

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HYRUM JOSEPH WEST,
Appellant,
vs.
THE STATE OF NEVADA; DENTIST
DR. CALDERON; A. BUENCAMINO; B.
GUTIERREZ; AND DR. ARANAS,
Respondents.

No. 73546

FILED

AUG 15 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Hyrum Joseph West appeals from a district court order dismissing a civil rights complaint. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

West, a prisoner, filed his complaint against respondents the State of Nevada, Department of Corrections (NDOC); Dr. Romeo Aranas; Alberto Buencamino; Dr. Carlos Calderon and Benedicto Gutierrez alleging violations of the Eighth and Fourteenth amendments. Respondents filed a motion to dismiss for failure to state a claim, which was granted over West's opposition. This appeal followed.

As an initial matter, on appeal West provides no argument challenging the dismissal of Aranas, Buencamino or Gutierrez based on lack of personal participation. He also fails to challenge the dismissal of NDOC and the rest of the respondents in their official capacities. Thus, he has waived any such arguments and we therefore affirm the district court's

order in that regard. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (stating that issues not raised in appellant's opening brief are waived). Additionally, while West presents arguments on appeal challenging the dismissal of his causes of action for retaliation and deliberate indifference to mental health needs, he failed to present such arguments in the district court and has therefore, waived them. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."). Therefore, we affirm the dismissal of those causes of action.

An order granting an 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 decision to dismiss a complaint under NRCP 12(b)(5) 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.


West has alleged that Dr. Calderon was deliberately indifferent to his serious dental needs. To maintain a claim for deliberate indifference to serious medical needs, a "plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal quotations


omitted). The plaintiff must also show the response was deliberately indifferent by showing "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." *Id.* A "delay in providing a prisoner with dental treatment, standing alone, does not constitute an eighth amendment violation." *Hunt v. Dental Dept.*, 865 F.2d 198, 200 (9th Cir. 1989). Additionally, a difference of opinion between a prisoner-patient and a prison medical provider regarding treatment does not amount to deliberate indifference. *Franklin v. Oregon, State Welfare Div.*, 662 F.2d 1337, 1344 (9th Circ. 1981).

Our review of the arguments and record before us on appeal reveals that West has failed to state a claim for deliberate indifference to dental needs. Some of West's allegations involve a difference of opinion regarding treatment, which does not amount to deliberate indifference. As to other complaints, West's allegations themselves indicate reasonable treatment, such as antibiotics being provided and teeth extracted. Further, with regard to the delay in relation to partials and/or dentures, delay alone is insufficient to state a claim and here, while West may have alleged enough to show a serious need, he has failed to allege any harm caused by the delay. As noted above, to show deliberate indifference, West would need to show not only a failure to treat but harm as a result. West generally alleges he has to chew food with only one tooth, but does not actually allege

harm, such as pain, bruising of his gums, inability to eat, weight loss, etc.¹ He has therefore, failed to state a claim for deliberate indifference and accordingly, dismissal as to this cause of action is affirmed.

It is so ORDERED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. David M. Jones, District Judge
Hyrum Joseph West
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk

¹We note that West did allege in his opposition to the motion to dismiss that he was in pain and that his gums were bruised and on appeal he again alleges pain; however, the complaint contains no such allegations and West neither amended the complaint to add such allegations nor sought leave to do so.