

IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTT BURTON, A/K/A PRESTON
GRIFF,
Appellant,

vs.

JOHN E. HERR, AN INDIVIDUAL; AND
VALLEY HEALTH SYSTEM, LLC,
D/B/A VALLEY HOSPITAL MEDICAL
CENTER,
Respondents.

No. 47884

FILED

OCT 18 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from a district court order that denied appellant's motion for reconsideration of an earlier dismissal order. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

Appellant Scott Burton filed a medical malpractice complaint against respondent John E. Herr, M.D., and University Medical Center (UMC). On December 31, 2003, the district court dismissed without prejudice Burton's claim against Dr. Herr for failure to comply with the medical expert affidavit requirement under NRS 41A.071. On April 19, 2004, the court granted UMC's motion to dismiss. One year later, Burton moved to reopen his case and for leave to file a second amended complaint. Burton's proposed amended complaint again named as a defendant Dr. Herr, but also named respondent Valley Health System (VHS). Burton attached to his proposed amended a complaint a letter, purportedly from Dr. Jean Ding, which Burton asserted satisfied NRS 41A.071's requirements.

After respondents presented evidence that the letter was a forgery, the district court denied Burton's motion to "reopen" his case and



for leave to file an amended complaint, and, at respondents' request, the court entered an order dismissing the case with prejudice. Burton appealed, and this court vacated the district court's order in part, concluding that, because the April 19 order resolved all remaining claims against all remaining parties, it was the final judgment¹ from which Burton could have appealed or filed an appropriate motion to alter or amend, and thus, the district court lacked jurisdiction to change that final order from a dismissal without prejudice to a dismissal with prejudice.²

Subsequently, Burton filed a motion in the district court for reconsideration of the dismissal, again requesting leave to amend his complaint and again proposing to submit the same letter to satisfy the affidavit requirement. The district court denied the motion, noting that it was without merit since the proposed affidavit "was and is a forgery." The court also granted Dr. Herr's countermotion to dismiss and ordered that its prior dismissal with prejudice "shall stand." Burton appeals.

Burton's proper person appeal statement indicates that he wishes to appeal or seek mandamus relief to compel the district court to "allow [the] refi[l]ing of [his] complaint against the remaining defendant

¹See NRAP 3A(b)(1); Lee v. GNLV Corp., 116 Nev. 424, 996 P.2d 416 (2000).

²See Burton v. Herr, Docket No. 45443 (Order Vacating Judgment in Part, March 31, 2006); see also Greene v. Dist. Ct., 115 Nev. 391, 395, 990 P.2d 184, 186 (1999) (stating that "[o]nce a judgment is final, it should not be reopened except in conformity with the Nevada Rules of Civil Procedure"); Dredge Corp. v. Peccole, 89 Nev. 26, 505 P.2d 290 (1973); NRCP 59 and 60 (specifying causes, grounds, procedures, and time limits for amending, altering, or granting relief from a judgment).

John Herr, etc.” To the extent that Burton is seeking mandamus relief, we note that the relief he requests is not available, since the district court found that the letter that Burton attempted to submit as an affidavit was a forgery and, thus, Burton’s non-compliance with NRS 41A.071 precludes his action against Dr. Herr.³

To the extent that Burton seeks to appeal from the district court’s most recent order, that order is not appealable.⁴ In particular, the district court’s order does not constitute a special order after final judgment because it does not affect the rights of any party growing out of the final April 19, 2004 dismissal order.⁵ Nor does the district court’s order constitute an amended judgment from which an appeal may be taken. The test for determining whether an appeal is properly taken from an amended judgment rather than the judgment originally entered depends upon whether the amendment disturbed or revised legal rights

³See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991) (noting that this court may issue a writ of mandamus to compel the performance of an act that the law requires); see also NRS 34.160. Appellant has also failed to follow the procedural requirements for filing a petition for a writ of mandamus. See NRS 34.170 and NRS 15.010.

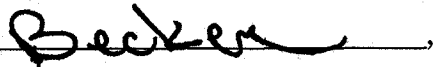
⁴See NRAP 3A(b) (listing appealable judgments).

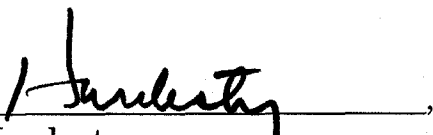
⁵See Gumm v. Mainor, 118 Nev. 912, 59 P.3d 1220 (2002). It is unclear why Dr. Herr, in response to appellant’s motion for reconsideration, filed a countermotion to dismiss for failure to comply with NRS 41A.071. As noted above, appellant’s claims against Dr. Herr were dismissed on December 31, 2003, for failure to comply with NRS 41A.071; thus, all claims against Dr. Herr were already dismissed and the court’s most recent order, purporting to dismiss those claims again, is superfluous.

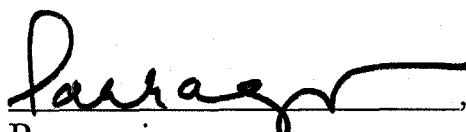
and obligations that the prior judgment had plainly and properly settled with finality.⁶

Here, although the district court's order denying reconsideration indicates that its prior order dismissing Burton's complaint with prejudice "shall stand," this court vacated that order; instead, as we explained before, because the April 19, 2004 order dismissing the last remaining claims against the last remaining defendant plainly and properly settled the parties' legal rights and obligations, that order remains the final judgment in this case. Accordingly, we

ORDER this appeal DISMISSED.⁷


Becker J.


Hardesty J.


Parraguirre J.

cc: Hon. Michael A. Cherry, District Judge
Scott Burton
Alverson Taylor Mortensen & Sanders
Cotkin, Collins, & Ginsburg
Clark County Clerk

⁶Morrell v. Edwards, 98 Nev. 91, 640 P.2d 1322 (1982).

⁷In light of this order, we vacate our October 9, 2006 directing the district court to transmit the record in the underlying case.