

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALVIN D. BARNER,
Appellant,

vs.

ROBERT B. BANNISTER; DAVID MAR;
JOHN B. PEERY; DEPARTMENT OF
CORRECTIONS; AND MEDICAL
DEPARTMENT,
Respondents.

No. 50693

FILED

JUN 13 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order dismissing appellant's medical malpractice complaint. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant Alvin D. Barner, an inmate at Lovelock Correctional Center, filed a district court complaint alleging that respondents have denied him adequate medical treatment and that respondents violated NRS 209.371 and 212.020, both of which prohibit inhumane treatment of prisoners. Specifically, Barner alleges that respondents withdrew his pain relief medication and, instead, have prescribed "off-label" psychiatric drugs. Respondents removed the matter to federal court and the case was remanded to Nevada's First Judicial District Court.

Thereafter, respondents filed and served, by mail, a motion to dismiss Barner's complaint based on, among other reasons, Barner's failure to attach a medical expert's affidavit to his complaint, as required by NRS 41A.071. Respondents also filed a request for submission of that motion. Approximately one week before Barner filed his opposition to respondents' motion, the district court entered an order granting the motion to dismiss. This appeal followed.

On appeal, Barner contends that the district court improperly dismissed his case without reviewing his opposition. We conclude that this procedural error was harmless.¹ Specifically, although Barner's opposition was timely filed,² and respondents' motion to dismiss could not be submitted for a decision until December 6, 2007,³ under NRS 41A.071 the district court was required to dismiss Barner's complaint.

NRS 41A.071 provides that a medical malpractice complaint must be supported by an appropriate affidavit from a medical expert.⁴ When a medical malpractice complaint is not supported by an expert affidavit, dismissal is required.⁵ Here, Barner failed to submit a medical

¹See NRCP 61 (providing that at every stage of the proceedings the court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties").

²See DCR 13(3) (providing that an opposition to a motion shall be filed and served within ten days after service of the motion); FJDCR 15(3) (providing the same); NRCP 6(e) (allowing three additional days to the prescribed period when service is by mail); NRCP 6(a) (providing that the day of the act is not included in the computation of time and when the deadline is less than 11 days weekends and nonjudicial days are excluded in the computation).

³See FJDCR 15(6) (providing that a written request for submission of a matter may not be made until the expiration of the time for filing the reply memorandum has expired).

⁴NRS 41A.071.

⁵Washoe Med. Ctr. v. Dist. Ct., 122 Nev. 1298, 1302, 148 P.3d 790, 794 (2006).

expert's affidavit with his complaint. Thus, under NRS 41A.071, dismissal of his complaint was required.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁷


_____, J.
Maupin


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. James Todd Russell, District Judge
Alvin D. Barner
Attorney General Catherine Cortez Masto/Carson City
Carson City Clerk

⁶To the extent that Barner argues that his claims related to medical negligence, not medical malpractice, and thus NRS 41A.071 did not apply, that argument is unpersuasive. Barner's allegations relate only to his claim that instead of being provided with adequate medical treatment, respondents have prescribed him "off-label" psychiatric drugs. Thus, the district court properly recognized that Barner's negligence allegations and statutory claims are in fact medical malpractice claims. See, e.g., Hartford Ins. v. Statewide Appliances, 87 Nev. 195, 197-98, 484 P.2d 569, 571 (1971) (providing that the term "action" refers to the nature or subject matter and not the characterization given by the pleader, and the court construes the complaint's allegations according to the real purpose for filing the action); see also NRS 41A.009 (defining malpractice as the failure of a physician in rendering services to use reasonable care, skill or knowledge ordinarily used under similar circumstances).

⁷Barner also challenges the district court's denial of his motion for injunction and motion for default. Having considered those arguments, we conclude that they lack merit and do not warrant reversal of the district court's judgment.