IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL MCINERNEY,
Appellant,
vs.
LAKES CROSSING CENTER,
Respondent.

No. 55341

FILED

MAR 30 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order dismissing appellant's complaint in a tort action. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant filed a complaint for damages against respondent, alleging negligent supervision and failure to supervise, based on allegations that he suffered personal injuries as a result of an inappropriate relationship initiated by a social worker who worked for respondent and who treated him at respondent's facility while he was a patient there. Respondent moved to dismiss the complaint on statute of limitations grounds, and the district court granted the motion.

Having reviewed the record, the proper person appeal statement, respondent's response, and appellant's reply thereto, we perceive no error in the district court's decision. As respondent pointed out in the district court, appellant was discharged as a patient at respondent's facility in September 2003, after he was adjudicated competent to stand trial on criminal charges. Thereafter, appellant

participated in his criminal trial and post-conviction proceedings, during which the district court determined that there was no reason to believe that appellant was either unstable or incompetent, and in fact, appellant appeared fully cognizant of the criminal proceedings and to understand the court's questions. See Butler v. Bayer, 123 Nev. 450, 460 n.23, 168 P.3d 1055, 1062-63 n.23 (2007) (quoting Smith By and Through Smith v. City of Reno, 580 F. Supp. 591, 592 (D. Nev. 1984) to interpret "'insane' as used in NRS 11.250 'to include a mental disability resulting in the inability to manage one's affairs'").[1] Thus, the statute of limitations on appellant's claims was not tolled under NRS 11.250.

As for appellant's assertion that he did not become aware of his injuries until 2009, appellant's complaint indicates that in 2003, the social worker explained to appellant that their meetings should not be discussed and that she knew that her behavior was not appropriate. Additionally, appellant acknowledges in his complaint that the social worker was forced to resign her employment with respondent in 2005 as a result of her relationship with appellant. Accordingly, since the statute of limitations had expired on appellant's claims when he filed his complaint and no tolling provision applied, his complaint was properly dismissed. Bemis v. Estate of Bemis, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998) ("A court [may] dismiss a complaint for failure to state a claim upon which

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[1]Although appellant argues that the district court erred by refusing to consider his opposition to the motion to dismiss, we disagree. Appellant's opposition failed to comply with SDCR 10(6), and under SDCR 10(11), the district court clerk cannot accept for filing any documents that do not comply with SDCR 10's requirements. Appellant failed to correct the error within the 10-day time frame for opposing a motion, see SDCR 12(2), and before the district court decided the motion to dismiss.

relief can be granted if the action is barred by the statute of limitations.") We therefore,

ORDER the judgment of the district court AFFIRMED.[2]

_____, J.
Gibbons

_____, J.
Pickering

CHERRY, J., dissenting:

In my view, the district court erred by dismissing appellant's complaint at this stage of the litigation. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 181 P.3d 670 (2008) (recognizing that in reviewing orders dismissing complaints under NRCP 12(b)(5), all factual allegations in the complaint are recognized as true and all reasonable inferences are drawn in the plaintiff's favor); Clark v. City of Braidwood, 318 F.3d 764,

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[2]We perceive no abuse of discretion in the district court's order denying as futile appellant's motion for leave to amend his complaint. Allum v. Valley Bank of Nevada, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993). Thus, we reject appellant's argument that reversal is warranted on the ground that he should have been permitted to amend his complaint.

Appellant has filed a motion to compel, asserting that the prison in which he is incarcerated improperly confiscated medical record exhibits attached to his opposition to the motion to dismiss, thus interfering with this ongoing litigation, and asking this court to order the prison to return the exhibits to appellant. Respondent and the Nevada Department of Corrections, which is not party to this appeal, oppose the motion, and appellant has filed a replied thereto. The motion is denied. See Nevada Department of Corrections Administrative Regulation 639 (governing inmate medical records and review procedures). Appellant's motion to strike respondent's response to the motion to compel is also denied.

767-68 (7th Cir. 2003) (explaining that on a motion directed at the pleadings, the only question is "whether there is any set of facts that if proven would establish a defense to the statute of limitations," and that, while a plaintiff can plead himself out of court if he alleges facts that affirmatively show that his suit is time-barred, he need not negate an affirmative defense, such as the statute of limitations, in his complaint) (citing Early v. Bankers Life and Cas. Co., 959 F.2d 75, 80 (7th Cir. 1992)); Bethel v. Jendoco Const. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978) ("If the [statute of limitations] bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6).").

Here, the district court found that appellant's negligence claims were time-barred as a matter of law, since appellant did not file his complaint until 2009, approximately four years after any allegedly negligent acts on behalf of respondent ended in 2005. See NRS 11.190(4)(e) (providing that negligence actions must be filed within two years from the alleged tort). But appellant alleged that (1) an abusive and inappropriate relationship with a social worker formerly employed by respondent continued through 2009, until the social worker abruptly discontinued the relationship shortly before appellant filed his complaint, and that the cause of action did not accrue until he became aware of the alleged injury around that time; and (2) he was mentally ill when the cause of action accrued. See Siragusa v. Brown, 114 Nev. 1384, 1392-93, 1400-01, 971 P.2d 801, 806-07, 812 (1998) (recognizing that when a plaintiff does not discover his injury or cause of injury at the time when it occurred, the statute of limitations is tolled "'until the injured party discovers or reasonably should have discovered facts supporting a cause of

action,'" and whether a plaintiff has discovered or should have discovered the cause of his injury is ordinarily a question of fact for the jury) (quoting Petersen v. Bruen, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990)); NRS 11.250 (providing that if a person is insane at the time when his cause of action accrued, "the time of such disability shall not be a part of the time limited for the commencement of the action"); Butler v. Bayer, 123 Nev. 450, 460 n.23, 168 P.3d 1055, 1062-63 n.23 (2007) (indicating, without actually defining the scope of "insanity," that the statute of limitations is tolled under NRS 11.250 when the plaintiff has a mental disability resulting in the inability to manage his affairs); see also Hsu v. Mt. Zion Hospital, 66 Cal. Rptr. 659, 664 (Ct. App. 1968) (explaining that under a similar California Code statute of limitations exception, "'insane' has been defined as a condition of mental derangement which renders the sufferer incapable of . . . understanding the nature or effects of his acts"). Because factual issues concerning the accrual of appellant's cause of action and when he discovered the facts supporting his action are in dispute, the district court erred by resolving this matter on an NRCP 12(b)(5) motion.[3]

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[3]As for appellant's argument that the district court improperly rejected his opposition to respondent's motion to dismiss on the basis that he neglected to include an index of exhibits with the opposition, the district court indicated that it considered respondent's reply to the opposition in rendering its decision and, after appellant corrected the index error, the opposition and exhibits were filed. At this stage of the litigation, the question is whether there is any set of facts that if proven would establish a defense to the statute of limitations. See Bemis v. Estate of Bemis, 114 Nev. 1021, 1024, 967 P.2d 437, 439-40 (1998); Clark, 318 F.3d at 768; Bethel, 570 F.2d at 1174. Thus, the opposition was not necessary to defeat respondent's motion to dismiss.

I would therefore reverse the district court's order and remand this matter for further district court proceedings to resolve the factual disputes.

Cherry, J.
Cherry

cc: Hon. Steven P. Elliott, District Judge
Michael J. McInerney
Attorney General/Carson City
Washoe District Court Clerk