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CASE NUMBER: 2021CA1142

SUMMARY
January 26, 2023

2023COA8

No. 21CA1142, *Scardina v. Masterpiece* — Colorado Anti-Discrimination Act — Discrimination in Places of Public Accommodation; Administrative Law — Failure to Exhaust Administrative Remedies; Constitutional Law — First Amendment — Freedom of Speech — Freedom of Religion

This dispute arises out of a customer's effort to purchase a cake from a cake shop. The customer requested a custom pink cake with blue frosting. The shop indicated it could make the cake as requested. The customer then told the shop's employees that the cake was intended to celebrate her birthday and her identity as a transgender woman. Upon learning this additional information, the shop refused to sell the cake to the customer.

The customer subsequently brought an action against the cake shop and one of its owners under the Colorado Anti-Discrimination Act (CADA), asserting that she was illegally denied

service based on her transgender status. The trial court ruled in favor of the customer and assessed a fine of $500.00 against the defendants, who now appeal.

A division of the court of appeals rejects the defendants' argument that the customer's lawsuit was barred by her alleged failure to exhaust administrative remedies. The division also concludes the customer's claim was not rendered moot by the defendants' delivery to her of a check in the amount of $500.01, which was accompanied by a denial of any CADA violation.

Turning to the constitutional issues presented, the division concludes that the act of baking a pink cake with blue frosting does not constitute protected speech under the First Amendment. The division also rejects the defendants' argument that the enforcement of CADA against them in this case is an application of an unconstitutional "offensiveness rule," which they contend permits proprietors to refuse to provide services that they find offensive based on secular views, while prohibiting others from declining to provide goods or services based on religious views. Additionally, the division concludes that CADA's prohibition against discrimination

based on a person's transgender status does not violate a proprietor's right to freely exercise or express their religion.

COLORADO COURT OF APPEALS **2023COA8**

Court of Appeals No. 21CA1142
City and County of Denver District Court No. 19CV32214
Honorable A. Bruce Jones, Judge

Autumn Scardina,

Plaintiff-Appellee,

v.

Masterpiece Cakeshop, Inc. and Jack Phillips,

Defendants-Appellants.

JUDGMENT AFFIRMED

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

Announced January 26, 2023

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¶ 1 This case requires us to resolve a dispute between the parties arising out of important rights that each enjoys. The plaintiff, Autumn Scardina, contends she was denied service by a bakery because of her identity as a trans woman, in violation of her right to be free from discrimination in a place of public accommodation. In contrast, the defendants, Masterpiece Cakeshop, Inc. (Masterpiece) and its proprietor, Jack Phillips, contend their decision not to make a cake for Scardina was based on their firm and sincere religious beliefs and the right to be free from compelled speech that would violate those beliefs. We agree with the trial court's judgment in favor of Scardina and therefore affirm.

¶ 2 We first describe the factual and procedural circumstances leading to this dispute. We then address Masterpiece and Phillips' contention that Scardina's claims are barred by her failure to exhaust administrative remedies and by their tender to her of the maximum fine that could be imposed for a violation of the Colorado Anti-Discrimination Act (CADA). Lastly, we address whether the trial court properly determined that Masterpiece and Phillips violated Scardina's right to be free from discrimination based on her identity as a trans woman, and whether such a conclusion violates

Masterpiece and Phillips' right to be free from compelled speech or their right to freely exercise their religious faith.

I. Factual Background

¶ 3 On June 26, 2017, the United States Supreme Court granted certiorari to review a division of this court's decision in *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, *rev'd sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 584 U.S. ___, 138 S. Ct. 1719 (2018). Inside Masterpiece that day, it was busy due to the Supreme Court's announcement. Ordinarily, Phillips, a devout Christian, answered the phone. But because it was busy, his wife and Masterpiece's co-owner, Debra[1] Phillips, answered the phone when Scardina called to order a cake.

¶ 4 Although the precise content and timing of what happened next was disputed at trial, after considering the evidence — including the testimony of Scardina, Phillips, Debra, and the Phillipses' daughter, Lisa Eldfrick, as well as Masterpiece and

[1] Because related individuals share the same last name, we refer to Debra Phillips as Debra for clarity. We mean no disrespect in doing so.

Phillips' judicial admissions — the trial court made the following factual findings that are not challenged on appeal.[2]

¶ 5 Scardina stated she wanted to purchase a custom birthday cake for six to eight people and that she would need it in a few weeks. Scardina ordered a pink cake with blue frosting. She did not request that the cake contain any words, symbols, or details — just a pink cake with blue frosting. Debra confirmed that Masterpiece could make the requested cake.

¶ 6 Scardina then told Debra that the custom birthday cake had personal significance, reflecting Scardina's birthday as well as celebrating her transition from male to female. Debra replied that she did not think the shop could make the cake "because of the message" and said she would get Phillips on the phone. Before Phillips could speak to Scardina, the call was disconnected.

¶ 7 When Scardina called back, Eldfrick answered. Scardina again requested a custom pink and blue cake celebrating her

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[2] Although Masterpiece and Phillips' counsel attempted to challenge some of the trial court's factual findings at oral argument, the defendants did not raise such challenges in their briefs. We decline to address matters presented for the first time at oral argument. *See, e.g.*, *Arline v. Am. Fam. Mut. Ins. Co.*, 2018 COA 82, ¶ 23 n.2.

birthday and her transition from a man to a woman. Eldfrick explained that the shop could not make the requested cake. Phillips never spoke to Scardina regarding the requested cake. He testified, however, that he "won't design a cake that promotes something that conflicts with [his] Bible's teachings" and that "he believes that God designed people male and female, that a person's gender is biologically determined." For these reasons, Phillips testified, he will not create a custom cake to celebrate a gender transition.

¶ 8 More generally, Phillips agreed that a pink cake with blue frosting has no "particular inherent meaning" and does not express any message. The trial court found that Phillips would make the same pink and blue cake for other customers and would even sell an identical premade (as opposed to custom ordered) cake to Scardina, even if she disclosed the purpose of the cake.

II. Procedural Background

¶ 9 The procedural background involving Masterpiece and Phillips stretches over a decade of litigation. We start by summarizing *Craig*. We then describe the procedural history of Scardina's discrimination charge filed against Masterpiece and Phillips with

the Colorado Civil Rights Division (CCRD). Lastly, we address the complaint that Scardina filed against Masterpiece and Phillips with the Denver District Court.

A. *Craig v. Masterpiece*

¶ 10 In 2012, Charlie Craig and David Mullins, a gay couple, went to Masterpiece to request a wedding cake. Phillips declined to make the cake based on his religious belief that marriage is between a man and woman and his corresponding belief that he could not make a cake for a same-sex wedding because it expressed a message contrary to those beliefs. Craig and Mullins filed a discrimination charge with the CCRD, and it found that probable cause supported their claim of discrimination based on their sexual orientation. A contested evidentiary hearing was held before an administrative law judge, who found in favor of the CCRD. The Colorado Civil Rights Commission (Commission) affirmed.

¶ 11 Masterpiece and Phillips appealed the Commission's decision to the Colorado Court of Appeals. A division of this court rejected their arguments that CADA was neither a neutral law nor a law of general applicability. It specifically concluded that CADA is generally applicable because "[o]n its face, it applies equally to

religious and nonreligious conduct." *Craig*, ¶ 88. The division also concluded that CADA is neutral because it carves out an exemption for places primarily used for a religious purpose. *Id.* at ¶ 89. This exemption, the division concluded, also negated Masterpiece and Phillips' argument that CADA is hostile toward a business' or its owner's religious beliefs. *Id.*; *see also* §§ 24-34-601 to -605, C.R.S. 2022.

¶ 12 The United States Supreme Court reversed on a narrow basis. Specifically, it focused on comments made by certain Commission members and concluded the Commission's treatment of Masterpiece and Phillips' arguments displayed "elements of a clear and impermissible hostility." *Masterpiece*, 584 U.S. at ___, 138 S. Ct. at 1729. The Supreme Court also concluded the Commission did not consider Phillips' religious objection to making a same-sex wedding cake with "[t]he neutral and respectful consideration to which Phillips was entitled." *Id.*

B. Scardina's Administrative Charge

¶ 13 As previously noted, Scardina filed a charge with the CCRD asserting that Masterpiece and Phillips violated CADA by refusing to sell her a custom pink cake with blue frosting because of her status

as a trans woman. *See* § 24-34-306(1)(a), C.R.S. 2022. After investigation, the CCRD found probable cause to conclude that Masterpiece and Phillips' actions violated CADA. The CCRD then ordered the parties to attend mediation. After these efforts failed, the Commission filed a notice and complaint against Masterpiece and Phillips seeking equitable relief. *See* § 24-34-306(4).

¶ 14 Scardina intervened in the administrative proceeding. As an intervenor, Scardina could not bring a claim in her individual capacity, and she did not have status as a party. But she could, through counsel, "present oral testimony or other evidence and . . . examine and cross examine witnesses." Dep't of Regul. Agencies Rule 10.8(A)(5), (B), 3 Code Colo. Regs. 708-1.

¶ 15 Before the evidentiary hearing could be held, Masterpiece sued the Commission in federal court. After Scardina unsuccessfully sought to intervene, Masterpiece, Phillips, and the Commission reached a settlement that resulted in the dismissal of the federal lawsuit. Scardina was not a party to the settlement, but under its terms, the Commission agreed to dismiss its administrative

complaint against Masterpiece and Phillips. Thus, the Commission never addressed the merits of Scardina's discrimination charge.[3]

C. Scardina's Lawsuit

¶ 16 After receiving the Commission's "Order of Closure," Scardina filed this action, asserting claims for violation of CADA and deceptive trade practices. The trial court dismissed Scardina's deceptive trade practices claim, but the CADA claim proceeded to trial.

¶ 17 After a bench trial, the court found that Masterpiece and Phillips violated CADA by refusing to serve Scardina "because of" her transgender status. The court also held that CADA did not violate Masterpiece and Phillips' right to free speech or religious expression. Masterpiece and Phillips now appeal.

III. Analysis

¶ 18 Masterpiece and Phillips assert that (1) Scardina's CADA claim is procedurally barred for failure to exhaust administrative remedies, for failure to meet statutory conditions precedent, and by the doctrine of claim preclusion; (2) their tender of $500.01 to

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[3] The settlement agreement is not in the record, and its terms are unknown.

Scardina rendered the CADA claim moot; (3) the trial court erred by finding their conduct violated CADA; and (4) the trial court's ruling violated their rights to be free from compelled speech and to freely exercise their religious faith. We address these contentions in turn.

A. Are Scardina's Claims Procedurally Barred?

¶ 19 Before trial, Masterpiece and Phillips moved, unsuccessfully, to dismiss the CADA claim on various procedural grounds, including failure to exhaust administrative remedies, failure to fulfill statutory conditions precedent, and claim preclusion.

1. Did Scardina Fail to Exhaust Administrative Remedies?

¶ 20 CADA permits a person to file a civil action for a violation of their right to public accommodations if they first exhaust their administrative remedies. § 24-34-306(14). If administrative remedies have not been exhausted, the trial court is without jurisdiction to hear the claim. *See, e.g.*, *Thomas v. Fed. Deposit Ins. Corp.*, 255 P.3d 1073, 1077 (Colo. 2011). Whether Scardina exhausted her administrative remedies presents a mixed question of fact and law. In this instance, the operative facts are undisputed and, thus, do not require review. We review de novo the trial

court's legal conclusions. *See, e.g.*, *Liberty Bankers Life Ins. Co. v. First Citizens Bank & Tr. Co.*, 2014 COA 151, ¶ 15.

¶ 21 Masterpiece and Phillips argue that Scardina failed to exhaust her administrative remedies because she did not appeal the order dismissing the Commission's complaint, which was entered pursuant to the settlement agreement between Masterpiece, Phillips, and the Commission. The trial court rejected this argument, relying on *Demetry v. Colorado Civil Rights Commission*, 752 P.2d 1070 (Colo. App. 1988).

¶ 22 In *Demetry*, the plaintiff brought a claim of discrimination against his employer based on his status as a person with a physical handicap. *Id.* at 1070. Like Scardina, Demetry had submitted a charge of discrimination to the CCRD. In Demetry's case, however, the CCRD determined there was no probable cause to support the charge, and the Commission affirmed that decision and dismissed the case. *Id.* Demetry then appealed the order of dismissal.

¶ 23 In dismissing Demetry's appeal, a division of this court noted,

> If, as here, the Commission upholds the Director's decision to dismiss the charge, no further agency action occurs. The person

> aggrieved may then file a civil action . . . in district court. This proceeding is *de novo* in nature, and only during this proceeding is evidence adduced and a record made. This procedure must be followed when the Commission upholds the Director's decision dismissing the charge, based upon a finding of a lack of probable cause.

Id. at 1071 (citations omitted). The division concluded that the dismissal order "bears no indicia of a final order" because "[t]here has been no hearing on, or adjudication of, the merits of the charge, nor has there been a determination of the legal rights of the employer and employee." *Id.* at 1072. Therefore, the division held, the dismissal order was not a final appealable judgment and did not impact Demetry's right to bring a claim.

¶ 24 Like the dismissal order in *Demetry*, the dismissal of the Commission's complaint against Masterpiece and Phillips does not have the indicia of a final order subject to appeal. A final judgment is one "which ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved." *D.H. v. People*, 192 Colo. 542, 544, 561 P.2d 5, 6 (1977) (quoting *Stillings v. Davis*, 158 Colo. 308, 310, 406 P.2d 337, 338 (1965)).

¶ 25 Scardina was not a signatory to the settlement agreement and did not acquiesce in the agreement either expressly or implicitly. Moreover, no hearing was held on the merits of Scardina's discrimination charge, there was no adjudication of Scardina's charge, and there was no determination of the legal claims asserted by Scardina or the important constitutional defenses asserted by Masterpiece and Phillips.

¶ 26 In an effort to distinguish *Demetry*, Masterpiece and Phillips note the dismissal order in the present case included language dismissing the Commission's complaint with prejudice. They then cite *Foothills Meadow v. Myers*, 832 P.2d 1097, 1098 (Colo. App. 1992), for the proposition that a dismissal with prejudice is a final judgment. But *Foothills* was not a case brought under CADA or any other administrative hearing statute. In this administrative context, the Commission's dismissal order does not preclude the filing of a subsequent civil action by the person who brought the dismissed discrimination charge. *See* § 24-34-306(14). Indeed, if the dismissal order were treated as a final order under such circumstances, it would always preclude the subsequent action that section 24-34-306(14) expressly contemplates.

¶ 27 This brings us back to the question of whether Scardina exhausted her administrative remedies. In a second effort to evade *Demetry*, Masterpiece and Phillips cite *Agnello v. Adolph Coors Co.*, 689 P.2d 1162 (Colo. App. 1984) (*Agnello I*), and *Agnello v. Adolph Coors Co.*, 695 P.2d 311 (Colo. App. 1984) (*Agnello II*). Both cases are distinguishable. In *Agnello I*, Agnello appealed to this court after the CCRD and her employer, Coors, settled her claim of discrimination. The division considered her appellate arguments on the merits — a result that Masterpiece and Phillips argue shows that Scardina could have similarly appealed their settlement with the Commission rather than filing a new lawsuit. But the *Agnello I* division reached the merits of Agnello's appellate arguments only after concluding that Agnello had "accepted the agreement" based on her cooperation with and participation in the settlement's requirements, which contemplated the potential reinstatement of Agnello depending upon the results of a medical examination. *Agnello I*, 689 P.2d at 1165. The Commission settlement in this case provided no such benefit to Scardina, and Scardina did not accept it.

¶ 28 *Agnello II* is likewise inapposite. In addition to the appeal of the Commission's ruling she pursued in *Agnello I*, Agnello also sued Coors in district court. The district court dismissed her complaint for multiple reasons, including that "administrative procedures had not been followed through to their appellate conclusions." *Agnello II*, 695 P.2d at 312. But the division never reached this argument and, instead, affirmed the dismissal of Agnello's complaint on different statutory grounds. *Id.* at 313. Thus, *Agnello II* is of little relevance to this case.

2. Is Scardina's Claim Statutorily Barred?

¶ 29 Masterpiece and Phillips argue that the Commission cannot "lose jurisdiction after probable cause is found" except under the conditions set forth in section 24-34-306(11). Masterpiece and Phillips contend these conditions were not met and therefore Scardina could not bring an action in district court. This argument presents a matter of statutory interpretation, which we review de novo. *See McCoy v. People*, 2019 CO 44, ¶ 37.

¶ 30 While we agree that none of the conditions set forth in section 24-34-306(11) existed in this case, we reject the argument that this provision provides the sole means by which the Commission can

lose its jurisdiction over a claim. Section 24-34-306(14) also contemplates that an aggrieved person may bring a claim in district court if the person exhausts their administrative remedies. For the reasons explained in the prior section, Masterpiece and Phillips argue that Scardina did not exhaust her administrative remedies, so section 24-34-306(14) affords her no path to the district court. As a consequence, Masterpiece and Phillips argue, the Commission never lost jurisdiction, and the trial court lacked jurisdiction to hear the claim. We are unpersuaded.

¶ 31 Masterpiece and Phillips cite no case law holding that the satisfaction of one of the three conditions in section 24-34-306(11) is a jurisdictional prerequisite to the filing of an action in district court. In the absence of such authority, we are unwilling to imply such a bar. Moreover, section 24-34-306(14) contemplates that a person may exhaust their administrative remedies and thereafter bring an action in district court without any reference to section 24-34-306(11). This vitiates the argument that the section 24-34-306(11) conditions are the exclusive means by which the Commission may lose its jurisdiction.

¶ 32 Additionally, the urged interpretation of section 24-34-306(11) would lead to absurd results and frustrate the central purposes of CADA. By holding a perfunctory "commencement hearing" and then entering into a settlement, the Commission and accused party could deprive the charging party of the right to present their claims in any meaningful way to the Commission and also preclude them from bringing an action in district court. We cannot conclude that the General Assembly intended such an unjust result. *See People v. Wood*, 999 P.2d 227, 229 (Colo. App. 2000).

¶ 33 Similarly, the urged interpretation would allow the Commission to resolve a case in which it has found probable cause that a violation of CADA occurred without ordering any sort of remediation of the discriminatory practices and without providing any legal or equitable relief to the aggrieved party. Such a result would be at odds with the core purposes of CADA, and we are not at liberty to interpret a statute in a manner that frustrates its very purpose. *See People v. Kovacs*, 2012 COA 111, ¶ 10.

¶ 34 For these reasons, we conclude that section 24-34-306(11) did not bar Scardina's claim.

3. Claim Preclusion

¶ 35 The final procedural bar Masterpiece and Phillips assert is claim preclusion. A claim is precluded if (1) the judgment in a prior proceeding was final; (2) the prior and current proceeding involved identical subject matter; (3) the proceedings involved identical claims for relief; and (4) the parties were identical or in privity with one another. *Foster v. Plock*, 2017 CO 39, ¶ 12. We review de novo whether the conditions of claim preclusion have been met. *Id.* at ¶ 10.

¶ 36 We agree that element two of the test is satisfied here — the prior and current proceeding arose out of identical subject matter. But for the reasons previously explained in detail, the dismissal order did not constitute a final judgment on the claim that Scardina filed in district court. The absence of a final judgment prevents the application of the claim preclusion doctrine.

¶ 37 For these reasons, we perceive no error in the trial court's conclusion that Scardina's claims were not procedurally barred.

B. Was Scardina's CADA Claim Mooted?

¶ 38 Masterpiece and Phillips next contend that Scardina's CADA claim became moot when they tendered a cashier's check to her in

the amount of $500.01. At the time of making this offer, counsel for Masterpiece and Phillips represented that their clients would pay "any court-approved court costs accrued regarding this claim." The offer also stated that it was "not to be construed as an admission of liability, fault, or wrongdoing caused by [Masterpiece and Phillips] or as an admission that [Scardina] has been caused any injury by [them]."

¶ 39 Masterpiece and Phillips attempted the tender at two different junctures. They first moved to deposit the offered funds with the court under C.R.C.P. 67(a). The second time, they sent Scardina's counsel a check in the amount of $500.01, payable to Scardina. The trial court rejected the request to deposit funds under C.R.C.P. 67(a), and Scardina refused to accept the cashier's check. The trial court held that neither tender rendered Scardina's claims moot.

1. Standard of Review

¶ 40 "An issue becomes moot when the relief granted by the court would not have a practical effect upon an existing controversy." *Rudnick v. Ferguson*, 179 P.3d 26, 29 (Colo. App. 2007). If a dispute is rendered moot, we typically decline to address the merits of the case. *See, e.g.*, *Grossman v. Dean*, 80 P.3d 952, 960 (Colo.

App. 2003). We review de novo the legal question of whether a case is moot. *People in Interest of C.G.*, 2015 COA 106, ¶ 11.

2. Was a Tender Effectuated?

¶ 41 "A tender is an unconditional offer of payment consisting in the actual production, in current coin of the realm, of a sum not less than the amount due on a specified debt or obligation." *Duran v. Hous. Auth.*, 761 P.2d 180, 185 (Colo. 1988). "The party making tender must have the ability for immediate performance. The tender must be absolute and unconditional to be effectual." *Carpenter v. Riley*, 675 P.2d 900, 904 (Kan. 1984).

¶ 42 Section 24-34-602(1)(a), C.R.S. 2022, provides that "[a]ny person" who violates CADA "shall be fined not less than fifty dollars nor more than five hundred dollars for each violation." Masterpiece and Phillips argue the trial court's failure to permit the deposit and to treat the offer as a tender is contrary to the decision in *Rudnick*. They quote *Rudnick* for the proposition that a tender occurs when a plaintiff is offered the "maximum amount" recoverable at trial, at which point a plaintiff's claim is mooted. But the actual holding in *Rudnick* is not as broad as Masterpiece and Phillips argue. Rather, the precise language used by the division was "[a] case *may become*

moot when a plaintiff is offered the maximum amount recoverable at trial." *Rudnick*, 179 P.3d at 29 (emphasis added). This language suggests that the tender/mootness argument must be evaluated on a case-by-case basis.

¶ 43 *Rudnick* involved the alleged negligence of publicly employed physicians. The plaintiffs' claims were subject to the Colorado Governmental Immunity Act (CGIA), which limits the amount an injured party may recover. In contrast to the CGIA, CADA protects citizens from discrimination by businesses, including those that provide goods and services to the public. CADA accomplishes this mission through both administrative action by the Commission and civil litigation initiated by either the Commission or an aggrieved individual. *See* §§ 24-34-306 and -307, C.R.S. 2022. In the context of a claim brought by an aggrieved party, CADA imposes a fine to deter discriminatory practices by the defendant rather than to award damages to fully compensate the aggrieved party.

¶ 44 The Colorado Supreme Court recently confirmed that CADA was adopted "to fulfill the 'basic responsibility of government to redress discriminatory . . . practices.'" *Elder v. Williams*, 2020 CO 88, ¶ 24 (quoting *City of Colorado Springs v. Conners*, 993 P.2d

1167, 1174 (Colo. 2000)). Thus, the court reasoned, CADA was "not designed primarily to compensate individual claimants," and CADA claims are "designed to implement the broad policy of eliminating intentional discriminatory or unfair . . . practices." *Id.* at ¶¶ 24, 27 (quoting *Conners*, 993 P.2d at 1174).

¶ 45 In light of CADA's central public policy of eliminating discrimination, the trial court here concluded it would not treat the conditional offer as an effective tender absent Masterpiece and Phillips' admission of liability on the CADA claim.

¶ 46 We recognize that *Rudnick* held, in the context of a medical malpractice action, that the defendant doctors were not required to admit liability or confess a judgment in order to effectuate a tender. 179 P.3d at 30-31. But *Rudnick* was not a claim predicated upon alleged discriminatory practices. We agree with the trial court's conclusion that to treat an offer without a defendant's admission of liability as an effective tender in a CADA case would frustrate the primary purpose of the legislation. Moreover, the precedential value of a liability finding is critical. It operates to deter the prohibited conduct both by the defendant and by other proprietors. It also reinforces the broad societal interests in affirming the equality of all

persons and disavowing discriminatory practices in the public sector. These core policies would be frustrated if a proprietor could avoid the finding of discrimination simply by paying a fine.

¶ 47 In summary, we perceive no error in the trial court's conclusion that Masterpiece and Phillips' offer to pay $500.01 did not moot Scardina's claim. Having reached this conclusion, we need not address whether the offer to pay costs in an amount to be determined by the trial court was sufficient to effectuate a tender, or whether we should apply one of the exceptions to the mootness doctrine.

3. Did the Trial Court Err by Declining to Permit a Deposit of the Offered Sum?

¶ 48 Masterpiece and Phillips argue that the trial court abused its discretion by declining to permit them to deposit the offered sum. C.R.C.P. 67(a) provides as follows:

> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, to be held by the clerk of the court subject to withdrawal in whole or in part at any time thereafter upon order of the court.

The question of whether to permit a deposit under C.R.C.P. 67(a) is left to the trial court's sound discretion, and we review for an abuse of that discretion. *Rudnick*, 179 P.3d at 30.

¶ 49 We do not read C.R.C.P. 67(a) to provide an alternative substantive basis for effectuating a tender. Rather, it simply provides a procedural mechanism for placing disputed funds under the control of the court. Because the deposit of the offered funds in this case would not have effectuated a tender, we conclude that the trial court did not abuse its discretion in denying the request.

¶ 50 Having addressed Masterpiece and Phillips' procedural and mootness arguments, we now turn to their contentions regarding the trial court's resolution of the merits of this dispute.

C. Did Masterpiece and Phillips' Conduct Violate CADA?

¶ 51 Masterpiece and Phillips challenge both the application of CADA and its content.

1. Did the Trial Court Err by Finding that Scardina was Denied Service Because of Her Transgender Status?

¶ 52 The finding of a CADA violation presents a mixed question of fact and law. We review a trial court's factual findings for clear

error and, as previously noted, its legal conclusions de novo. *May v. Petersen*, 2020 COA 75, ¶ 10.

¶ 53 CADA provides:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods [or] services . . . of a place of public accommodation . . . .

§ 24-34-601(2)(a).[4] No party contests that Scardina and this transaction fall within the protections of CADA.

¶ 54 Recall that the trial court found that before Scardina disclosed why she wanted it, Masterpiece (through Debra) agreed to make the custom pink cake with blue frosting. Thus, the court found Masterpiece and Phillips' refusal to make the requested cake was "because of" Scardina's transgender status.

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[4] We note that the terms "gender identity" and "gender expression" were added to this section by the General Assembly in 2021. Ch. 156, sec. 7, § 24-34-601, 2021 Colo. Sess. Laws 888. No party contends, however, that Scardina's status as a trans woman was not protected by CADA as it existed at the time of the alleged discrimination in this case. *See* § 24-34-301(7), C.R.S. 2016 (defining "sexual orientation" to include "an individual's orientation toward . . . transgender status").

¶ 55 The record supports that finding. Scardina testified she requested a custom pink and blue cake with no message or other design elements. The trial court found that Debra agreed to make that cake but then retracted the commitment once Scardina told her what the cake was for.

¶ 56 In a similar vein, Phillips testified he would make the same custom pink and blue cake for other customers. He stated he would make the cake if he did not know why the cake was being used, and, most critically, Phillips acknowledged that a pink cake with blue frosting "has no intrinsic meaning and does not express any message."

¶ 57 It was only after Scardina disclosed that she was transgender and intended to use the cake to celebrate both her birthday and her transition that Masterpiece and Phillips refused to provide the cake. Thus, it was Scardina's transgender status, and her desire to use the cake in celebration of that status, that caused Masterpiece and Phillips to refuse to provide the cake.

¶ 58 To prove a violation of CADA, Scardina needed only to establish that "but for" her status as a trans woman, Masterpiece and Phillips would have sold her the cake. *See Tesmer v. Colo. High*

Sch. Activities Ass'n, 140 P.3d 249, 254 (Colo App. 2006). In response, Masterpiece and Phillips argue that they did not refuse to make the cake for Scardina because of her status but, rather, because of the message conveyed by its intended use to celebrate such status.

¶ 59 But the Supreme Court has rejected efforts to differentiate between discrimination based on a person's status and discrimination based on conduct that is inextricably intertwined with such status. *See, e.g.*, *Masterpiece*, 584 U.S. at ___, 138 S. Ct. at 1727 ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights."); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) ("Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them."); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that

declaration in and of itself is an invitation to subject homosexual persons to discrimination . . . ."); *see also Glenn v. Brumby*, 663 F.3d 1312, 1315-20 (11th Cir. 2011) (terminating transgender woman's employment based on how she dressed or presented at work violated her right to equal protection under the law because "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender"). For these reasons, we conclude that the trial court did not err by concluding that Masterpiece and Phillips discriminated against Scardina because of her status as a trans woman.

2. Did the Commission's Finding of a CADA Violation Result from the Improper Application of an Offensiveness Standard?

¶ 60 Masterpiece and Phillips contend that Colorado applies CADA using an "offensiveness rule," which allows bakers to decline to create messages they consider offensive, and that the trial court erred by not considering the Commission's application of this rule in other cases where a baker refused to make a cake. They also contend this offensiveness rule allows the Commission to treat their religious views differently than others' secular views.

¶ 61 We agree with Masterpiece and Phillips, particularly in light of the concerns expressed by the Supreme Court in *Masterpiece*, that the trial court should have considered the rulings made by the Commission in other cases in which bakers refused to make requested cakes. Because the arguments are based on exhibits admitted into evidence, we may consider the Commission's rulings in those cases to determine whether the trial court erred by finding that Masterpiece and Phillips' refusal to make Scardina a custom pink and blue cake violated CADA.

¶ 62 The three cases cited by Masterpiece and Phillips arose out of requests to purchase cakes from three different bakeries. Each request was made by the same customer, William Jack, in March 2014. In each instance, Jack requested similar cakes:

> The Charging Party visited the Respondent's store . . . and was met by [a pastry chef]. The Charging Party asked [the chef] for a price quote on two cakes made in the shape of open Bibles. The Charging Party requested that one of the cakes include an image of two groomsmen, holding hands in front of a cross, with a red "X" over the image. The Charging Party also requested that each cake be decorated with Biblical verses. On one of the cakes, he requested that one side read "God hates sin. Psalm 45:7" and on the opposite side of the cake "Homosexuality is a detestable

> sin. Leviticus 18:2 [It appears the intended reference was Leviticus 18:22]." On the second cake, which he requested include the image of two groomsmen with a red "X" over them, the Charging Party requested that it read: "God loves sinners," and on the other side "While we were yet sinners Christ died for us. Romans 5:8." The Charging Party did not state that the cakes were intended for a specific purpose or event.

¶ 63 In each instance, the bakery declined to make the requested cakes. Jack filed a charge of discrimination with the CCRD, asserting that the denial was based on his religious beliefs. In each case, the CCRD found the bakery did not discriminate based on Jack's religious beliefs, "but instead refused to create cakes for anyone, regardless of creed, where a customer requests derogatory language or imagery."

¶ 64 Contrary to the arguments made by Masterpiece and Phillips, we conclude that the outcomes in Jack's cases were not due to whether the proprietor or the Commission viewed the message as objectionable based on its religious content but, rather, because the cakes required the bakers to create a message that amounted to compelled speech.

¶ 65 Scardina did not ask Masterpiece and Phillips to make a cake that included Biblical text. She asked for a pink cake with blue frosting with no verse or imagery. As Phillips conceded at trial, there is no inherent meaning or expressed message associated with such a cake. In contrast, the cakes that Jack requested would have required the baker to express religious verses and related images. And as Justice Kagan pointed out in her concurring opinion in *Masterpiece*, the bakers who declined to make the cakes requested by Jack would have refused to make the same cake for anyone, regardless of their religion or creed. 584 U.S. at ___, 138 S. Ct. at 1733 (Kagan, J., concurring).

¶ 66 Because the cake requested by Scardina expressed no message, it could not fall within an "offensiveness rule" exception even if we assume, for the sake of argument, that such an exception exists. *See, e.g.*, *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1184-87 (10th Cir. 2021) (rejecting the argument that the Commission's decisions in the Jack cases reflected a double standard by which religious beliefs were treated differently when compared to secular beliefs), *cert. granted in part*, 595 U.S. ___, 142 S. Ct. 1106 (2022). Thus, any error associated with the trial court's failure to analyze

and consider the Commission's rulings involving Jack's charges of discrimination was harmless. *See* C.R.C.P. 61; *see also Laura A. Newman, LLC v. Roberts*, 2016 CO 9, ¶ 26 ("[T]he reviewing court must apply an outcome-determinative analysis, which asks whether the error substantially influenced the outcome of the case.").

D. Were Masterpiece and Phillips' Constitutional Rights Violated?

¶ 67 Masterpiece and Phillips assert that the trial court's ruling violates their right to be free from compelled speech and that CADA violates their right to freely exercise their religious faith.

1. Did the Trial Court's Ruling Violate Masterpiece and Phillips' First Amendment Rights?

¶ 68 Masterpiece and Phillips assert that the trial court's ruling compels them to speak in violation of their First Amendment Rights. To establish a claim for compelled speech, a defendant must show that the subject conduct constitutes (1) speech, (2) to which the defendant objects, that is (3) compelled by governmental action. *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015). In this case, the second and third elements are not disputed. Thus, resolution of the issue rests upon whether the creation of a pink cake with blue frosting constitutes protected speech.

¶ 69 "It is a 'fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of [their] own message.'" *303 Creative*, 6 F.4th at 1176 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995)). A corollary principle is that the government may not force a person to communicate a particular message. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 61 (2006) (*FAIR*).

¶ 70 The Supreme Court has repeatedly recognized that in some instances, actions or conduct that are not accompanied by words may constitute "inherently expressive" conduct that rises to the level of speech for purposes of First Amendment protection. *See, e.g.*, *Hurley*, 515 U.S. at 569-70 (organizing a parade); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (wearing an armband to protest a war); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (saluting or refusing to salute a flag). Thus, expressive conduct need not contain verbal speech or the written word to be entitled to First Amendment protection.

¶ 71 But not all conduct constitutes speech. *FAIR*, 547 U.S. at 65-66. Rather, the First Amendment extends only to conduct that is "inherently expressive." *Id.* at 66.

¶ 72 In assessing whether conduct is inherently expressive, courts evaluate (1) whether the conduct is intended to convey a particular message and (2) "[whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The party asserting that conduct is expressive bears the burden of proving these elements, and the burden is not met by arguing merely a plausible contention. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984) ("To hold otherwise would be to create a rule that all conduct is presumptively expressive . . . . [W]e decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it.").

¶ 73 Phillips is an experienced and expert baker. Cakes are his specialty. He creates both custom cakes, which are specially ordered by the customer, and store cakes, which are prepared without an intended purchaser and are available for purchase by

the public. In creating custom cakes, Phillips obtains information from the customer, and depending on the occasion and information provided, he creates the requested design or develops a design on his own that he believes captures the particular celebration. In creating a custom cake, Phillips often uses artistic tools, such as a palette, paintbrushes, knives, and sponges. Reflective of this artistic expression, the Masterpiece logo is a paint palette with a brush and a whisk. It is this act of creating a custom cake that Masterpiece and Phillips assert is inherently expressive and therefore entitled to First Amendment protection.

¶ 74 The question in this case, however, is not whether Phillips' artistic efforts in creating a custom cake never or always amount to expressive conduct. Rather, the only issue presented is whether making a pink cake with blue frosting rises to the level of protected conduct. As the Supreme Court noted in *Masterpiece*, 584 U.S. at ___, 138 S. Ct. at 1723, these particular facts matter:

> If a baker refused to design a special cake with words or images celebrating the marriage — for instance, a cake showing words with religious meaning — that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be

> protected, these details might make a difference.

¶ 75 With these standards in mind, we turn to the question of whether the cake requested by Scardina — a pink cake with blue frosting — is inherently expressive.

¶ 76 As previously noted, Phillips testified that a pink cake with blue frosting has no intrinsic meaning and does not express any message. Similarly, Masterpiece and Phillips concede they would gladly prepare and sell a custom pink cake with blue frosting to members of the general public. Given the depth and sincerity of Phillips' religious beliefs concerning transgender identity, it is clear that he would not agree to make a pink and blue cake if he thought it was inherently associated with a pro-transgender message.

¶ 77 Consistent with Phillips' testimony, the third-party witness called by Masterpiece and Phillips at trial, Michael Jones, testified that he would not perceive any transgender message if he saw a pink cake with blue frosting at a grocery store. But Jones also testified there may be circumstances in which such a cake may have meaning:

> Q. Now, one more question on that Mr. Jones. If you were at a friend's party to

> celebrate that friend[']s transition from male to female and you saw that same cake being served, would that send a different message to you as a member of the LGBT community?
>
> A. Well, if I understood that was the reason that the party was happening and the cake was there, I totally understand what pink represents and what blue represents.
>
> Q. And what does it represent to you as a member of the LGBT community, Mr. Jones? —
>
> A. It would represent —
>
> Q. — in that context?
>
> A. Yeah. It would represent from male to female, the colors.

¶ 78 As Masterpiece and Phillips argue, in this specific context the pink cake with blue frosting may be perceived as conveying information. But the information is not derived from any artistic details or message created by the baker. Rather, the message in that context would be generated by the observer based on their understanding of the purpose of the celebration, knowing the celebrant's transgender status, and seeing the conduct of the persons gathered for the occasion.

¶ 79 Based on the same hypothetical situation, if an observer saw a group of pink and blue balloons at the celebration, they would likely

know what those balloons represented. But the observer would not gather that message based on the conduct of the person who manufactured or inflated the balloons or arranged them in a bundle. The message would be generated by the observer's knowledge and the surrounding circumstances. Thus, the message would not be attributed to the creator or arranger of the balloons.

¶ 80 Returning to the case before us, the trial court found that Scardina called Masterpiece with the bona fide intent to purchase the requested cake. In that sense, the court determined that the transaction was not a "set-up" to initiate litigation. But the trial court also found that Scardina's conversation with Debra was sequenced so that Masterpiece did not learn the purpose for which the cake would be used until after Masterpiece committed to making the cake. The parties do not contest these findings.

¶ 81 Masterpiece and Phillips objected to making a cake for Scardina solely based on the content of the information that she volunteered concerning her transgender status and her intended celebration. Thus, it is possible to conclude that Scardina suffered injury only because she voluntarily disclosed why she intended to make the purchase, and once she volunteered that information, it

put Masterpiece and Phillips in a situation where they would be making a product that would be part of that same celebration.

¶ 82 But as previously noted, Masterpiece's gathering of information concerning the intended use of the cake was not unusual. Phillips testified that part of his creative process in making a custom cake involved visualizing the particular celebration where the cake would be enjoyed and the persons in attendance. Thus, Masterpiece often obtained such information, whether through questions initiated by its employees or voluntary statements from customers. But regardless of the source of knowledge, a proprietor may not refuse to sell a nonexpressive product to a protected person based on that person's intent to use the product as part of a celebration that the producer considers offensive. *See, e.g.*, *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019) (flower shop owner's act of creating floral arrangement that was to be used at the marriage of a same-sex couple was not inherently expressive), *cert. denied*, 594 U.S. ___, 141 S. Ct. 2884 (2021).

¶ 83 We conclude that creating a pink cake with blue frosting is not inherently expressive and any message or symbolism it provides to

an observer would not be attributed to the baker. Thus, CADA does not compel Masterpiece and Phillips to speak through the creation and sale of such a cake to Scardina.

2. Does CADA Violate Masterpiece and Phillips' Right to Freely Express Their Religious Views?

¶ 84 Whether a law or court order unconstitutionally infringes on a person's right to freely express their religious beliefs presents a question of law that we review de novo. *Craig*, ¶ 75.

¶ 85 The First Amendment of the United States Constitution and article II, section 4 of the Colorado Constitution protect the "free exercise" of religion. Masterpiece and Phillips assert that, as enforced against them, CADA violates their right to freely exercise their Christian faith.

¶ 86 The trial court found, and the record is clear, that Phillips and Debra have a deep and abiding faith that informs how they live their lives, including how they operate Masterpiece. As it relates to transgender identity, Debra explained that she understands the Bible to state that God created each person as either male or female. She also explained that she and Phillips believe it would dishonor God to deny or alter that original gender designation.

Thus, Masterpiece and Phillips argue, requiring them to make a cake that they know will be used to celebrate an occasion that their faith informs them is an affront to God's design violates their right to freely exercise their religion.

¶ 87 In the context of providing public accommodations, however, a proprietor's actions based on their religious beliefs must be considered in light of a customer's right to be free from discrimination based on their protected status. The Supreme Court has long held that the Free Exercise Clause does not relieve a person from the obligation to comply with a neutral law of general applicability. *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 879 (1990). Both our state and federal courts have concluded that CADA is a neutral law of general applicability. *See, e.g.*, *303 Creative*, 6 F.4th at 1183-88; *Craig*, ¶¶ 86-89. For a neutral law of general applicability to survive a free exercise challenge, it must be rationally related to a legitimate state interest. *See 303 Creative*, 6 F.4th at 1183-88; *Craig*, ¶¶ 79, 86-89.

¶ 88 The Supreme Court has consistently held that the state has a legitimate, indeed compelling, interest in eliminating discrimination from public accommodations. *Bob Jones Univ. v. United States*, 461

U.S. 574, 604 (1983) (government has compelling interest in eliminating racism from private education); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (government has compelling interest in eliminating gender discrimination in places of public accommodation); *see also 303 Creative*, 6 F.4th at 1190 (Colorado has a compelling interest in protecting same-sex couples from discrimination). Thus, CADA is rationally related to a legitimate governmental interest. Accordingly, CADA may be enforced against Masterpiece and Phillips without violating their right to the free exercise of religion.

¶ 89 Masterpiece and Phillips also argue that CADA punishes them for their religious beliefs and therefore the statute should be subject to heightened scrutiny. They tether this argument, in part, to reasoning first articulated in *Smith*, 494 U.S. 872, in which the Supreme Court distinguished prior cases applying strict scrutiny analysis to free exercise claims by noting they involved situations in which there was a free exercise challenge coupled with a violation of another independent constitutional right. *See id.* at 881. We need not decide whether the language in *Smith* supports the application of a heightened standard of review in such cases, however, because

we have already rejected Masterpiece and Phillips' contention that CADA violates their right to free speech. In short, this is not a situation involving hybrid constitutional violations.

¶ 90 We also reject Masterpiece and Phillips' argument that the statute punishes them for exercising their religious beliefs because CADA is "applie[d] through the Commission's purported use of an 'offensiveness rule.'" For the reasons previously articulated, even if we were to assume such a standard exists, the trial court's ruling in this case was not predicated on the perceived "offensiveness" of the message, but rather on the fact that the pink and blue cake expressed no message, whether secular or religious.

¶ 91 Finally, we reject Masterpiece and Phillips' assertion that the trial court demonstrated hostility toward their religious beliefs. This argument is predicated upon two events regarding pronouns. First, the trial court had a discussion with the parties and counsel at a preliminary conference in which the court simply indicated that it would use the respective parties' preferred pronouns but would not force the parties to use pronouns that they found offensive. In the second reference, the court noted that Ms. Phillips' decision to avoid using feminine pronouns when referring to Ms. Scardina was

relevant to the credibility of her suggestion that Scardina's transgender status was unrelated to the decision not to make the requested cake.

¶ 92 We do not discern any suggestion of hostility in the court's statements. The trial court gave all parties the benefit of its careful attention to the evidence and arguments they presented, and the court rendered a thorough order that dispassionately explained the reasons for its rulings. In short, these proceedings were not marked by any hostility toward Masterpiece or Phillips, or by a desire to punish or target them based on their religious views.

IV. Conclusion

¶ 93 For the reasons stated, we affirm the judgment entered by the trial court.

JUDGE DUNN and JUDGE GROVE concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

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

DATED: January 6, 2022

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