


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES KEVIN MACK, SR.,
Appellant,
vs.
THE STATE OF NEVADA; THE STATE
OF NEVADA DEPARTMENT OF
CORRECTIONS; and AGNES
MANALANG,
Respondents.

No. 73063

FILED

DEC 28 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

James Kevin Mack, Sr., appeals from a district court order dismissing his civil rights complaint.¹ Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Below, Mack alleged that, while incarcerated at High Desert State Prison he was subject to cruel and unusual punishment relating to delayed and inadequate medical care in violation of his rights under the Eighth Amendment to the United States Constitution. He further claimed that, after he complained about a rash, he was seen by multiple medical

¹Because Mack only served his complaint on respondents, the State of Nevada, the Department of Corrections, and Agnes Manalang, the remaining defendants never became parties to the case, and thus, they are not proper parties to this appeal. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994) (explaining that a person who is not served with process and does not make an appearance in the district court is not a party to that action). We therefore direct the clerk of the court to amend the caption of this case to conform to the caption on this order.

professionals and received multiple ointments to address the rash but it did not clear up, and he continued to suffer.

The district court dismissed Mack's complaint for failure to state a claim pursuant to NRCP 12(b)(5).² In so doing, the court found that Mack could not show deliberate indifference to serious medical needs to establish his § 1983 claims as he was seen by multiple medical providers and given treatment. *See Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). The court further found that the claimed action in "diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment," relying on *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

An order granting a NRCP 12(b)(5) motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A NRCP 12(b)(5) dismissal is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Id.* Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672.

Based on our review of the record, we conclude that the district court properly determined that, accepting all of the allegations in Mack's complaint as true, his claim of negligence in medical treatment at High Desert State Prison was insufficient to state a claim for § 1983 relief. *See Estelle*, 429 U.S. at 106-07 (holding that a prisoner that was seen multiple

²Because only the State and Manalang were served and appeared below, only the claims against these parties were at issue in the underlying case and motion to dismiss.

times but had missed diagnoses could not state a claim under § 1983). Notably, the facts that Mack alleged do not give rise to a claim of deliberate indifference to a serious medical need, as Mack's allegations show that treatment, while not successful, was attempted at multiple junctures. See *id.*; see also *Jett*, 439 F.3d at 1096 (setting forth the required showing for deliberate indifference).

And to the extent Mack suggests that he should have been granted leave to amend his complaint to address any deficiencies, the record demonstrates that the district court struck Mack's motion to amend, which had been provided to respondent's counsel, but had not been filed at the time of the hearing on the motion to dismiss. On appeal, Mack presents no argument regarding the propriety of the court's decision to strike the motion to amend, and thus, any such arguments have been waived. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (issues not raised in appellate briefing are waived).

Based on the foregoing, we see no basis to overturn the district court's dismissal of Mack's complaint or its decision to strike the motion to amend the complaint. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

cc: Hon. Richard Scotti, District Judge
James Kevin Mack, Sr.
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk