DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	
Plaintiffs: SPENCER KONTNIK, and COLORADO CROSS-DISABLITY COALITION, a Colorado Corporation, **v.** **Defendant:** DENVER COUNTY COURT.	▲ COURT USE ONLY▲
Attorneys for the City and County of Denver: Michele A. Horn, Atty. No. 32599 Amanda K. MacDonald, Atty. No. 41094 Assistant City Attorneys Municipal Operations Section 201 W. Colfax Avenue, Dept. 1207 Denver, CO 80202-5332 Telephone: 720.913.3275 E-mail: michele.horn@denvergov.org; amanda.macdonald@denvergov.org	Case Number: 2022CV32599 Courtroom: 466

REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant, Denver County Court ("DCC"), through undersigned counsel, replies in support of its Motion to Dismiss as follows:

INTRODUCTION

DCC moves to dismiss this action on legal grounds. By doing so, DCC is not, in any way, attempting to diminish Mr. Kontnik or trivialize the hearing loss with which he lives. However, for the legal reasons stated in the Motion to Dismiss ("Motion"), Mr. Kontnik has not established that he is entitled to the relief he seeks. Accordingly, the Amended Complaint ("Complaint") must be dismissed pursuant to C.R.C.P. 12(b)(5).

In Plaintiffs' Opposition to DCC's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(5) ("Response"), Plaintiffs, Spencer Kontnik and Colorado Cross-Disability Coalition (jointly

referred to herein as "Mr. Kontnik")[1], fail to address numerous legal arguments raised by DCC in its Motion. Namely, Mr. Kontnik fails to address: whether his claim substantively is barred by judicial immunity [Motion, pp. 4-7]; whether a court system can be held civilly liable for a sitting judge's granting of a motion during jury selection in a criminal trial [*Id*., pp. 7-10]; whether an entity's response to an administrative investigation can legally be considered ratification of the incident being investigated [*Id*. p. 9]; or whether procedural rules related to choosing a jury necessarily form the standard by which meaningful access is defined under the Colorado Anti-Discrimination Act ("CADA") [*Id*., pp. 10-12].

At the motion to dismiss stage, this Court is obligated to accept all allegations in the Complaint as true, even though those facts must be interpreted in the light most favorable to the Plaintiff. *Warne v. Hall*, 373 P.3d 588, 589-90 (Colo. 2016). Despite this well-established standard, the Response either completely ignores key facts which are included in the Complaint or characterizes them in a fashion that is not supported by the contents of the Complaint itself. Most importantly, in the Response, Mr. Kontnik never mentions the fact that his excusal from jury service resulted from a joint stipulation presented by the parties in a criminal trial that was granted by Judge Smith. Rather, Mr. Kontnik presents his arguments as if Judge Smith, on her own and without the joint stipulation, unilaterally opted to remove him from the jury pool. Further, although the statement from the interpreter that Mr. Kontnik attached to his Complaint clearly states that the parties' reason for making their joint stipulation was concern regarding possible delay to a scheduled one-day jury trial, Mr. Kontnik treats this fact as newly fabricated

[1] As in the Motion to Dismiss, DCC jointly refers to both Plaintiffs as "Mr. Kontnik." Any assertion that by so doing, DCC has not moved to dismiss any claims asserted by Colorado Cross-Disability Coalition is spurious, especially considering the Complaint consists of a single Prayer for Relief. [*See* Response, fn. 1].

by DCC. [Response, p. 3; Complaint, Exhibit 1, p. 6]. Finally, in his Response, Mr. Kontnik minimizes that DCC provided him access to the jury selection process when it provided a CART interpreter for his use; yet he admits in the Complaint that DCC provided CART interpreters, he was familiar with the procedures for obtaining such an interpreter, was provided an interpreter for his use by DCC and used the interpreter for all of the jury selection process up and until the time he was excused. [Complaint, ¶¶ 44, 46-48]. Furthermore, he attaches to his Complaint the very procedures by which the CART interpreter was obtained, including the form he necessarily completed to choose the type of interpreter he preferred. [Complaint, Ex. 1, p. 15].[2]

ARGUMENT

I. *Absolute immunity is a proper basis for a C.R.C.P. 12(b)(5) motion and the Response fails to address the immunity arguments set forth in DCC's Motion.*

Mr. Kontnik incorrectly claims that judicial immunity cannot be resolved in a C.R.C.P. 12(b)(5) motion to dismiss and that it can only be pled in an answer. This is demonstrably false and fails to recognize the fundamental distinction between immunity and other types of affirmative defenses. In *State v. Nieto*, 993 P.2d 493 (Colo. 2000), the Colorado Supreme Court discussed this distinction. The court discussed this distinction, explaining that immunity from suit means that a plaintiff cannot legally file a lawsuit naming that person or entity as a defendant. *Id*. at 507 (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (recognizing that an entitlement not to stand trial or face other burdens of litigation is an *immunity from suit* rather than a mere defense to liability)). Immunity means that the person or entity is incapable of being

[2] Consistent with DCC's Motion, the page numbers cited in this Motion consider the first page following the title page (bearing only the words "Plaintiffs Exhibit 1") to be page 1 of the Exhibit to the Complaint and the remaining pages are treated as if they were numbered sequentially thereafter.

sued, regardless of fault or wrongdoing. *Id*. (citing *Harlow,* 457 U.S. at 818; *Richardson v. McKnight,* 521 U.S. 399, 403 (1997) (stating that a legal defense may well involve "the essence of the wrong," while an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly)). In contrast, an affirmative defense is a legal argument that a defendant, who is capable of being sued, may assert to require the dismissal of a claim or to prevail at trial. *Id*.

While an affirmative defense typically must be raised in an answer, there are narrowly tailored exceptions, such as when the allegations of the complaint reveal that the affirmative defense applies. *Prospect Dev. Co., Inc. v. Holland & Knight, LLP*, 433 P.3d 146, 149-50 (Colo. App. 2018). The bare allegations of Mr. Kontnik's Complaint, if taken as true, indicate that judicial immunity applies. The Complaint alleges that Judge Smith, as a Denver County Court judge, granted a stipulation between the DA and PD that excused Mr. Kontnik from jury service while she was presiding over jury selection in a criminal trial assigned to her courtroom. [Complaint, ¶¶ 60, 65]. These allegations, on their face, reveal that the doctrine of judicial immunity applies, as immunity is overcome in only two circumstances – nonjudicial actions or actions taken in the complete absence of all jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11 (1991). When the "allegations indicate the existence of an affirmative defense that will bar the award of any remedy," a party may raise an affirmative defense in a motion to dismiss. *Williams v. Rock-Tenn Servs., Inc.*, 370 P.3d 638, 642 (Colo.App. 2016).

Courts have repeatedly granted C.R.C.P. 12(b)(5) motions to dismiss based upon the doctrine of immunity. *See, e.g., Freedom from Religion Found., Inc. v. Romer*, 921 P.2d 84 (Colo. App. 1996) (affirming motion to dismiss based on qualified immunity); *Moody v. Ungerer*, 885 P.2d 200 (Colo. 1994) (reinstating order of dismissal pursuant to C.R.C.P. 12(b)(5) based upon qualified immunity); *Nat'l Camera, Inc. v. Sanchez*, 832 P.2d 960 (Colo. App. 1991)

(affirming C.R.C.P. 12(b)(5) motion to dismiss based on qualified immunity). Moreover, numerous federal court decisions have dismissed claims – and specifically ADA claims – based upon immunity for failure to state a claim. *See, e.g.*, *Crane v. Utah Dep't of Corr.,* 15 F.4th 1296 (10th Cir. 2021) (dismissing amended complaint, which included claim for violation of ADA, for failure to state a claim); *Kent Vu Phan v. Cross*, 715 Fed. Appx. 835 (10th Cir. 2017) (affirming dismissal of ADA claims against state court judges under 28 U.S.C. 1915(e)(2)(B)[3]); *Lowery v. Utah*, 315 F. App'x 45, 46-47 (10th Cir. 2008) (affirming dismissal of ADA claims against state court judge, the state court, and State of Utah under 28 U.S.C. 1915(e)(2)(B), stating the appellant "cannot circumvent the doctrine of judicial immunity by naming nonjudicial parties for alleged violations committed 'through the actions of defendant [judge]'"); *Barber v. Town of La Veta*, 14-CV-03273-RBJ, 2015 WL 5865105 (D. Colo. Oct. 8, 2015) (dismissing claims against municipal judge for violation of the ADA pursuant to F.R.C.P. 12(b)(6)).

Mr. Kontnik cites *Pulliam v. Allen*, 466 U.S. 522 (1984), for the proposition that judicial immunity cannot apply to injunctive relief; however, *Pulliam* involved a § 1983 case and the question before the court was whether judicial immunity was a bar to an award of attorney's fees under 42 U.S.C. § 1988. *Id*. at 541-42.[4] Notably, Congress abrogated *Pulliam*'s holding in 1996 by amending § 1983 to expressly exempt judicial officers from equitable remedies sought by plaintiffs. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847,

[3] 28 U.S.C. § 1915(e)(2)(B) is similar to an F.R.C.P. 12(b)(6) motion, but applies specifically to cases brought *in forma pauperis*. Section 1915(e)(2)(B) requires federal courts to dismiss a case brought *in forma pauperis* at any time if the court determines it fails to state a claim on which relief can be granted.

[4] Likewise, *Churchill v. Univ. of Colorado at Boulder*, 285 P.3d 986 (Colo. 2012), cited by Mr. Kontnik in a footnote, involved a § 1983 case deciding, in part, whether the Regents were entitled to absolute immunity as quasi-judicial officials.

3853. Nonetheless, even taking Mr. Kontnik's arguments at face value, he does not address in his Response (1) that DCC is entitled to absolute immunity as an extension of the immunity that shields Judge Smith from liability for her discretionary actions pursuant to *State v. Mason*, 724 P.2d 1289 (Colo. 1986); and (2) that DCC is entitled to absolute immunity from damages.

II. *DCC has not discriminated against Mr. Kontnik and cannot be liable for the discretionary act of a judge.*

The argument raised by DCC regarding whether Plaintiff has a cause of action against it does not concern whether or not DCC is a public entity as defined by CADA. The issue, which Mr. Kontnik entirely fails to address, is whether, aside from the insurmountable issue of judicial immunity, a court system can be found civilly liable for a discretionary act of a sitting judge who has granted a joint motion during jury selection in a criminal trial. Given that sitting judges are independent and not constrained in their decision-making on the bench by the entities which employ them, to sustain his cause of action, Mr. Kontnik must point to statutory authority or case law supporting his assertion that DCC should be civilly liable for Judge Smith's granting of a stipulated motion excusing him from the jury. As Mr. Kontnik has provided no such authority, his claim must be dismissed as he has failed to "raise his right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Neither of the cases presented by Mr. Kontnik supports a finding that DCC can be found liable under the specific facts of this case. *United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987) does not concern civil liability at all but, rather, is a criminal case in which the court denied a joint motion to excuse a deaf juror from service and allowed her to serve with the aid of an interpreter. The Tenth Circuit, while emphasizing the "determinations of qualifications [of potential jurors] are committed to the sound discretion of the trial court," determined that the trial

court had not erred in allowing the juror to serve. *Id*. at 1088. Critically, what the Tenth Circuit did not consider was whether the trial court would have erred had it granted the joint motion or that the district court would have been civilly liable had the joint motion been granted rather than denied. Accordingly, *Dempsey* does nothing to support Mr. Kontnik's claim here.

Likewise, *DeLong v. Brumbaugh*, 703 F.Supp. 399 (W.D. Penn. 1989) is easily distinguishable. In *DeLong* the trial court made a unilateral, blanket determination that no deaf person could ever serve on a jury array because the juror could not speak the English language; the case did not consider whether a judge could grant a joint stipulation excusing a juror from a criminal jury because of concern regarding completing a one-day trial in time. *Id*. at 402. In *DeLong*, the state court judge was concerned that the presence of the interpreter would violate the sanctity of the jury and the secrecy of their deliberations. *Id*. at 405. The state court judge testified that he would disqualify a deaf person under all circumstances. *Id*. at 406. Therefore, the issue in *DeLong* was a blanket determination by the judge that would preclude any deaf person from ever serving on a jury in the subject judge's courtroom, which is clearly distinguishable from the facts of this case.

As stated in DCC's Motion, cases in which a court system have been found civilly liable for excluding disabled individuals from jury access have all included blanket prohibitions from such service. Here, Mr. Kontnik admits in his Response that DCC has no such blanket prohibition and that procedures already in place are sufficient to satisfy the requirements of CADA. [Response, p. 8]. Accordingly, as case law indicates that court systems have only been found civilly liable for blanket prohibitions and seeing as Mr. Kontnik admits that no such blanket prohibitions exist, his claim against DCC must be dismissed.

III. *DCC provided meaningful access to Mr. Kontnik.*

Mr. Kontnik cites to cases regarding "meaningful access" but provides no legal authority for his proposition that the Colorado Uniform Jury Services and Selection Act would be the standard for such access. Further, he minimizes the fact that a CART interpreter was provided to him and provides no legal authority showing that the access provided to him, i.e., a CART interpreter during his jury service, was not "meaningful." Finally, Mr. Kontnik conflates the actions of Judge Smith with the DCC, as the public entity subject to CADA.

To effectuate the ADA, regulations have been promulgated to implement its nondiscrimination mandate. *See Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1195 (10th Cir. 2007). The regulations provide, "[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities … an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." 28 C.F.R. § 35.160(b)(1). Mr. Kontnik fails to address how the provision of the CART interpreter by the DCC, as the public entity, does not comply with the ADA standards which he states apply to DCC. [Response, p.3, fn.4.].

Mr. Kontnik appears to assert that Judge Smith's failure to interview him pursuant to C.R.S. § 13-71-104(c) is what deprived him of meaningful access. [Response, p. 13]. He admits in the Complaint that he was provided with a CART interpreter until he was excused by order of the court. [Complaint, ¶¶ 44, 46-48]. In his Response, Mr. Kontnik admits that he is not asserting any right to actually sit on the jury. [Response, p. 13]. The only actions in between the portion of jury service for which Mr. Kontnik admittedly was accommodated and service on the jury, which he admits he was not entitled to, is 1) the motion made by the parties and 2) Judge Smith's discretionary act in granting the motion. There can be no credible argument that DCC is liable

for the types of motions brought before sitting judges. Accordingly, Mr. Kontnik's claim must be limited to Judge Smith's granting of the motion without interviewing Mr. Kontnik pursuant to C.R.S. § 13-71-104(c).

Mr. Kontnik's failure to address that the Colorado Uniform Jury Services Selection Act is in no way a part of CADA and does not, in itself, create an independent cause of action, is fatal to his lawsuit. This is especially true in light of the holding in *People v. Pineda*, 40 P.3d 60, 63 (Colo. App. 2001), wherein the Court held that the interview referenced in C.R.S. § 13-71-104(c) is not mandatory. In a footnote, Mr. Kontnik merely states that *Pineda* is "distinguishable" from this case without providing any explanation as to how. [Response, p. 9, fn. 6].

Furthermore, Mr. Kontnik characterizes several facts relied upon by Judge Smith to excuse him from the jury, which are facts he included in his Complaint, as post-hoc and pretextual. [Response, pp. 9-10]. First, the facts to which Mr. Kontnik refers are documented in Exhibit 1 to his Complaint and occurred prior to his excusal from the jury so they, by definition, are not post-hoc. Second, such characterization is improper at this stage of the proceedings because all facts included in the Complaint must be considered as true. *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999). Mr. Kontnik cannot include facts in his Complaint and then argue, in response to a Rule 12(b)(5) motion, that the same facts are not true. There are no well-pled facts in the Complaint to support Mr. Kontnik's characterization of the various factors considered by Judge Smith in granting the joint stipulation to be pretextual reasons for targeting Mr. Kontnik because of his hearing loss.

Secondly, none of the facts contained in the Complaint and considered by Judge Smith in granting the stipulated motion insinuate that Mr. Kontnik would have made a poor juror simply because of his hearing loss. The parties raised issues as to the timing of the one-day trial and

whether the accommodation provided to Mr. Kontnik would slow down that process. [Complaint, Ex. 1, pp. 4-8]. The judge also expressed concerns about needing to sit an alternate juror in case there was a technical problem with the CART interpretation services. [Complaint, ¶ 136]. It is not error for a judge to consider the collateral effects of an accommodation in determining whether a juror should sit on a criminal jury and such considerations are not pretextual. *Pineda*, 40 P.3d at 60 (Colo. App. 2001). Accordingly, Mr. Kontnik's interpretation of these facts as pretextual or indicative of a violation of CADA are without legal foundation.

IV. *A criminal defendant's constitutional rights are paramount to a juror's right to participate in jury service.*

Mr. Kontnik contends that DCC "attempts to create a conflict" between a defendant's constitutional rights and a juror's right to participate in jury service. [Response, p. 12]. Rather, DCC's point lay in the very case cited by Mr. Kontnik: "[a]lthough promoting access to courts is and should be a primary concern of the judiciary, the trial court's paramount duty is to ensure that the accused is afforded a fair trial." *State v. Speer*, 925 N.E.2d 564, 589 (Ohio 2010); *see also People ex rel. Gallagher v. District Court*, 933 P.2d 583, 588 (Colo. 1997). "The court must balance the public interest in equal access to jury service against the right of the accused to a fair trial, the latter being the predominant concern." *Id*. at 590 (emphasis added). The facts pled by Mr. Kontnik in his Complaint indicate that defense counsel raised his concern with delay in the one-day trial and the parties stipulated that he be excused. [Complaint, ¶ 65; Ex. 1, p.6]. Mr. Kontnik once again ignores these facts, casting it as a unilateral decision of Judge Smith.

Mr. Kontnik uses *Speer* and *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), cited in footnote 8, to argue for individualized inquiries into whether a juror may competently serve. This argument has been addressed *supra* and in DCC's Motion on pgs. 10-12. The interactive process

referenced by Mr. Kontnik was unnecessary because DCC provided Mr. Kontnik the specific accommodation that he requested – a CART interpreter.

CONCLUSION

For the foregoing reasons, DCC requests that Mr. Kontnik's Complaint be dismissed.

Dated this 15th day of November 2022.

By: */s/ Amanda K. MacDonald*
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November 2022 a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS** was filed and served via the Colorado Court electronic filing system to the following:

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