

**COLORADO COURT OF APPEALS,
STATE OF COLORADO**

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DATE FILED: May 15, 2015 10:45 AM
FILING ID: B9729675E5414
CASE NUMBER: 2014CA1816

DISTRICT COURT, CITY & COUNTY OF DENVER
Honorable Andrew P. McCallin, Judge
Case No. 2013-CV-34544

JANE E. NORTON,

PLAINTIFF- APPELLANT,

v.

ROCKY MOUNTAIN PLANNED PARENTHOOD,
INC. a/k/a PLANNED PARENTHOOD OF THE
ROCKY MOUNTAINS, INC., a Colorado nonprofit
corporation; JOHN W. HICKENLOOPER, in his
official capacity as Governor of the State of Colorado;
SUSAN E. BIRCH, in her official capacity as Executive
Director of the Colorado Department of Health Care
Policy and Financing; and LARRY WOLK, in his
official capacity as Executive Director of the Colorado
Department of Public Health & Environment,

DEFENDANTS-APPELLEES.

▲ COURT USE ONLY ▲

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PLAINTIFF-APPELLANT'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28 (g). It contains 3,187 words.
2. The brief complies with C.A.R. 28(k). It contains a citation to the precise location in the record (CD , p), not to an entire documents, where the issue was raised and ruled on.

s/ Natalie L. Decker

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I. INTRODUCTION

In their Answer Briefs, Defendants ask this Court to confirm the errors made by the district court below. The district court erred by:

- Conflating Colorado’s Abortion Funding Limitation¹ terms “directly” and “indirectly.”
- Giving no meaning to Colorado’s Abortion Funding Limitation term “indirectly” thereby reading it out of Colorado’s constitution.
- Relying on affidavits and other documents submitted with Defendants’ Rule 12(b)(1) standing motion and converting Defendants’ Rule 12(b)(5) failure to state a claim motions to Rule 56 motions for summary judgment.

No pleading has been filed by any Defendant which is responsive to Norton’s² complaint. Though requested by Norton and denied by the district court, no discovery has been conducted in this case.

The district court failed, in considering Defendants’ Rule 12(b)(5) failure to state a claim motion, to view the allegations of Norton’s complaint most favorably

¹ “Colorado’s Abortion Funding Limitation” refers to Article V, § 50, Colo. Const., which provides that “[n]o public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, *either directly or indirectly*, any person, agency or facility for the performance of any induced abortion.” (emphasis added).

² “Norton” refers to Plaintiff-Appellant Jane E. Norton.

to Norton. The district court erred by making findings of material facts which are in dispute. At this state, it is undisputed that Norton's complaint established that:

- The State Defendants³ have paid (and continue to pay) State Taxpayer dollars to Planned Parenthood.⁴
- From 2009 to date, more than \$14 million in State Taxpayer dollars have been paid by the State Defendants to Planned Parenthood.
- Planned Parenthood and its induced abortion-performing affiliate Rocky Mountain Services Corporation (“Planned Parenthood’s Abortion Affiliate”) are so interconnected that payments of State Taxpayer dollars to Planned Parenthood amount to payments of State Taxpayer dollars to Planned Parenthood’s Abortion Affiliate.
- Planned Parenthood’s Abortion Affiliate provides all services and products, including induced abortions, at clinic facilities owned and/or operated by

³“State Defendants” refers to Defendants-Appellees John W. Hickenlooper, in his official capacity as Governor of the State of Colorado; Susan E. Birch, in her official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing; the Colorado Department of Health Care Policy and Financing; Larry Wolk, in his official capacity as Executive Director of the Colorado Department of Public Health & Environment; and the Colorado Department of Public Health & Environment.

⁴ “Planned Parenthood” refers to Defendant-Appellee Planned Parenthood of the Rocky Mountains, Inc.

Planned Parenthood without fair market reimbursement to Planned Parenthood by Planned Parenthood's Abortion Affiliate.

- Planned Parenthood's Abortion Affiliate provides all services and products, including induced abortions, using medical and administrative personnel paid for by Planned Parenthood without fair market reimbursement to Planned Parenthood by Planned Parenthood's Abortion Affiliate.
- Planned Parenthood's Abortion Affiliate provides all services and products, including induced abortions, using medical and other equipment and supplies paid for by Planned Parenthood without fair market reimbursement to Planned Parenthood by Planned Parenthood's Abortion Affiliate.

Not only did the district court fail to properly credit these undisputed allegations in Norton's complaint, as it must in determining a Rule 12(b)(5) motion, it failed to credit Norton's 2002 policy determination, based on advice of counsel,⁵ that State Taxpayer dollars paid to Planned Parenthood under identical facts and circumstances violated Colorado's Abortion Funding Limitation at that time and, when Planned Parenthood refused to separate from its Abortion Affiliate, Norton ordered that payment of State Taxpayer dollars to Planned Parenthood cease.

⁵ Such counsel is the current Attorney General for the State of Colorado Cynthia H. Coffman who represents the State Defendants in this case.

Norton's complaint alleges that the State Defendants have paid (and continue to pay) State Taxpayer dollars to Planned Parenthood which "directly or indirectly" paid for induced abortions. Norton's complaint properly states a claim for relief and should not have been dismissed by the district court pursuant to Rule 12(b)(5).

II. ARGUMENT

A. The District Court Did Not Err When it Considered Documents Submitted with Defendants' Rule 12(b)(1) Standing Motion.

Contending that Norton's complaint challenged the State Defendants' expenditure of federal funds, the State Defendants' Rule 12(b)(1) motion, joined in by Planned Parenthood, (CD p. 211), challenged Norton's taxpayer standing. Defendants' Rule 12(b)(1) standing motion was accompanied by affidavits and other papers in which it was acknowledged that the State Defendants had paid about \$1.4 million in State Taxpayer dollars to Planned Parenthood.⁶ Norton's response to Defendants' Rule 12(b)(1) standing motion was also accompanied by affidavits and other papers.

As a Rule 12(b)(1) standing motion presents a question of law, *see, e.g., Marks v. Gessler*, ___ P.3d ___, 2013 WL 3943248 (Colo. App. 2013), in resolving a Rule 12(b)(1) motion, the trial court need not treat facts alleged by the non-moving

⁶ As Norton's complaint alleges that more than \$14 million in State Taxpayer dollars have been paid by the State Defendants to Planned Parenthood, this allegation must be accepted as true for purposes of resolving the Rule 12(b)(5) failure to state a claim motions.

party in her complaint as true. *City of Lakewood v. Brace*, 919 P.2d 231 (Colo. 1996). The trial court may permit affidavits and documents, hold a limited evidentiary hearing to resolve disputed jurisdictional facts, *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (citing *Brace*, 919 P.2d 231), and make appropriate findings of facts. *Id.*

Thus, affidavits and supporting documentation were properly presented by the parties in connection with Defendants' Rule 12(b)(1) standing motion and were properly considered by the district court in ruling on Defendants' Rule 12(b)(1) standing motion. (CD pp. 227-320). Moreover, the district court properly denied Defendants' Rule 12(b)(1) standing motion and ruled that Norton had taxpayer standing. (CD p. 382). There was no cross-appeal by Defendants on this issue.

B. The District Court Erred When it Considered Documents Submitted with Defendants' Rule 12(b)(1) Standing Motion to Resolve Defendants' Rule 12(b)(5) Failure to State a Claim Motions.

The district court next considered Defendants' Rule 12(b)(5) failure to state a claim motions. Even the State Defendants conceded that, in resolving Defendants' Rule 12(b)(5) failure to state a claim motions, "the court must take the allegations of the [Plaintiff's] Complaint as true and draw all inferences in favor of the plaintiff," but that any effort to introduce evidence unrelated to the "Court's power to hear this case" would be "patently improper." (CD pp. 365-366).

It is elementary that dismissal of a complaint pursuant to Rule 12(b)(5) is highly disfavored. Such motions are to be granted rarely and only under the most extraordinary of circumstances. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995). Importantly, in considering a Rule 12(b)(5) motion, a court may only consider the allegations of plaintiff's complaint and may not go beyond the confines of the pleadings. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992).

However, that is precisely what the district court did here. Over Norton's objections, the district court, in resolving Defendants' Rule 12(b)(5) failure to state a claim motions, considered the affidavits and documents submitted in connection with Defendants' Rule 12(b)(1) standing motion. This converted Defendants' Rule 12(b)(5) failure to state a claim motions to Rule 56 summary judgment motions. The Court then made findings of fact regarding facts that are in dispute, and entered Rule 56 summary judgment in favor of defendants. *See, e.g.*, CD p. 253 (Norton requested "that the Court disregard, as it must, all affidavits of any party in resolving Defendants' Rule 12(b)(5) motion to dismiss"); CD Transcript p. 31 (the district court could only properly consider the affidavits and related documents in connection with Defendants' Rule 12(b)(1) motion); CD pp. 253, 360 (Norton requested an evidentiary hearing or the opportunity to conduct discovery if, in resolving the State Defendants' Rule 12(b)(1) standing motion, the Court was

inclined “to consider the affidavits and documents attached to the parties’ pleadings”); CD p. 365 (State Defendants, in objecting to Norton’s request for testimony on grounds their Rule 12(b)(1) motion only challenged Norton’s standing concerning the expenditure of federal funds, acknowledged a factual dispute as to the amount of State Taxpayer dollars expended, conceded that some State Taxpayer dollars had been paid to Planned Parenthood, and that the amount actually paid to Planned Parenthood “may require discovery”).

The district court failed to credit, as it must, the undisputed factual allegations of Norton’s complaint. Moreover, though no pleading responsive to Norton’s complaint had been filed by any Defendant, no discovery had been conducted, and many facts are in dispute, including whether Planned Parenthood itself performs induced abortions or provides services and products related thereto, the district court made findings of fact, including that, since it was not alleged that Planned Parenthood itself performed induced abortions, no State Taxpayer dollars could have been paid to Planned Parenthood which “directly” paid for the performance of induced abortions.

Although the district court claimed that Norton’s complaint raised a “pure question of law” (CD p. 380), the district court necessarily reached this conclusion by relying on evidence outside of the complaint and by making factual findings, (CD p. 378), including:

- “[T]here is . . . no evidence that funding was provided for any abortion.” (CD p. 379).
- “[T]he State Defendants attach[ed] affidavits and other documentary evidence demonstrating that more than \$13.0 Million of the public funds identified by Plaintiff . . . were actually federal funds.” *Id.*
- “With regard to the remaining \$1.4 Million, the State Defendants present[ed] evidence that none of it was paid to Planned Parenthood for abortion services.” *Id.*
- “The State Defendants submit[ted] affidavits and documentary evidence that demonstrate that the \$13.0 Million paid to Planned Parenthood were purely federal funds. This evidence also demonstrates that the \$1.4 Million in state funds were paid to Planned Parenthood for services that are not related to abortions.” (CD p. 380).
- “The evidence submitted by the parties has framed the legal issue presented...” (CD p. 381).
- “This evidence also clarifies the fact that the state funding of Planned Parenthood was for services unrelated to the performance of abortions.” *Id.*

In its Rule 12(b)(5) failure to state a claim motion, Planned Parenthood, the only party with real knowledge about how it used State Taxpayer dollars, did not

deny that it had received State Taxpayer dollars. It did not deny that it was interrelated with its Abortion Affiliate. It did not deny that it subsidized its Abortion Affiliate's induced abortion business. Indeed, Planned Parenthood did not contend that it does not perform induced abortions itself. Nor did it contend that it does not provide medical services and products that support the performance of induced abortions.

What Planned Parenthood does do in its Answer Brief is characterize the district court's conversion of Defendants' Rule 12(b)(5) failure to state a claim motions to Rule 56 summary judgment motion without permitting discovery as a discovery issue. Planned Parenthood Answer Brief, p. 13. The Court should reject this proposition out of hand as the sole case Planned Parenthood relies upon for its proposition is *Keybank Nat'l Ass'n v. Mascarenas*, 17 P.3d 209 (Colo. App. 2000). *Keybank* was a declaratory judgment action expedited pursuant to C.R.C.P. 57(m). *Id.* at 215. When a case is expedited, case management provisions and discovery rules do not apply. *Id.* (citing C.R.C.P. 16(a) and 26(a)). Norton's complaint is not a declaratory judgment action that has been expedited pursuant to C.R.C.P. 55(m). Neither was Norton's complaint exempted from the rules of civil procedure. Consequently, a case that found no abuse of discretion when a court declined to enter an order that the parties follow rules that are not applicable is

wholly irrelevant to this Court's review and analysis. *Keybank* is clearly inapposite.

Moreover, it is improper for a court to convert a Rule 12(b)(5) motion to a Rule 56 summary judgment motion without notice to the parties. *Horne Eng'g Svcs. v. Kaiser-Hill*, 72 P.3d 451, 452-453 (Colo. App. 2003). *Horne* expressly acknowledges the importance of courts giving notice to parties when converting motions to dismiss to motions for summary judgment in order to give the parties a reasonable opportunity to present all materials pursuant to Rule 56. *Horne*, 72 P.3d at 453. See also *Gay v. Wall*, 761 F.2d 175, 177-178 (4th Cir. 1985); *Jordan v. Washington Mut. Bank*, 761 F.2d 670, 674 (D. Md. 2002). Courts are obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery. *Dowling v. City of Philadelphia*, 855 F.2d 136, 139 (3rd Cir. 1988) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Costlow v. United States*, 552 F.2d 560 (3d Cir. 1977)).

Here, Norton had no opportunity to conduct discovery and was denied the opportunity to contest the veracity of the evidence presented by the State Defendants in connection with their Rule 12(b)(1) motions. This precludes summary judgment even assuming Norton was provided notice, which she was not, that the district court intended to convert Defendants' Rule 12(b)(5) failure to state a claim motions to Rule 56 summary judgment motions.

The district court improperly relied on extraneous evidence in resolving Defendants' Rule 12(b)(5) failure to state a claim motions. The conversion of Defendants' Rule 12(b)(5) motion to a Rule 56 summary judgment motion without notice was error.

C. The District Court Erred by Conflating the Terms “Directly” and “Indirectly” in Colorado’s Abortion Funding Limitation and by Reading the Term “Indirectly” Out of Colorado’s Constitution.

The district court conflated Colorado’s Abortion Funding Limitation terms “directly” and “indirectly.” In so doing, the district court equated “indirectly” with “directly” thus giving no separate meaning to the term “indirectly.” The term “indirectly” was thereby read out of Colorado’s constitution. Defendants urge this Court to confirm this error. *See* Planned Parenthood Answer Brief, 5; State Defendants’ Answer Brief, 5.

The language of Colorado’s Abortion Funding Limitation is clear and unambiguous. It prohibits using State Taxpayer dollars to pay for, either *directly or indirectly*, induced abortions. Norton’s complaint clearly alleges that the State Defendants have paid State Taxpayer dollars to *directly or indirectly* pay for induced abortions.

The State Defendants contend in their Answer Brief that the district court essentially “held that the Amendment requires the public funds to have a nexus to the performance of an abortion.” State Defendants’ Answer Brief, p. 28. It appears

that what the district court meant by this was that, to be prohibited by Colorado's Abortion Funding Limitation, the expenditure of State Taxpayer dollars must have a direct nexus to the performance of an abortion, *i.e.*, there must be a *direct* payment to the entity that performs the induced abortion. Defendants further argue that "the Amendment prohibits the State from using public funds to pay or reimburse for induced abortions, whether that payment is direct or indirect. It says nothing regarding 'subsidies.'" State Defendants' Answer Brief, p. 30.

This, of course, makes the constitutional term "indirectly" devoid of any meaning and a mockery of the people's enactment. The district court effectively eliminated the constitutional prohibition on "*indirect*" payments for induced abortions and ignored the fact that "to subsidize" is "to indirectly pay for" something, *i.e.*, indirect payments for induced abortions prohibited by Colorado's Abortion Funding Limitation. *See, e.g., Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458, 463 (8th Cir. 1999) ("No subsidy [of an abortion affiliate] will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds.").

The State Defendants argue that a contrary interpretation would "impose a duty on the State to monitor and control every dollar that comes out of a state account." State Defendants' Answer Brief, p. 34. It is irrelevant to the constitutional analysis

whether it is difficult or even troublesome for State government employees to account for expenditures of State Taxpayer dollars; because that is precisely the obligation imposed upon them by Colorado's Abortion Funding Limitation. State employees must ensure that State Taxpayer dollars are not used to subsidize abortions, *i.e.*, to *indirectly* pay for induced abortions.

With no pleading filed by any Defendant responsive to Norton's complaint and no discovery performed by any party, it was improper for the district court to conclude, as a matter of law, that State Taxpayer dollars paid by the State Defendants to Planned Parenthood had not *directly or indirectly* paid for induced abortions, whether performed by Planned Parenthood's Abortion Affiliate or, should discovery so demonstrate, Planned Parenthood itself. Norton should be afforded the opportunity to engage in discovery so as to provide some factual basis for this finding. It is, at this time, hotly disputed.

D. The State Defendants Improperly Argue New Facts on Appeal

Although Defendants contend there are no genuine issues of material fact in dispute, a contention Norton disputes, the State Defendants improperly argue in their Answer Brief facts that are not in the record. The State Defendants proclaim: "The documents incorporated into the complaint demonstrate that Medicaid funds did not pay for abortions." State Defendants' Answer Brief, p. 16. The State Defendants then discuss documents Defendants contend were produced in response

to Norton's CORA requests, despite the fact that the documents the State Defendants refer to in their Answer Brief were neither attached to Norton's complaint, referred to in it, nor otherwise made part of the record in the district court in this case. Tellingly, no citations to the record for these facts are (or can be) provided by the State Defendants.

In this regard, the State Defendants claim that, as a Medicaid provider, Planned Parenthood was required to enter into a Provider Participation Agreement, and that a copy of Planned Parenthood's agreement was provided to Norton in response to her CORA request. As this Provider Participation Agreement is not in the district court's record, there neither is nor can be any citation to it in the record as required by C.A.R. 28(e).

Whether Planned Parenthood did or did not sign such a Provider Participation Agreement, when such agreement was signed, what it provided for, and whether or not Planned Parenthood complied with its terms are all factual issues which have yet to be determined and are thus in dispute.

The State Defendants cannot add new facts to the record at this stage, claim they are undisputed, and then argue that such new facts support their position.

III. CONCLUSION

Colorado's Abortion Funding Limitation Amendment clearly limits the use of State taxpayer funds to pay, *directly or indirectly*, for induced abortions. The

district court improperly conflated the terms “direct” and “indirect” in Colorado’s Abortion Funding Limitation Amendment, essentially reading out of the constitution the term “indirect.”

Norton’s complaint alleges that the State Defendants have paid (and continue to pay) State Taxpayer dollars to Planned Parenthood which “directly or indirectly” have paid (and continue to pay) for induced abortions. Norton’s complaint properly states a claim for relief and should not have been dismissed pursuant to Rule 12(b)(5).

Plaintiff renews her request that the district court’s order dismissing her complaint be reversed and that this case remanded for further proceedings.

Dated this 15th day of May, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 15th day of May, 2015, a true and correct copy of the foregoing **PLAINTIFF-APPELLANT'S REPLY BRIEF** was filed with the Colorado Court of Appeals via ICCES and served via ICCES on the parties and/or their counsel of record, all of whom are registered ICCES users.

/s/ Natalie L. Decker
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