IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN J. LISLE,
Appellant,
vs.
THE STATE OF NEVADA, EX. REL., NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA; AND KENNETH L. WILLIAMS, IN HIS OFFICIAL CAPACITY,
Respondents.

No. 89761-COA

ORDER OF AFFIRMANCE

Kevin J. Lisle appeals from a district court order of dismissal in a civil rights and tort action. Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

On April 12, 2024, Lisle, an inmate, filed a complaint against the State of Nevada on behalf of the Nevada Department of Corrections (NDOC); Kenneth Williams, M.D. (Medical Director of NDOC); and James Dzurenda (Director of NDOC). The complaint alleged that in 2019, Lisle's doctor prescribed him medication for chronic neuropathy pain, which was caused by a spinal injury. Lisle alleged that he was later informed that the Drug Enforcement Administration had ordered all narcotics be stopped at NDOC. Thus, Lisle's pain medications were changed. In October 2022, Lisle requested that his prior medications be reinstated as the new ones were ineffective and he was in severe pain. In response, medical staff indicated that it was up to Lisle's provider to make changes and wrote, "[i]ts provider's license, liability and discretion on prescribing medication."

Based on the foregoing, Lisle asserted two causes of action in his complaint. He alleged negligence against NDOC pursuant to NRS

41.031(3) based on their failure to provide "safety, care and health to prisoners per NRS 209.131(3)" and alleged they breached this duty "by enacting [a] policy that obstructed, delayed, denied, and prevented him from receiving proper medical care."[1]

Lisle also asserted a civil rights claim against Dr. Williams under 42 U.S.C. § 1983 for deliberate indifference to his medical needs and asserted that Dr. Williams "enacted a policy which exposed Lisle to a substantial risk of harm." Lisle sought compensatory damages and injunctive relief. Lisle did not attach an NRS 41A.071 expert affidavit to his complaint.

Respondents filed a motion to dismiss under NRCP 12(b)(5) arguing that the state and state agencies and officials were acting in their official capacities and thus could not be sued pursuant to § 1983. Respondents also asserted that Lisle failed to allege facts establishing that Dr. Williams was personally involved in any alleged constitutional violation and therefore could not be sued pursuant to § 1983. With respect to the

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[1]Notably, there are no causes of action against Dzurenda in Lisle's complaint, and Lisle noted in his complaint that he named Dzurenda as a defendant because he believed that he was required to do so pursuant to NRS 41.0337, which the State correctly argued below was not required under that statute. While the court ultimately dismissed the complaint in its entirety because Lisle did not attach a medical expert affidavit to his complaint, we conclude the dismissal was properly granted as to Dzurenda under NRCP 12(b)(5) given that Lisle did not assert any claims against him. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1201 (2010) (noting this court can affirm a district court's order if the right result was reached, even if for the wrong reason). But regardless, Lisle does not challenge Dzurenda's dismissal on appeal, *see Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed forfeited), and we therefore do not discuss him further.

negligence claim, respondents asserted that the gravamen of Lisle's complaint was for *medical* negligence, and that an affidavit was required as Dr. Williams was the medical director who was responsible for the medical treatment of offenders under NRS 209.077. And because Lisle failed to file an NRS 41A.071 expert affidavit in support of this claim, the case must be dismissed. Lisle filed an opposition that his complaint was for ordinary negligence and not for medical negligence. Further, Lisle argued that prospective injunctive relief could be granted even if respondents were acting in their official capacities. Respondents' reply reiterated their position that an affidavit to support allegations of medical negligence was required, and that injunctive relief was not appropriate because Lisle did not allege that the policy of restricting the use of narcotics in the prison system was unconstitutional.

Subsequently, the district court found that Lisle's allegations challenged the medical treatment he received while in prison, and specifically the denial of certain narcotic medications. The court found Lisle's allegations were inextricably tied to a claim for professional negligence. Thus, to the extent Lisle asserted in his opposition that his negligence claim was a claim for ordinary negligence, the court essentially rejected this argument. And because Lisle had failed to attach an affidavit of merit to his complaint to support his claim as statutorily required under NRS 41A.071, the district court granted respondents' motion to dismiss and dismissed Lisle's complaint in its entirety. The district court's order did not specifically address Lisle's § 1983 claim against Dr. Williams. This appeal followed.

On appeal, Lisle argues that his negligence claim was not subject to NRS 41A.071's expert affidavit requirement because it arose from

an NDOC policy and was not a matter of medical judgment. He further asserts that his § 1983 claim was a federal claim, and thus, was not subject to the expert affidavit requirement of NRS 41A.071. Conversely, respondents assert, among other things, that Lisle's negligence claim sounded in professional negligence and thus was subject to NRS 41A.071's expert affidavit requirement. Respondents further assert that the district court properly dismissed the § 1983 claim because Lisle failed to allege facts establishing that Dr. Williams was deliberately indifferent to his medical needs necessary to establish an Eighth Amendment violation under § 1983.

"We review a district court order granting a motion to dismiss de novo." *Zohar v. Zbiegien*, 130 Nev. 733, 736, 334 P.3d 402, 404 (2014). In doing so, we deem "all factual allegations in [the plaintiff's] complaint as true and draw all inferences in [the plaintiff's] favor." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). A "complaint should be dismissed 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.* We also review a "district court's decision to dismiss [a] complaint for failing to comply with NRS 41A.071 de novo." *Yafchak v. S. Las Vegas Med. Invs., LLC*, 138 Nev. 729, 731, 519 P.3d 37, 40 (2022).

Professional negligence is "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015.

Under NRS 41A.071(1), a professional negligence action requires a supporting affidavit from a medical expert where a claim against a medical provider has been made. *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006); *see also Limprasert v.*

PAM Specialty Hosp. of Las Vegas LLC,140 Nev., Adv. Op. 45 ——, ——, 550 P.3d 825, 829 (2024) (noting that NRS 41A.015's "definition suggests that a claim arising from services rendered within the course of the relationship between a patient and a health care provider sounds in professional negligence.").

To determine how to characterize a claim, and whether the affidavit requirement must be satisfied, this court looks to the gravamen of each claim "rather than its form to see whether each individual claim is for medical malpractice or ordinary negligence." *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 643, 403 P.3d 1280, 1285 (2017). Consequently, "[a]llegations of [a] breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for [professional negligence]." *Id.* at 642, 403 P.3d at 1284.

Here, Lisle challenges the district court's dismissal of his negligence claim, asserting that his negligence claim challenged respondents' policy concerning medication and was not a claim based in medical judgment. However, this is belied by Lisle's complaint. While Lisle's complaint broadly refers to NDOC as to the negligence claim, he alleged that Dr. Williams implemented the policy concerning medication and thus we analyze the negligence claim in the context of Dr. Williams. Specifically, Lisle's complaint alleged that respondents breached their duties by enacting a policy that "obstructed, delayed, denied, and prevented the delivery of proper medical care" and respondents "negligently disregard[ed]" medical judgment. Because these allegations relate to a "breach of duty involving medical judgment, diagnosis, or treatment," the allegations sound in professional negligence. *See Szymborski*, 133 Nev. at 642, 403 P.3d at 1284 ("Allegations of [a] breach of duty involving medical

judgment, diagnosis, or treatment indicate that a claim is for [professional negligence]."). Because Dr. Williams is a provider of health care, to the extent that he was involved in the policy that changed Lisle's medications, Lisle's claim against him was properly dismissed for the failure to provide the required expert affidavit to demonstrate that Dr. Williams' actions fell below the accepted standard of care for pain management in adopting such policy, and therefore, we necessarily affirm the district court's dismissal of his negligence claim against Dr. Williams. *See* NRS 41A.071.

Moreover, to the extent Lisle contends he could nevertheless pursue an ordinary negligence claim against NDOC, he has not demonstrated a basis for relief. Specifically, Lisle fails to cogently argue that NDOC's conduct of following a policy approved by Dr. Williams gives rise to an ordinary negligence claim that would not need to be supported by an affidavit under NRS 41A.071 showing that Dr. Williams, a health care provider, breached the standard of care in adopting the policy. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that appellate courts need not consider issues that are not supported by cogent argument). Therefore, we affirm the dismissal of the negligence claim as to NDOC.

Lisle also concedes that his § 1983 Eighth Amendment claim was only against Dr. Williams and argues that he was not required to provide an expert affidavit to support the claim. Respondents argue that the district court properly dismissed the § 1983 claim because Lisle failed to allege facts establishing that Dr. Williams had any personal involvement in his medical care, other than enacting some policy, or that Dr. Williams was actually aware that the policy posed any risk to Lisle's medical care, necessary to establish an Eighth Amendment violation based on deliberate

indifference to Lisle's medical needs. § 1983 actions provide a mechanism for parties to obtain relief for violations of their federal rights in federal or state court. *Haywood v. Drown,* 556 U.S. 729, 731 (2009).

The "treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 31 (1993). "To establish an Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that the deprivation was serious enough to constitute cruel and unusual punishment—and a subjective standard—deliberate indifference." *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012), *overruled on other grounds by Peralta v. Dillard,* 744 F.3d 1076 (9th Cir. 2014).

To demonstrate that a prison official was deliberately indifferent, the inmate must show that the prison official "[knew] of and disregard[ed] an excessive risk to [his or her] safety," meaning that the official is "both . . . aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *see also Starr v. Baca,* 652 F.3d 1202 (9th Cir. 2011) (concluding that a plaintiff alleging that his supervisor violated his Eighth Amendment rights must plead that the supervisor personally acted with deliberate indifference). A mere difference of medical opinion does not support a claim of deliberate medical indifference. *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004). Instead, an inmate must show "that the chosen course of treatment was medically unacceptable under the circumstances, and was chosen in conscious disregard of an excessive risk to [the prisoner's] health." *Id.* (internal quotation marks and citations omitted) (alteration in original); *see also, e.g., Gauthier v. Stiles*, 402 Fed. App'x 203, 2010 WL 4296663 at *1

(9th Cir. 2010) ("[N]either [the prisoner's] disagreement with the dosage or type of pain medicine administered after his nose surgery, nor his dissatisfaction with the denial of prescription strength pain medicine for two days, constituted deliberate indifference to serious medical needs.").

To the extent Lisle's § 1983 claim was subject to NRS 41A.071's expert affidavit requirement, Lisle failed to provide one as discussed above. Nevertheless, even if Lisle is correct that he was not required to support his § 1983 claim with an expert affidavit, he failed to sufficiently plead an Eighth Amendment violation based on deliberate indifference to his medical needs.

Here, Lisle's complaint failed to allege that Dr. Williams personally knew of and disregarded an excessive risk to Lisle's health and safety, as the complaint merely asserted that Dr. Williams enacted a policy which exposed him to a substantial risk of harm and actual harm. *See Farmer*, 511 U.S. at 837; *see also Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 459, 168 P.3d 1055, 1062 (2007) (explaining that to demonstrate deliberate indifference, an inmate cannot merely allege ordinary lack of due care, but rather the "official must actually know of and disregard an excessive risk to inmate health or safety. An officer's failure to mitigate a serious risk that he should have perceived, but did not, cannot constitute an Eighth Amendment violation." (internal quotations omitted)); *Race v. Mont. State Prison Infirmary*, No. 24-38, 2025 WL 2017091, at *1 (9th Cir. Jul. 18, 2025) (determining that the inmate failed to allege facts to show deliberate indifference because it was not alleged that the subject doctor was personally aware of risks to the inmate's health nor was it alleged that the doctor had consciously made any decisions regarding the inmate's medical treatment). Thus, because Lisle failed to allege personal participation on

the part of Dr. Williams as to the § 1983 claim, he failed to sufficiently plead his claim.

Further, regardless of Dr. Williams' personal participation, Lisle fails to allege a constitutional violation based on the medication policy that would nevertheless permit injunctive relief as to this claim. *See Toguchi*, 391 F.3d at 1058 (rejecting prisoner's Eighth Amendment claim that "Seroquel is superior to Triafon" as a mere "difference of medical opinion" insufficient to show deliberate indifference); *see also, e.g.*, *Medina v. Barenchi*, No. 3:16-CV-2423-AJB-KSC, 2016 WL 7325508, at *5 (S.D. Cal. Dec. 16, 2016) ("[W]hile Plaintiff obviously disagrees with Defendants' assessment of his need for narcotics to treat his pain, his disagreement, without more, does not provide sufficient 'factual content' to plausibly suggest that . . . his treating physician . . . acted with deliberate indifference."); *O'Brien v. Saha*, No. 21-55326, 2022 WL 16945892, at *1 (9th Cir. Nov. 15, 2022) (affirming dismissal of an inmate plaintiff's deliberate indifference claim premised on doctors' discontinuation of morphine and gabapentin where "the defendants based their decisions on the [California Correctional Health Care Services'] guidance and on their independent medical opinion on the plaintiff's specific condition," which included a history of prior drug use and "suspicions of drug diversion"); *Peacock v. Horowitz*, No. 2:13-CV-2506-TLN-ACP, 2016 WL 3940346, at *7 (E.D. Cal. July 21, 2016) (determining a prisoner's claim failed to establish an Eighth Amendment violation based on deliberate indifference because "[w]hile plaintiff is certainly free to refuse specific medications or types of medication, he does not have a right to dictate what medications he will be prescribed." (citing *Stiltner v. Rhay*, 371 F.2d 420, 421 n.3 (9th Cir. 1967)).

Thus, we affirm the district court's dismissal of Lisle's § 1983 claim as to Dr. Williams. *See Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) (holding that appellate courts may affirm a district court order on different grounds than those used by the district court).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Chief Judge, Seventh Judicial District Court
Seventh Judicial District Court, Department 2
Kevin James Lisle
Attorney General/Carson City
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