Appendix A DATE FILED: July 20, 2021

DISTRICT COURT, ELBERT COUNTY, COLORADO

Court Address:

751 UTE AVENUE, P.O. BOX 232, KIOWA, CO, 80117

Plaintiff(s) THOMAS NELSEN

v.

Defendant(s) JOHN KELLNER et al.

Case Number: 2021CV02

Order Granting Defendants' Motion to Dismiss

The motion/proposed order attached hereto: GRANTED.

THIS MATTER comes before the Court on Defendants' John Kellner, George Brauchler, Brian Sugioka, and Douglas Bechtel ("Defendants") attached Motion to Dismiss filed on May 17, 2021. Plaintiff Thomas Neilsen ("Plaintiff") filed his Opposition to the Defendant's Motion to Dismiss on

June 7, 2021 . Defendants filed their Reply in Support of Motion to Dismiss on June 1 1 , 2021. The Court has reviewed all of the briefing, the file in its entirety, and the pertinent law. Being fully advised, the Count GRANTS the Motion to Dismiss.

Plaintiff has previously sought a declaration that he is entitled to discover evidence which he has allegedly repeatedly requested from Defendants. This Court in its November 14, 2018, order in Case No. 2018CV30041 stated:

'The Court has reviewed the Motion to Dismiss, the Response and the Reply. Colo. R. Crim. Pro. 35(c)(2)(l) provides that every person convicted of a crime is entitled as a matter of right to apply for post-conviction review where there is a claim

that the conviction was obtained in violation of the federal or state constitution. That rule provides the exclusive means for the district court to review Defendant's claims. Defendant has presented his claims for review both in this Court and on appeal. Plaintiff has thus exhausted his remedies."

2018CV30041 Order (Nov. 14, 2018). Plaintiff asserts that the prosecution should be charged with perjury because their testimony is contradicted by the checks written by Shazam Kianpour and the prosecution's discovery log. Complaint (Apr. 14, 2021 at 10-11 . The Court remains unconvinced that the evidence Plaintiff provides as the basis for his Brady assertions is newly discovered.

Moreover, this Court may not review another trial judge's rulings on evidentiary issues. As the remaining issue here is identical to an issue actually and necessarily determined in a prior proceeding, the parties were in privity in the prior s proceeding, there has been a final judgment, and Plaintiff had a full and fair opportunity to litigate previously, the Court

GRANTS the motion to dismiss Plaintiff's claim for injunctive relief pertaining to discovery.

Further, Plaintiff has not proven that his conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal courts issuance of a writ of habeas corpus. Accordingly, Plaintiff's claim is not cognizable under S 1983 and he is not entitled to any remedy thereunder. See Heck v. Humphrey, 512 U.S. 477, 486-87 (U.S. 1994).

Plaintiffs request for attorney's fees is DENIED.

SO ORDERED.

Issue Date: 7/20/2021

Appendix B

DISTRICT COURT, ELBERT COUNTY,COLORADO

Court Address:

751 UTE AVENUE,P.O.BOX 232,KIOWA, CO,80117

DATE FILED: September 27, 2021

P!aintiff(s) THOMAS NEILSEN

v.

Defendants) JOHN KELLNER et al.

ACOURT USE ONLY A

Case Number. 2021CV2

Division: 1 Courtroom:

Order Motion To Clarify and Reconsider Ruling on The Defendant's Motion to Dismiss

The motion/proposed order attached hereto: DENIED.

The Court has considered the attached motion under Rules 59 and 60. The motion is without merit.

The motion to reconsider and to "clarify" the Court's July 20, 2021, order is DENIED.

SO, ORDERED.

Issue Date: 9/27/2021

GARY MICHAEL KRAMER

District Court Judge

Page 1 of 1

Appendix C

DISTRICT COURT, ELBERT COUNTY,COLORADO

Court Address:

751 UTE AVENUE,P.O.BOX 232,KIOWA,CO,80117 DATE FILED: October 8, 2021

Plaintiffs) THOMAS NEILSEN

v.

Defendants) JOHN KELLNER et al.

ACOURT USE ONLY A

Case Number: 2021CV2

Division: 1 Courtroom:

Order: Second Motion to Reconsider Whether Judge Kramer Ruling on the Defendants Motion to

Dismiss was Proper When Judge Kramer Recused Himself on a Parallel Case Involving Many of the

Same Issues

The motion/proposed order attached hereto: DENIED.

The Court*s recusal in the other matter is unrelated to this matter. The undersigned judicial officer does not have a conflict in this matter.

The motion to reconsider is DENIED.

SO, ORDERED.

Issue Date: 10/8/2021

GARY MICHAEL KRAMER

District Court Judge

Appendix D

21CA1643 Neilsen v Kellner 12-15-2022

COLORADO COURT OF APPEALS

Court of Appeals No. 21CA1643
Elbert County District Court No. 21CV2
Honorable Gary M. Kramer, Judge

Thomas Neilsen,

Plaintiff-Appellant,

v.

John Kellner, in his official capacity as District Attorney; George H. Brauchler, in his past official capacity as District Attorney; Brian Sugioka, in his official capacity as Deputy District Attorney; and Douglas Bechtel, in his official capacity as Deputy District Attorney,

Defendants-Appellees.

JUDGMENT AFFIRMED AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE SCHUTZ
Dunn and Grove, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 15, 2022

Thomas Neilsen, Pro Se

Hall & Evans, LLC, Nicholas J. Deaver and Andrew D. Ringel, Denver, Colorado, for Defendants-Appellees

DATE FILED: December 15, 2022

¶ 1 Thomas Neilsen brought this civil rights lawsuit under 42 U.S.C. § 1983. The district court dismissed the case pursuant to C.R.C.P. 12(b)(5). Neilsen now appeals. Recognizing that "[a]ll things must end — even litigation," we affirm. S. Rambler Sales, Inc. v. Am. Motors Corp., 375 F.2d 932, 938 (5th Cir. 1967).

I. Factual and Procedural Background

¶ 2 In November 2010, Neilsen pleaded guilty to sexual assault on a child and attempted sexual assault on a child in Elbert County case number 10CR62. As a result of his plea, nineteen other child sexual offense charges were dismissed. Neilsen stipulated to the entry of a deferred judgment with a condition that he complete Sex Offender Intensive Supervised Probation. In 2014, the trial court found that he had violated the terms and conditions of his sentence. The court revoked his deferred judgment, entered his conviction, and sentenced him to concurrent four- and three-year prison terms. Neilsen did not file a direct appeal, and he subsequently fulfilled his sentence.

¶ 3 Neilsen has spent the better part of the last decade filing pleadings attempting to overturn his conviction, withdraw his guilty plea, and obtain various injunctive and declaratory relief against

the prosecution, investigators, and witnesses involved in the original criminal proceedings. To understand the procedural context of the present civil case, it is necessary to review the history of Neilsen's prior litigation.

¶ 4 After his criminal sentence in 10CR62 became final, Neilsen filed a motion to withdraw his plea pursuant to Crim. P. 32(d) and 35(c). He claimed a Brady violation by the prosecution for allegedly concealing a recorded video interview of the victim. See Brady v. Maryland, 373 U.S. 83, 87 (1963) (suppression of evidence favorable to an accused violates due process if the evidence is material to guilt or punishment). Neilsen also claimed ineffective assistance of plea counsel. The postconviction court held an evidentiary hearing and thereafter denied the motion. Neilsen appealed, and a division of this court ordered a limited remand for the postconviction court to hear possible new evidence. After a hearing, the postconviction court upheld its prior ruling. Neilsen again appealed, and a division of this court affirmed. See People v. Neilsen, (Colo. App. No. 14CA0034, Dec. 3, 2015) (not published pursuant to C.A.R. 35(e)).

¶ 5 Neilsen filed a second Crim. P. 35(c) motion in 2016 alleging the prosecution and plea counsel colluded to commit fraud upon the court by offering perjured testimony. He also claimed ineffective assistance of postconviction counsel. The district court summarily denied the fraud claim as successive but granted a hearing for the claim regarding postconviction counsel. Neilsen never attempted to set that hearing, and the motion was deemed abandoned.

¶ 6 In 2018, Neilsen filed his first civil suit in Elbert County, case number 18CV30041. He sought declaratory and injunctive relief, once again based upon alleged Brady violations. The district court granted the defendants' motion to dismiss, concluding the claims were successive. Neilsen appealed, and a division of this court affirmed. See Neilsen v. Brauchler, (Colo. App. No. 18CA2476, Apr. 23, 2020) (not published pursuant to C.A.R. 35(e)).

¶ 7 In 2019, Neilsen filed a pro se motion in 10CR62 requesting his conviction be set aside pursuant to C.R.C.P. 60. He again alleged the prosecution and plea counsel concealed a video interview of the victim. The district court concluded that C.R.C.P. 60 did not apply because Neilsen had an adequate remedy to address these issues under Crim. P. 35, and his claims under that rule were time barred and successive. Neilsen appealed, and a division of this court affirmed. See People v.

Neilsen, (Colo. App. No. 19CA2300, Jan. 21, 2021) (not published pursuant to C.A.R. 35(e)).

¶ 8 Neilsen then turned to the federal court, filing a civil complaint with a request for a trial by jury pursuant to 42 U.S.C. § 1983 against current and former employees of the Eighteenth Judicial

District Attorney's Office, a detective, an investigator, and his former counsel. The defendants moved to dismiss. The magistrate recommended that the defendants' motions be granted, which is pending.

¶ 9 In April 2021, Neilsen filed another § 1983 complaint in Elbert County against various district attorneys. That case is 21CV2, the subject of this appeal. Neilsen's complaint consisted of 75 pages, 279 paragraphs, and 3 claims for relief under 42 U.S.C. § 1983: (1) a Brady violation for the alleged failure to disclose exculpatory evidence; (2) conspiracy among the district attorneys for allegedly covering up alleged Brady violations; and (3) Neilsen's actual innocence. Neilsen requested the court order that (1) . . . he is entitled to disclosure of all Brady material concealed by the prosecution . . . and that the defendants have failed to fulfill those

obligations . . . .(2) . . . an injunction commanding that the defendants . . . provide the enumerated

discovery . . . .(3) . . . the defendants . . . correct the perjured testimony by disclosing to this Court and

Neilsen everything that was false and untrue...(4) . . . the plaintiff has shown that it is more likely than not that he is factually

innocent . . . .(5) . . . [it] withdraw his guilty plea and vacate the convictions against him.

¶ 10 The defendants filed a motion to dismiss, arguing that the claims were an improper collateral attack on his criminal conviction, moot, untimely, and barred by issue preclusion.

¶ 11 The district court agreed, and in July 2021, it granted the motion to dismiss. With regard to Neilsen's first two claims, the court determined that the disputed evidence was not newly discovered. It also concluded Neilsen's claims were barred by issue preclusion. Finally, the court determined that Neilsen's claim of actual innocence based upon alleged new testimony from the victim was not cognizable under 42 U.S.C. § 1983. See Heck v. Humphrey, 512 U.S. 477, 486-87 (1994).

¶ 12 A month after the court's dismissal of 21CV2, Neilsen filed yet another civil complaint in Elbert County, 21CV6, that named the victim, her immediate family members, and her attorney as defendants. Judge Kramer, who initially presided over that case, sua sponte recused himself from the

new civil action. The order did not state the factual basis for recusal, only that it was appropriate.

¶ 13 Based upon the recusal, Neilsen filed for reconsideration in 21CV2, claiming that Judge Kramer should have recused himself based on the assumption that if he had a conflict in 21CV6, he also had a conflict when dismissing 21CV2. Judge Kramer denied the motion, explaining that "[t]he Court's recusal in the other matter is unrelated to this matter. The undersigned judicial officer does not have a conflict in this matter."

¶ 14 Neilsen now appeals the district court's dismissal and recusal orders. He argues that Judge Kramer should have recused himself from 21CV2, and requests that we reverse and remand with instructions to vacate the orders. Alternatively, Neilsen argues that the court's applications of issue preclusion and Heck were inappropriate, and that he should be given the opportunity to pursue the merits of his claims. We address these issues in turn.

II. Recusal

¶ 15 "In civil cases, a trial judge's decision whether to disqualify himself is discretionary and will not be reversed unless an abuse of discretion is shown." Bocian v. Owners Ins. Co., 2020 COA 98,

¶ 12. An abuse of discretion occurs when the trial court's decision is manifestly arbitrary,

unreasonable, or unfair. Watson v. Cal-Three, LLC, 254 P.3d 1189, 1192 (Colo. App. 2011).

¶ 16 C.R.C.P. 97 provides, A judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein. A judge may disqualify himself on his own motion for any of said reasons, or any party may move for such disqualification and a motion by a party or disqualification shall be supported by affidavit.

¶ 17 The defendants argue Neilsen has waived his right to demand recusal because he did not raise the issue until after the district court had dismissed the case. Rule 97 does not specify the timeliness with which a motion for disqualification must be filed, but "[f]ailure to timely object has been held to constitute waiver." Zoline v. Telluride Lodge Ass'n, 732 P.2d 635, 638 (Colo. 1987).

However, "a finding of waiver depends upon the facts and circumstances present in each particular case." Id. (quoting Johnson v. Dist. Ct., 674 P.2d 952, 957 (Colo. 1984)). As the defendants note, Neilsen did not file a motion for disqualification pursuant to Rule 97. But he was unaware of the possible conflict involving Judge Kramer until the

judge sua sponte recused himself from 21CV6, which was after the entry of the dismissal order.

Neilsen filed this motion for reconsideration in 21CV2 within two weeks of the judge's recusal in 21CV6. Because Neilsen timely filed the motion for reconsideration, we determine that he did not waive his right to request that Judge Kramer's dismissal order be vacated.

¶ 18 "Disqualification for an appearance of impropriety must be distinguished from disqualification for actual bias. While the former may be waived, the latter may not." Rea v. Corr. Corp. of Am., 2012 COA 11, ¶ 22. Actual bias exists if "a judge has a bias or prejudice that in all probability will prevent him . . . from dealing fairly with a party." People v. Julien, 47 P.3d 1194, 1197 (Colo. 2002); see also § 16-6-201(1)(d), C.R.S. 2022.

¶ 19 Neilsen notes that Judge Kramer's conflict occurred in a case that involved issues related to those posed in 21CV2. From there, Neilsen speculates that Judge Kramer must have had a conflict of interest with the victim's counsel. Based upon that speculation, Neilsen posits that Judge Kramer also had a conflict in this case and was required to recuse himself.

¶ 20 To establish bias or prejudice that requires disqualification, Neilsen was required to show that

Judge Kramer had a mindset that would prevent him from dealing fairly with Neilsen in 21CV2. See Rea, ¶ 24. Speculation based on unsubstantiated facts cannot be used to disqualify a judge or to reverse the decisions he has made. "Indeed, to permit such allegations to form the basis of a legally sufficient motion to disqualify would be to permit any party dissatisfied with the outcome of a [proceeding] to file a motion to disqualify and consequently create unwarranted delay and chaos." Litinsky v. Querard, 683 P.2d 816, 818 (Colo. App. 1984).

¶ 21 Judge Kramer considered Neilsen's argument and rejected it with the explanation that "[t]he Court's recusal in the other matter is unrelated to this matter," and he "does not have a conflict in this matter." Neilsen offers no facts to rebut Judge Kramer's

representation, and we therefore accept the representation as true.

¶ 22 For these reasons, we conclude that Neilsen's assertion that Judge Kramer should have recused himself from this case is unavailing.

III. Alleged Discovered Evidence and Its Concealment

¶ 23 Neilsen contends that the district court erred in applying Heck and issue preclusion to dismiss his complaint. We review de novo a trial court's

grant of a motion to dismiss. BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 71 (Colo. 2004).

A. Inapplicability of 42 U.S.C. § 1983

¶ 24 In each of his three claims, Neilsen alleges that the prosecution suppressed material evidence in 10CR62, including a video interview of the victim in which she purportedly contradicted her previous testimony. Neilsen entered his guilty plea in 10CR62 on November 21, 2011. The video in question was "informally furnished" to his attorney the month prior, and his plea counsel

1 Parenthetically, we note there are a myriad of potential explanations why Judge Kramer determined that he was required to recuse himself in 21CV6 but not 21CV2.

11

confirmed that he had received the video prior to Nielsen's guilty

plea. Neilsen, No. 19CA2300, slip op. at ¶ 6. Undeterred, Neilsen argues that the video was never in his possession before he pleaded guilty, and had it been provided to him, he would not have entered a guilty plea. As in the unsuccessful Crim. P. 35(c) proceedings, these allegations are predicated on a claimed Brady violation.

¶ 25 In dismissing Neilsen's complaint, the court cited Heck. It was correct in doing so. Heck's

holding outlines critical components of a successful § 1983 claim. Most notably, the claimant must prove "termination of the prior criminal proceeding in favor of the accused." Heck, 512 U.S. at 484. This is necessary to avoid conflicting outcomes, or as the United States Supreme Court stated, to uphold a "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." Id. (quoting 8 Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, American Law of Torts § 28:5, at 24 (1991)). In dismissing Heck's claim for damages under § 1983, the Supreme Court ruled, [A] § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Id. at 486-87. Neilsen's complaint fails this test. He has not, and could not, allege that his conviction was reversed, expunged, or declared invalid. Indeed, to the contrary, his efforts to set aside the conviction have repeatedly been denied.

¶ 26 Neilsen points to Justice Souter's concurrence in Heck as well as subsequent concurring opinions from other Justices in an attempt to create an

exception to Heck. Neilsen specifically points to Justice Souter's concurring opinion in Spencer v. Kemna, 523 U.S. 1 (1998), which three other Justices joined, for the proposition that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." Id. at 21. Spencer's holding specifically addressed a petitioner without a habeas remedy because he was no longer in custody.

¶ 27 Neilsen is no longer in custody and therefore urges us to apply the Spencer concurrence to conclude that the Heck bar does not apply to his claim. There are multiple problems with this theory. First, the Spencer concurrence has never been adopted in a majority opinion from the Supreme Court. We acknowledge, however, that the rationale of the Spencer concurrence has been applied in a limited circumstance, albeit by a court whose decisions do not bind us. See Cohen v. Longshore, 621 F.3d 1311 (10th Cir. 2010).

¶ 28 Cohen addressed an immigration detainee's complaint of false imprisonment. In that setting, the 10th Circuit concluded that Heck does not serve as a bar to a petitioner "who has no available remedy in habeas, through no lack of diligence on his part." Id. at 1317. In contrast to the detainee in Cohen, Neilsen has exhausted his Crim. P. 35(c)

remedies, and he did not seek federal habeas relief while he was in custody. For that reason, we decline to apply the rationale of Cohen to a case such as the present, in which the defendant had ample opportunity to pursue both state and federal remedies while he remained in custody.

¶ 29 Because he has failed to demonstrate a favorable outcome in10CR62, as required by Heck, the district court correctly concluded that Nielsen's claims are barred.

B. Issue Preclusion

¶ 30 Even if we were to conclude that Neilsen's § 1983 claims are viable notwithstanding Heck, the district court accurately determined that Neilsen's first two claims, and aspects of the third claim, are barred by issue preclusion.

¶ 31 Issue preclusion prevents factual matters that have been previously litigated and decided before a court from being relitigated. Issue preclusion applies to claims brought under § 1983. See Jones v. Samora, 2016 COA 191.2

¶ 32 Issue preclusion applies when (1) the issue is identical to the issue "actually and necessarily adjudicated" in the previous case; (2) the party against whom the doctrine is sought was a party or in privity with a party in the prior case; (3) the prior case ended with a final judgment on the

merits; and (4) the party against whom issue preclusion is

2 In a similar vein, our supreme court has determined that § 1983 claims are not excepted from the related concept of claim preclusion. See Gale v. City & Cnty. of Denver, 2020 CO 17. asserted "had a full and fair opportunity to litigate the issue[]" in the prior case. Id. at ¶ 56 (quoting Calvert v. Mayberry, 2016 COA 60, ¶ 12).

¶ 33 We first conclude that the district court did not clearly err when it determined that the Brady issues in these claims are factually the same as the issues presented in Neilsen's previous filings. Thus, the first element is satisfied. The second and third elements are also met because Neilsen is a party to both cases, and the previous cases ended in a final judgment.

¶ 34 The fourth element of issue preclusion is satisfied as well. While Neilsen disputes his conviction and the resolution of the related proceedings, it is clear that he has been afforded ample opportunity to fully and fairly litigate these issues.

¶ 35 We therefore conclude that issue preclusion bars Neilsen's first two claims, and the Brady portion of his third claim.

C. Claim of Actual Innocence

¶ 36 In his third claim, Neilsen asserts actual innocence predicated upon the alleged discovery of new evidence. Neilsen points to a vaguely identified "deposition" allegedly given by the victim in 2021. There are numerous procedural and substantive problems with this allegation.

¶ 37 First, no part of the deposition is in the record. Aside from a summary assertion that it was taken on February 19, 2021, Neilsen does not identify the case, the parties to the case, or the parties and/or attorneys present at the purported deposition. Moreover, the complaint includes undocumented allegations of an alleged interview between the victim and a person identified only as "Captain Jack." The pleadings and briefs on appeal do not explain who Captain Jack is, or the origin of the alleged deposition and interview. See C.R.C.P. 32(a)(1) (Generally, a deposition "may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof" to contradict or impeach "the testimony of deponent.") (emphasis added).

¶ 38 These ambiguities, and the extraordinary nature of the statements attributed to the victim, raise serious questions about the plausibility of the claimed new evidence. See Warne v. Hall, 2016 CO 50, ¶ 9 (Generally, we assume factual allegations in a complaint to be true for purposes of reviewing a motion to dismiss, but the allegations must state a plausible claim to avoid dismissal.).

¶ 39 In addition to these procedural problems, the claim of actual innocence fails as a matter of law. Section 1983 claims must be based on a violation of a federal law or the Constitution. See Howlett v. Rose, 496 U.S. 356, 375-76 (1990). Under federal law, a guilty plea that was made knowingly, voluntarily, or intelligently may not be set aside absent a showing that plea counsel was ineffective. See Tollett v. Henderson, 411 U.S. 258, 267-68 (1973). As previously detailed, numerous courts have rejected Neilsen's claims regarding ineffective assistance of counsel, and he may not relitigate them here.

¶ 40 Similarly, a § 1983 claim of actual innocence must be tethered to a violation of the Constitution. Neilsen attempts to meet this standard by marrying his new claim of actual innocence to the alleged Brady violations. But his Brady claims also have been repeatedly rejected. Because Nielsen's claim of actual innocence is not grounded in a viable violation of the Constitution, we conclude that the district court properly rejected it.

IV. Appellate Attorney Fees

¶ 41 The defendants request their appellate attorney fees, asserting that Neilsen's appeal is frivolous. We may award attorney fees under C.A.R. 38(b) against a party when the party brought an appeal that is substantially frivolous.

Similarly, section 13-17- 102(4), C.R.S. 2022, provides that "[t]he court shall assess attorney

fees if . . . it finds that an attorney or party brought or defended an action . . . that lacked substantial justification . . . . As used in this article, 'lacked substantial justification' means substantially frivolous, substantially groundless, or substantially vexatious." A court may only award attorney fees against a pro se party if it "finds that the party clearly knew or reasonably should have known" that his claim was substantially frivolous, groundless, or vexatious. § 13-17-102(6). A claim is vexatious if it is stubbornly litigious. Engel v. Engel, 902 P.2d 442, 446 (Colo. App. 1995).

¶ 42 This case is predicated, in large part, on legal theories that have been consistently rejected by prior courts. The only new "facts" asserted are based upon an alleged interview and deposition whose origins are not articulated. Given Neilsen's incessant rehashing of previously rejected claims, the suspect nature of the claimed "new evidence," and Neilsen's persistent refusal to accept the final results of prior proceedings, we conclude Neilsen knew or should have known this appeal was frivolous. Accordingly, we grant the defendants' request for appellate attorney fees.

V. Conclusion

¶ 43 For the reasons stated, we affirm the district court's dismissal of Neilsen's complaint, grant the

defendants' request for appellate attorney fees, and remand the case to the district court for a determination of the defendants' reasonable fees incurred on appeal.

JUDGE DUNN and JUDGE GROVE concur.

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect. Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge
STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT
litigant coordinator at 720-625-5107 or
appeals.selfhelp@judicial.state.co.us

Appendix E

Supreme Court Case number 2023SC44
Date filed June 12, 2023

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Certiorari to the Court of Appeals No. 21CA1643
Elbert County District Court No. 21CV2

Petitioner:

Thomas Neilsen,

v.

Respondents:

John Kellner, in his official capacity as District Attorney; George H. Brauchler, in his past official capacity as District Attorney; Brian Sugioka, in his official capacity as Deputy District Attorney; and

Douglas Bechtel, in his official capacity as Deputy District Attorney,

ORDER OF THE COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Cout of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same is, DENIED.

BY THE COURT , EN BANC, JUNE 12, 2023