

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHANNON DEAN CARTER,  
Appellant,  
vs.  
THE STATE OF NEVADA; JAMES  
DZURENDA, DIRECTOR OF NDOC; S.  
BEAN, DENTIST ASST. HDSP; AND  
MANGAPIT, DENTIST HDSP,  
Respondents.

No. 73636

FILED

MAY 09 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

Shannon Dean Carter appeals from district court orders dismissing a civil rights complaint and denying a motion for preliminary injunction. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Carter filed an amended civil rights complaint against respondents alleging a cause of action for deliberate indifference to medical needs related to dental care he sought while incarcerated. Respondents moved to dismiss pursuant to NRCP 12(b)(5) for failure to state a claim and respondent James Dzurenda also sought dismissal for failure to timely serve the complaint. The motion was granted over Carter's opposition. Additionally, Carter filed a motion seeking a preliminary injunction to ensure he received the dental care he alleged he needed and that motion was denied. Carter appeals these decisions.

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); see also *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014). A decision to dismiss a

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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 complaint. *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. 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.

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.* Indifference may be shown when prison officials deny or delay treatment. *Id.*

A review of Carter’s amended complaint reveals allegations sufficient to state a claim for deliberate indifference, and they include: 1) he informed dental at the prison that he was having pain in his back teeth and wanted to be seen; 2) while he was notified by respondent S. Bean that an appointment was scheduled, he was not seen for 61 days; 3) in the interim he notified dental multiple times advising of various issues he was having, including that he was in pain, losing sleep, was unable to eat, his teeth were worsening, his gums were bleeding and swollen, he had blisters on his gums and it was affecting his blood pressure and overall health; 4) an examination determined he had three teeth that needed treatment and respondents Bean and Mangapit advised he would be put on a list to be treated; 5) he

advised he had been requesting to be seen for months and Bean and Mangapit responded that they knew about his requests, he was making them look bad, and called him Mr. ASAP; 6) he told them he was in excruciating pain and it was affecting his blood pressure; 7) after the exam he informed dental that the pain was too much, his condition was worsening and his teeth were chipping; 8) it took 117 days for the first of the three teeth to be treated and the third tooth still has not been treated; and 9) the delays caused unrepairable damage, including chips that left sharp edges and cut his tongue, and pain, which affected his blood pressure and overall health.

Taken as a whole, and accepted as true as required under the dismissal standard, these asserted facts allege that the failure to treat his condition resulted in further injury and unnecessary pain and that respondents purposefully failed to respond or delayed responding to his pain/medical condition which caused him harm, which is sufficient to state a claim for deliberate indifference. *See id.* Therefore, dismissal should not have been granted on the grounds of failure to state a claim and we reverse and remand as to that part of the dismissal order.<sup>1</sup> *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

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<sup>1</sup>Ordinarily we would direct respondents to file a responsive brief prior to providing relief, *see* NRAP 46A(c); however, having considered Carter's informal brief and amended complaint in light of the de novo standard of review and applicable case law, we conclude a response is not necessary as the record demonstrates that an NRCP 12(b)(5) dismissal for failure to state a claim was reversible error under the circumstances presented here. To the extent the record—particularly the fact that the dismissal motion was initially orally denied before the district court reversed course and granted the motion shortly after holding the hearing on Carter's injunction request—suggests the district court may have

As to Dzurenda, in the district court, Carter did not present any argument in opposition to dismissing Dzurenda for failure to timely serve, thereby waiving any such argument and regardless, our review of the record reveals no abuse of discretion in granting the dismissal. *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.”); *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 595, 245 P.3d 1198, 1200 (2010) (stating that an order granting a motion to dismiss for failure to timely effect service of process is reviewed for an abuse of discretion). We therefore affirm that portion of the order dismissing Dzurenda for failure to timely serve.


Turning to Carter’s challenge of the district court’s denial of his requested preliminary injunction, a review of the record indicates that the evidence supports the district court’s determination that Carter failed to establish a likelihood of success on the merits and failed to show a reasonable probability of irreparable harm. *See S.O.C., Inc. v. Mirage*


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granted the motion based on evidence presented at that hearing, such evidence is not properly considered in the context of an NRCP 12(b)(5) motion. And if such evidence was considered, the motion was not properly converted to a summary judgment motion, which would have required the district court to give Carter a reasonable opportunity to present any evidence or materials made pertinent by NRCP 56, which it did not do. *See* NRCP 12(b) (stating that on an NRCP 12(b)(5) motion, if “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56”). Our ruling here does not bar respondents from filing a proper summary judgment motion, however, and we make no comment on the merits of such a motion.

*Casino-Hotel*, 117 Nev. 403, 408, 23 P.3d 243, 246 (2001) (explaining that to obtain a preliminary injunction, the party must show a likelihood of success on the merits and a reasonable probability of irreparable harm). We therefore see no abuse of discretion in the denial and affirm the district court's order denying the preliminary injunction. *See id.* at 407, 23 P.3d at 246 (stating that the denial of a preliminary injunction is reviewed for an abuse of discretion and the district court's findings will be upheld if they are supported by substantial evidence).

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Richard Scotti, District Judge  
Shannon Dean Carter  
Attorney General/Carson City  
Attorney General/Las Vegas  
Eighth District Court Clerk