

IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD VONTOBEL A/K/A GERALD
VON TOBAL,
Appellant,
vs.
ROBERT B. BANNISTER; JOHN
SCOTT; AND WARDEN, LOVELOCK
CORRECTIONAL CENTER, JACK
PALMER,
Respondents.

No. 52713

FILED

APR 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order dismissing the underlying action regarding appellant's medical treatment. Sixth Judicial District Court, Pershing County; Richard Wagner, Judge.

Here, the district court dismissed the underlying action on respondents' motion, which sought dismissal on the basis that appellant's complaint lacked the medical expert affidavit required by NRS 41A.071. Although appellant's complaint contained other claims in addition to his medical malpractice claims, respondents' motion to dismiss did not address those additional claims. Nonetheless, the district court's order dismissed appellant's complaint in its entirety, without explaining the basis for dismissing appellant's nonmedical malpractice claims.

Appellant's medical malpractice claims

With regard to the dismissal of appellant's medical malpractice claims, NRS 41A.071 requires that medical malpractice complaints be dismissed if they fail to attach the required medical expert affidavit, as the complaint is deemed to be void ab initio and may not be

amended to cure the defect.¹ Fierle v. Perez, 125 Nev. ___, ___, 219 P.3d 906, 914 (2009); Washoe Med. Ctr. v. Dist. Ct., 122 Nev. 1298, 1303-04, 148 P.3d 790, 793-94 (2006). Appellant's status as an inmate or indigent person does not excuse his failure to attach the requisite affidavit to his complaint. See Gill v. Russo, 39 S.W.3d 717 (Tex. App. 2001) (holding that a statute requiring an expert report to be filed within 180 days of an inmate's filing of a medical malpractice suit did not violate the open courts provision of the Texas Constitution, despite the inmate's arguments that he could not interview physicians from prison and did not have enough money to obtain the reports); see also O'Hanrahan v. Moore, 731 So. 2d 95 (Fla. Dist. Ct. App. 1999) (rejecting a prisoner's request to declare unconstitutional a pre-suit requirement for a medical expert opinion to initiate his medical malpractice action); Ledger v. Ohio Dept. of Rehab. & Corr., 609 N.E.2d 590 (Ohio Ct. App. 1992) (holding that an inmate's medical malpractice action was properly dismissed with prejudice for failure to meet the statutory affidavit requirement). Accordingly, we find

¹We decline to consider appellant's argument that no medical expert affidavit was required because his complaint asserted *res ipsa loquitur* claims in accord with NRS 41A.100, Nevada's *res ipsa loquitur* statute, because appellant failed to present those arguments to the district court and did not raise them on appeal until his reply to respondents' response to his civil proper person appeal statement. Liggett v. State Indus. Ins. System, 99 Nev. 262, 264, 661 P.2d 882, 883 (1983) (refusing to consider an argument not made in the district court and raised for the first time on appeal in appellant's reply brief); Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that a point not raised in the district court is deemed to have been waived and will not be considered on appeal).

no impropriety in the district court's dismissal of appellant's medical malpractice claims and affirm that portion of the district court's order.

Appellant's remaining claims

As noted above, respondents' motion to dismiss addressed only appellant's medical malpractice claims, but the district court nonetheless dismissed appellant's complaint in its entirety without explaining why appellant's nonmedical malpractice claims were dismissed. Despite the circumstances surrounding the dismissal of these remaining claims, appellant has not provided any arguments, authority, or explanation on appeal as to why the district court's dismissal of his nonmedical malpractice claims should be reversed. See Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider the district court's dismissal of certain claims when the appellant failed to provide cogent arguments, authority, or otherwise address the district court's dismissal of those claims). Therefore, we affirm the district court's dismissal of appellant's remaining claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

²In light of this order, we deny appellant's request to strike respondents' answering brief. We further deny respondents' July 24, 2009, motion for leave to file a surreply.

cc: Hon. Richard Wagner, District Judge
Gerald Vontobel
Attorney General/Carson City
Pershing County Clerk