NO. 98133-7

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN L. CORRIGAN, SR.,

Petitioner,

v.

GRANT COUNTY, a municipal Corporation; D. ANGUS LEE; PATRICK SCHAFF; JANIS WHITENERMOBERG; BRIAN D. BARLOW; JOHN A. ANTOSZ, and TIMOTHY KRON,

Respondents.

TIMOTHY KRON'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In its unpublished opinion, the Court of Appeals correctly affirmed the dismissal of pro se Petitioner Corrigan's claims against Trooper Kron for insufficient service of process. Mr. Corrigan admitted in briefing that he had only served Trooper Kron electronically, but neither rule nor statute authorizes electronic service. Mr. Corrigan's procedural argument is equally flawed, reasoning that the Court of Appeals erred by reviewing the 12(b) dismissal as a summary judgment because he was not allowed additional discovery. The Court of Appeals' application of the summary judgment standard of review is consistent with case law from this Court dating back to at least 1966. Regardless, because Mr. Corrigan conceded the dispositive fact regarding service, no additional discovery was necessary.

This action has run its course. It has been nearly nine years since Mr. Corrigan refused to stop in response to Trooper Kron's attempt to pull him over for speeding, and each of Mr. Corrigan's three lawsuits, attempting to blame the State for his arrest and prosecution, have resulted in dismissal. This Court should deny review.

II. COUNTERSTATEMENT OF ISSUE PRESENTED

In considering the CR 12 motion to dismiss, the trial court reviewed certain information outside the pleadings and ultimately granted the motion. Did the Court of Appeals violate due process or otherwise err by reviewing the CR 12 dismissal as a summary judgment?

III. COUNTERSTATEMENT OF THE CASE

In 2011, Trooper Kron attempted to stop a speeding driver on Interstate 90. CP at 405. Though Trooper Kron was driving an otherwise unmarked patrol vehicle, his vehicle was equipped with lights and a siren. CP at 405–06. He pulled behind the speeding vehicle, and activated the lights and siren, but the driver, later identified as John Corrigan, refused to stop, continuing to drive for eight miles before pulling off the road. CP at 406. Trooper Kron arrested Mr. Corrigan for failure to obey an officer's order to stop and a district court jury ultimately convicted him as charged. CP at 407–08.

Petitioner Corrigan has now sued Trooper Kron three times regarding this 2011 incident. He first sued in 2013 in federal court, naming Trooper Kron, another Washington State Patrol officer, Grant County, a Grant County prosecutor, a corrections facility sergeant, and Justice Madsen, then Chief Justice of the Washington Supreme Court. CP at 391–401. Ultimately, the federal district court granted Justice Madsen's

12(b) motion to dismiss and granted summary judgment to the remaining defendants. CP at 404, 437. Mr. Corrigan appealed that matter to the Ninth Circuit, which refused to allow the appeal to proceed because "the appeal is so insubstantial as to not warrant further review." CP at 439.

Unswayed, Mr. Corrigan sued again in 2015—this time adding additional prosecutors and three Grant County judges, but based on the same 2011 arrest and conviction. CP at 19–20. After removing the suit to federal court, Trooper Kron again sought summary judgment. The federal court granted that motion on res judicata grounds, dismissing Trooper Kron. CP at 467–76.

Subsequently, and despite the two past dismissals, Mr. Corrigan named Trooper Kron again as a party in his third attempt to seek relief on this incident, adding him as a defendant to his Amended Complaint in federal court. CP at 315–30. However, Mr. Corrigan failed to complete personal service as to Trooper Kron, instead merely serving him electronically with a copy of the amended complaint. CP at 361 n.2, 375, 388. The amended complaint asserted only state law claims and Corrigan moved to remand it to Kittitas County Superior Court. After remand, the trial court dismissed the case pursuant to CR 12 and the Court of Appeals, treating the dismissal as a ruling on summary judgment, affirmed.

In an unpublished opinion, Division Three of the Washington Court of Appeals affirmed the trial court's dismissal of Mr. Corrigan's claim against Trooper Kron (amongst other defendants) on the service of process issue. It reviewed the dismissal as a summary judgment, reasoning that the trial court considered matters outside the pleadings. Division Three ultimately agreed that Mr. Corrigan had failed properly to serve Trooper Kron with his amended complaint, where he merely sent him a copy of the complaint electronically. In light of its review on the straightforward service issue, the Court of Appeals indicated that it did not need to reach the other two grounds upon which the trial court dismissed Mr. Corrigan's suit, including, failure to state a claim, and res judicata. *See* Op. at 9 n.1. A copy of the opinion is attached as Appendix A.

IV. ARGUMENT

This Court should deny review of this matter because the Court of Appeals correctly applied this Court's established precedent. Division Three correctly reviewed the CR 12 motion to dismiss as a summary judgment where the trial court considered information outside the pleadings. Mr. Corrigan suggests that the Court of Appeals' decision is in conflict with precedent from the United States Supreme Court, the Washington State Supreme Court, and all three Divisions of the Washington Court of Appeals. Mr. Corrigan misunderstands the

precedent: the Court of Appeals opinion accords with both this Court's rulings and practice, making review inappropriate. Finally, there can be no due process violation where Mr. Corrigan conceded the dispositive facts on the service issue.

A. The Court of Appeals followed precedent in reviewing the CR 12 dismissal as a summary judgment.

This Court has long held that, where the trial court considered information outside the pleadings, the appellate courts should review a CR 12 dismissal as a summary judgment. An early example of this review occurred in *Stevens v. Murphy*, 69 Wn.2d 939, 942–43, 421 P.2d 668 (1966), *overruled on other grounds by Merrick v. Sutterlin*, 93 Wn.2d 411, 610 P.2d 891 (1980). There, this Court reviewed a motion to dismiss where children added their father to a complaint alleging negligence regarding a motor vehicle accident. *Id.* at 940, 421 P.2d 668. The father brought a motion to dismiss, with an accompanying affidavit explaining the nature of his relationship to the minors. *Id.* at 941. Ultimately, the trial court granted the motion to dismiss. *Id.* On review, this Court treated the trial court's stated motion to dismiss as a ruling on summary judgment because the trial court had considered information outside the pleadings, reasoning as follows:

> Although the trial court's ruling took the form of an order of dismissal, in substance the trial judge determined that, in

> the daughters' claim against their father, there was no genuine issue of material fact, and found for the respondent as a matter of law. On this appeal we must, therefore, treat the case as though a formal motion for summary judgment had been made and granted.

Id. at 943, 421 P.2d 668.

This Court has continued to apply this doctrine on review. In *Stack v. Chicago, M., St. P. & P. R. Co.*, 94 Wn.2d 155, 615 P.2d 457 (1980), the Court reviewed a motion to dismiss as a summary judgment because the trial court considered matters outside the pleadings including "several affidavits." Thus, for the purposes of "review" the Court "consider[ed] the dismissal to be based on summary judgment." *Id.* at 157, 615 P.2d 457. Again, in *Beaman v. Yakima Valley Disposal, Inc.*, 116 Wn.2d 697, 807 P.2d 849 (1991), the Court followed that approach, this time reducing the discussion to mere footnote. "Because the trial court received matters outside the pleadings, Valley's CR 12(b) motion to dismiss for lack of jurisdiction *is treated on review as a summary judgment motion* and the facts viewed in the light most favorable to Beaman." *Id.* at 701 n.3, 807 P.2d 849 (emphasis added).

Because this Court set forth the process that the Court of Appeals followed in reviewing the CR 12 dismissal as a summary judgment, the Court of Appeals opinion is not in conflict with a decision of this Court. *See* RAP 13.4(b)(1).

Similarly, the other Divisions of the Court of Appeals have also applied and followed this Court's guidance and precedent regarding review of CR 12 dismissals. *See, e.g.*, *Blenheim v. Dawson & Hall Ltd.*, 35 Wn. App. 435, 438, 667 P.2d 125 (1983) (Div. I); *Gibson v. American Construction Company, Inc.*, 200 Wn. App. 600, 607, 402 P.3d 928 (2017) (Div. II). Thus, Division Three's opinion here is not in conflict with other published opinions by the Court of Appeals. *See* RAP 13.4(b)(2).

B. The Court of Appeals did not violate Mr. Corrigan's due process rights by refusing to remand for discovery.

Finally, the Court of Appeals' opinion did not deprive Mr. Corrigan of a due process right to additional discovery prior to dismissal because discovery would have been irrelevant to the issue of service. Service of process presents a question of law, which the Court of Appeals properly reviewed de novo. Op. at 8. Division Three also properly recognized the requirements for service in both the federal and state courts: "Electronic service is not permitted under federal or state law." *Id.* (citing CR 4, RCW 4.28.080, RCW 4.28.100, and Fed. R. Civ. P. 4(e)).

The discovery issue is a red herring. Here, Mr. Corrigan *admitted* in briefing before the trial court that he had "served" Trooper Kron "electronically." CP at 361 n.2, 375. Because there was no dispute regarding how Mr. Corrigan served Trooper Kron, there was no need for

additional discovery regarding the service issue. Thus, even had the trial court considered this a summary judgment motion, a continuance for discovery would not have been necessary: "The trial court may deny a motion for a continuance [to conduct discovery] when . . . the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003).

The Court of Appeals did not violate Mr. Corrigan's due process rights: "Due process does not require any particular form or procedure . . . . It requires only that a party receive proper notice of proceedings and an opportunity to present [its] position before a competent tribunal." *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 699, 41 P.3d 1175 (2002). Because the Court of Appeals properly applied undisputed facts to the law of service, additional review is unnecessary.

V. CONCLUSION

Mr. Corrigan has not shown any consideration warranting review by this Court. Division Three's decision follows binding precedent and involves a straightforward failure to effect proper service on Trooper

Kron. Mr. Corrigan simply refuses to accept the law and rulings of courts in both the federal and state systems. Accordingly, this Court should deny Mr. Corrigan's petition.

RESPECTFULLY SUBMITTED this 27th day of February, 2020.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

☒ Via the Court's electronic filing system to:

Brian A. Christensen bchristensen@jmlawps.com

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27 day of February, 2020, at Spokane, Washington.

NIKKI GAMON

APPENDIX A

FILED
NOVEMBER 26, 2019
In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JOHN L. CORRIGAN, Sr.,	)	No. 36244-2-III
	)	
Appellant,	)	
	)	
v.	)	
	)	
GRANT COUNTY, a municipal Corporation; D. ANGUS LEE; PATRICK SCHAFF; JANIS WHITENER-MOBERG; BRIAN D. BARLOW; JOHN A. ANTOSZ, and TIMOTHY KRON,	)	UNPUBLISHED OPINION
	)	
Respondents.	)	

LAWRENCE-BERREY, C.J. — John Corrigan appeals the trial court's CR 12(b)(6) order dismissing his amended complaint. Because the trial court considered matters outside the pleadings, we review the trial court's order as if it were a CR 56 order granting summary judgment. Applying that standard, we affirm.

FACTS

In April 2011, John Corrigan sped by Trooper Timothy Kron on Interstate 90. Trooper Kron activated his emergency lights and followed Corrigan for eight miles until another trooper joined. At that point, Corrigan pulled over. Corrigan was cited for

speeding and failing to stop for a police officer. The speeding ticket was dismissed, but Corrigan was convicted for failing to stop. The conviction was later overturned by the superior court and dismissed without prejudice.

On March 25, 2013, Corrigan brought a 42 U.S.C. § 1983 suit in federal court against Trooper Kron, Grant County, and others, alleging violations of Corrigan's civil rights, malicious prosecution, and negligence stemming from his earlier arrest and prosecution.

On July 3, 2013, Grant County refiled charges against Corrigan for failing to stop. Corrigan was reconvicted of that charge.

On December 10, 2013, the federal court granted the defendants' motion for summary judgment dismissing all of Corrigan's claims. Corrigan appealed to the Ninth Circuit, but the Ninth Circuit denied it, finding the appeal "so insubstantial as to not warrant further review." Clerk's Papers (CP) at 174.

On September 15, 2016, Corrigan brought suit in Kittitas County Superior Court against Grant County, various Grant County employees, and Trooper Kron. In that suit, he asserted a 42 U.S.C. § 1983 claim, and claims for abuse of process, malicious prosecution, and negligence. The case was removed to federal court.

Trooper Kron brought a FED. R. CIV. P. 56 motion for summary judgment dismissal. The federal court granted that motion, and Trooper Kron was no longer a party to that action.

Grant County and its employees brought a FED. R. CIV. P. 12(b)(6) motion to dismiss. The federal court dismissed Corrigan's suit against Grant County and its employees. Somewhat contradictorily, it also afforded Corrigan leave to amend his complaint.

Corrigan filed an amended complaint, which asserted only State law claims. Although Trooper Kron was no longer a party to that action, Corrigan informally e-mailed Trooper Kron the amended complaint instead of formally serving him. Corrigan's amended complaint alleged: (1) negligence by Grant County and the prosecutor's office, (2) abuse of process against Grant County for the recharge and retrial after Corrigan's conviction was overturned and after he filed a § 1983 action, (3) a fair trial violation against Grant County and Judge Whitener-Moberg, and, (4) malicious prosecution against Grant County and Trooper Kron. Corrigan moved to remand the case, and the federal court remanded it back to Kittitas County Superior Court.

On April 23, 2018, Grant County moved to dismiss Corrigan's amended complaint pursuant to CR 12(b)(6). Among many other arguments, Grant County argued that Corrigan's claims were outside the three-year statute of limitations.

Trooper Kron also filed a motion to dismiss pursuant to CR 12(b)(6). Among many other arguments, Trooper Kron argued insufficient service of process under CR 12(b)(5).

The trial court agreed with the defendants' many arguments and granted their motions for dismissal. Corrigan timely appealed to this court.

ANALYSIS

A. ADEQUATE RECORD

Corrigan contends statements from various parties, including the trial court, are missing from the verbatim report of proceedings. He argues this error requires reversal. We disagree.

As explained below, we review the trial court's rulings de novo. This means we review the same documents that the trial court considered. The trial court's questions and the parties' answers during argument of their motions are irrelevant to our review. Because we review only the written record, we are satisfied the record is sufficient for our review.

B. STANDARD OF REVIEW

CR 12(c) provides in relevant part:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56 . . . .

Because the trial court considered matters outside Corrigan's amended complaint, we review the trial court's order under CR 56.

On review of a summary judgment order, we engage in the same inquiry as the trial court. *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 685, 202 P.3d 924 (2009). All facts and reasonable inferences are considered in a light most favorable to the nonmoving party. *Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001). Summary judgment is appropriate only when there are no disputed issues of material fact and the prevailing party is entitled to judgment as a matter of law. CR 56(c).

C. GRANT COUNTY'S MOTION TO DISMISS

Corrigan contends the trial court erred by granting Grant County's motion to dismiss on his claims of malicious prosecution, abuse of process, negligence, and his causes of action against the various judges. We disagree.

1. Malicious prosecution

A plaintiff asserting malicious prosecution must establish various elements, including that the proceedings terminated on the merits in favor of the plaintiff. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993). Here, Corrigan was reconvicted of failure to stop. He cannot establish that the proceedings terminated on the merits in his favor. The trial court did not err in dismissing this claim.

2. Abuse of process and negligence: Statute of limitations

A plaintiff asserting abuse of process or negligence must bring suit within three years of when the cause of action accrued. *See* RCW 4.16.080(2); *see also Nave v. City of Seattle*, 68 Wn.2d 721, 724, 415 P.2d 93 (1966) (abuse of process); *Washington v. Boeing Co.*, 105 Wn. App. 1, 17, 19 P.3d 1041 (2000) (negligence). Generally, a cause of action accrues when the party has the right to apply to a court for relief. *Deegan v. Windermere Real Estate Center-Isle, Inc.*, 197 Wn. App. 875, 892, 391 P.3d 582 (2017). A party has the right to apply to a court for relief when the party can establish each element of the action. *Shepard v. Holmes*, 185 Wn. App. 730, 739, 345 P.3d 786 (2014).

Here, Corrigan's claims for abuse of process and negligence centered around Grant County's and its employees' decision to refile criminal charges against him. If refiling the charges was wrongful, this is when Corrigan had a right to apply for judicial

relief. The criminal charges were refiled on July 3, 2013. Corrigan's September 15, 2016 original complaint was, therefore, outside the three-year limitation period. Even if his amended complaint related back to the filing of his original complaint, it too was late.

Corrigan argues that his September 2016 complaint was timely because he was *convicted* in November 2013. But being convicted of a crime is not an element of abuse of process or negligence, and is thus irrelevant to when he had a right to apply for judicial relief. We conclude that his conviction date is not when his abuse of process and negligence claims began to accrue.

3. Judicial immunity

"Under common law, judges are absolutely immune from suits in tort that arise from acts performed within their judicial capacity." *Lallas v. Skagit County*, 167 Wn.2d 861, 864, 225 P.3d 910 (2009). "[J]udicial immunity applies to judges only when they are acting in a judicial capacity and with color of jurisdiction." *Id.* at 865.

Here, Corrigan's claims against the various judges all occurred while they were acting within their judicial capacity. Therefore, judicial immunity extends to their actions, and Corrigan's claims fail.

D. TROOPER KRON'S MOTION TO DISMISS

Corrigan contends the trial court erred by finding Trooper Kron was not properly served and, thus, was not a party to the action. We disagree.

Whether service was proper is a question of law that this court reviews de novo. *Goettemoeller v. Twist*, 161 Wn. App. 103, 107, 253 P.3d 405 (2011). Under FED. R. CIV. P. 4(e)(1)-(2), service must occur: (1) on the individual personally, (2) on the individual's dwelling or usual place of abode with someone of suitable age who resides there, (3) on the individual's agent authorized by law to receive process, or (4) any method allowed by state law in the state where the district court is located or where service is made. Under Washington law, service must occur through: (1) personal service, (2) on the individual's usual place of abode with a person of suitable age who resides there, (3) on the individual's usual place of abode with a person of suitable age who resides there, a proprietor, or an agent, and then mailing a copy by first class mail to the person at their usual mailing address, (4) by publication when the defendant cannot be found, or (5) by certified mail when the court determines it is just as likely to give actual notice. *See* CR 4(d); RCW 4.28.080(16), (17); RCW 4.28.100.

Here, Corrigan does not assert that he served Trooper Kron in compliance with any of the aforementioned ways. He merely asserts that electronic service of his amended

complaint on Trooper Kron was sufficient. We disagree. Electronic service is not permitted under federal or state law. The trial court properly dismissed Corrigan's claims against Trooper Kron for insufficient service of process.[1]

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Siddoway, J.

Pennell, J.

[1] Because of our disposition of these arguments, we need not address the various other bases for which we might affirm the trial court's dismissal of Grant County, its employees, and Trooper Kron.

WASHINGTON ATTORNEY GENERAL SPOKANE TORTS

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