error is obvious"). Also, the supreme court has clarified that "actual notice of the lawsuit will not subject defendants to personal jurisdiction without substantial compliance with Rule 4.03." *Tullis*, 570 N.W.2d at 311. For these reasons, we affirm the district court's determination that appellants failed to serve process on TCHC under Minn. R. Civ. P. 4.03(c).

B. CRCCS

Regarding CRCCS, appellants' affidavit averred service by a third party who left a copy of the summons and complaint with the wife of Stephen Kurachek, chief executive officer (CEO) of CRCCS, at his residence. The district court determined that appellants had failed to demonstrate that they had served CRCCS because rule 4.03(c) does not permit "substitute service" of a corporate officer at the officer's usual place of abode.

Appellants argue that this court should interpret rule 4.03(c) to permit substitute service because CRCCS is a private corporation, which is like a private individual, and rule 4.03(a) allows substitute service on a private individual. Appellants are correct that for

private individuals, Minn. R. Civ. P. 4.03(a) permits a plaintiff to effect substitute service of a complaint "by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein." But Minn. R. Civ. P. 4.03(c) does not recognize substitute service on a private corporation.

Appellants fail to discuss *Obermeyer v. School Bd., Ind. Sch. Dist. No. 282*, where the supreme court held that the rule governing service on *public corporations*, Minn. R. Civ. P. 4.03(e), "is silent with regard to substitute service." 251 N.W.2d 707, 708 (Minn. 1977). The supreme court also explained why it refused to recognize substitute service as satisfying rule 4.03(e). "The policy reflected by the enumeration of designated agents of service is that those persons are capable of and authorized to act on behalf of the corporate body. This policy is not advanced by the attempted service upon the wife of a designated agent." *Id.* The same logic applies to service on a private corporation under rule 4.03(c).[8] Thus, we affirm the district court's determination that appellants failed to serve process on CRCCS under rule 4.03(c).

II. The third complaint fails to state a claim for relief under Minnesota's bias-offense statute, Minn. Stat. § 611A.79.

When reviewing a judgment dismissing a complaint under rule 12.02, "[t]he only question before us is whether the complaint set forth a legally sufficient claim for relief."

[8] For the first time, appellants argue on appeal that the district court erred because CRCCS "de facto consented to" substitute service at its CEO's home. Appellate courts generally decline to decide issues raised for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because this argument raises factual issues about service of process that appellants needed to submit to the district court and failed to do so, we decline to consider it.

Elzie v. Comm'r of Pub. Safety, 298 N.W.2d 29, 32 (Minn. 1980) (quotation omitted). Appellants' third complaint alleged a bias-offense claim against respondents, on behalf of each appellant, alleging that respondents' healthcare personnel committed intentional acts constituting murder, which caused the death of the child; that healthcare personnel committed these acts because the child was disabled, making these acts a bias offense; and that appellants personally suffered damages.

Minn. Stat. § 611A.79, subd. 2, provides: "A person who is damaged by a bias offense has a civil cause of action against the person who committed the offense." A "bias offense" is "conduct that would constitute a crime and was committed because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability as defined in section 363A.03, age, or national origin." Minn. Stat. § 611A.79, subd. 1. The statute authorizes a successful plaintiff to recover the greater of $500 or actual general and special damages, including damages for emotional distress, along with other appropriate relief. *Id.*, subd. 2.

The district court dismissed the third complaint against respondents, in part, because it determined that appellants lacked standing under Minn. Stat. § 611A.79. The district court concluded that "section 611A.79 does not . . . create a cause of action for family members of injured people" for two reasons. First, section 611A.79 authorizes a claim by a "person who is damaged by a bias offense" and does not expressly create a cause of action for family members of a bias-offense victim, and a court may not supply the missing language for the statute to do so. Second, family members of a deceased bias-offense victim have a remedy through the wrongful-death statute; but, in this case, any wrongful-death

action was barred by the statute of limitations, as finally determined in the judgment dismissing appellants' second complaint. Appellants challenge both reasons on appeal.

Because we have already affirmed the district court's decision to dismiss the third complaint against TCHC and CRCCS for failure to serve process, we focus on CM's position. CM argues, in part, that we may affirm on alternative grounds without resolving the standing issue. CM is correct that we may decide an appeal on alternative grounds raised to but not decided by the district court. *See Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 331 (Minn. 2010). We therefore consider CM's alternative argument and, because we find it persuasive, do not decide the standing issue.

In essence, CM contends that the third complaint did not adequately allege facts showing a crime, but only alleged medical negligence. To survive a motion to dismiss for a claim brought under Minn. Stat. § 611A.79, subd. 2, the third complaint must allege facts showing that respondents' conduct was "a crime" and that crime was committed *because of* the victim's race, color, religion, sex, sexual orientation, disability, age, or national origin. *See* Minn. Stat. § 611A.79, subd. 1. For the purposes of this issue, CM concedes that the third complaint sufficiently alleged that the healthcare personnel's conduct was because of the child's disability.

The district court did not reach this issue in dismissing the third complaint. But the district court's judgment dismissing the second complaint determined that the wrongful-death claim alleged only medical negligence and did not allege facts sufficient to state a claim for murder or another intentional act. The district court's analysis of the second complaint is persuasive in our review of the limited record available on the third

complaint. Appellants have generally described CM's conduct as murder. For example, in response to CM's argument that the third complaint failed to allege facts amounting to a crime, appellants argued below that CM "ignores the actual truth of the case" because "this is a civil case alleging the defendants committed a 'bias offense' by engaging in conduct that would constitute a crime (murder)."

For the first time, appellants argue on appeal that their "claims for damages under the Bias Offense statute do[] not need to rise to murder for the plaintiffs to prevail."[9] Appellants are correct that, under Minn. Stat. § 611A.79, subd. 1, a plaintiff must allege facts showing that defendants' conduct "constitute[d] a crime." But in appellants' brief to this court and in their district court memorandum, the only crime alleged is murder. Indeed, in appellants' memorandum opposing the respondents' motions to dismiss, appellants allege at least seventeen times, in varying iterations, that the respondents' healthcare personnel murdered the child with no mention of another offense. A party may not shift theories on appeal. *See Thiele*, 588 N.W.2d at 582.

After careful review of what little record we have, we conclude that the third complaint did not sufficiently allege facts showing that CM committed the crime of murder or another intentional act. Rather, the third complaint alleged facts showing that CM provided negligent medical treatment. We therefore conclude that the third complaint

[9] Appellants' brief to this court also mentions assault. Our review of the record shows that appellants did not allege assault during the district court proceedings. This court seldom considers new arguments on appeal. *Thiele*, 425 N.W.2d at 582. We therefore decline to consider whether the third complaint alleged assault or other possible crimes.

failed to allege facts showing a bias offense and therefore failed to state a claim for relief under Minn. Stat. § 611A.79, subd. 1.

While we acknowledge the tragedy of the child's death, we are nevertheless obligated to follow the law. Accordingly, because we determine that the district court did not err by dismissing the claims against TCHC and CRCCS for failure to serve process, nor by dismissing the claims against CM for failure to state a claim upon which relief can be granted under rule 12.02(e), we affirm the judgment dismissing the third complaint with prejudice. Therefore, we need not decide the whether the third complaint was timely under the statute of limitations or whether res judicata bars appellants' claims.

Affirmed.