

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID AUGUST KILLE, SR.,  
Appellant,  
vs.  
DONALD POAG; ROBERT B.  
BANNISTER; AND THE STATE OF  
NEVADA DEPARTMENT OF  
CORRECTIONS,  
Respondents.

No. 65174

**FILED**

JUL 20 2015

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

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order granting summary judgment to respondents in a civil rights action. Sixth Judicial District Court, Pershing County; Richard Wagner, Senior Judge.

Appellant David August Kille, Sr., filed a complaint against respondents, alleging they were deliberately indifferent to his serious medical need and violated his right to equal protection by failing to provide him with tinted glasses to treat his photophobia (light sensitivity). The district court granted respondents summary judgment, finding Kille had failed to demonstrate a genuine issue of material fact as to whether he actually suffered from photophobia and failed to state a claim for a violation of his equal protection rights.

On appeal, Kille argues the district court erred by granting summary judgment to respondents on his deliberate indifference claim because he presented evidence showing respondents had removed medical records indicating he suffered from photophobia from the files they submitted to the district court in support of their summary judgment

motion. He also contends respondents and the district court failed to consider his military records, which he asserts show he was diagnosed with photophobia requiring him to wear tinted lenses.

To state a claim for deliberate indifference to a serious medical need, Kille was required to show that respondents knew of and disregarded an excessive risk to appellant's health or safety. *See Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 459, 168 P.3d 1055, 1062 (2007). In opposition to summary judgment, Kille submitted, among other things, a memorandum from 2006 stating that his medical chart showed he suffered from migraine headaches if he did not wear tinted glasses. Additionally, notations in Kille's medical files indicate he had previously reported having photophobia and had been permitted by the prison to wear tinted lenses because of this condition.

Construing this evidence in Kille's favor, *see Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) ("[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party."), it demonstrates that prison officials had previously acknowledged Kille's complaint of photophobia and allowed him to wear tinted glasses because of this condition. But nothing in the record indicated that a diagnosis of photophobia had been confirmed while appellant was incarcerated or that prison officials had previously purchased tinted glasses for appellant. To the contrary, in 2012 and 2013, Kille's eyes were examined, but the optometrist neither diagnosed him with photophobia nor indicated that he was medically required to wear tinted glasses for photophobia or any other condition. Further, following

the 2013 examination, the optometrist specifically declined to prescribe tinted lenses, noting he did not find a diagnosis of photophobia.

As to the more recent examinations, Kille does not dispute that the optometrist concluded he did not suffer from photophobia, but instead, suggests that the optometrist's conclusions were invalid because the optometrist was not a neurosurgeon using the equipment necessary to diagnose photophobia. Kille, however, did not provide any evidence demonstrating that special knowledge or equipment, other than that used by an optometrist, is needed to diagnose photophobia, and thus, he did not establish the existence of a material issue of fact as to whether the optometrist's diagnosis constituted a valid medical opinion. *See Wood*, 121 Nev. at 732, 121 P.3d at 1031 (requiring a nonmoving party to "by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial" in order to overcome a motion for summary judgment).

As Kille did not present any evidence showing that respondents had any reason to discredit the 2012 and 2013 examinations, he did not demonstrate a genuine issue of material fact with regard to whether they knew Kille suffered from photophobia requiring tinted glasses but disregarded their knowledge of this condition. *See Butler*, 123 Nev. at 459, 168 P.3d at 1062 (requiring a plaintiff seeking to establish deliberate indifference to show that the defendant knew of and disregarded an excessive risk to the plaintiff's health or safety). Accordingly, the district court properly granted summary judgment in favor of respondents on Kille's deliberate indifference claim.


Finally, with regard to his equal protection claim, Kille did not identify any similarly situated individuals who were treated differently


from him. As a result, the district court correctly denied relief on Kille's equal protection claim as well. See *Boyne v. State ex rel. Dickerson*, 80 Nev. 160, 164, 390 P.2d 225, 227 (1964) ("The equality guaranteed by the equal protection clause is equality under the same conditions and among person similarly situated." (internal quotation marks omitted)).

For the reasons discussed above, we

ORDER the judgment of the district court AFFIRMED.<sup>1</sup>

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

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

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

<sup>1</sup>On June 22, 2015, Kille filed a motion for leave to file multiple pleadings, in which he seeks leave to file three motions. Because those motions were all filed on June 22, 2015, we deny the motion for leave to file them as moot. As to Kille's motion to submit additional medical records, which Kille contends were redacted from the medical records filed by respondents, we deny that motion. To the extent Kille seeks our review of documents that are not properly part of the district court record, we may not consider those documents. See *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981). We note, however, that several of the documents Kille seeks to submit were included in the district court record and those documents have been considered in our review of this appeal. Next, as to Kille's objection to the use of his confidential medical records without authorization, there is no indication Kille raised any argument in the district court that his medical records were improperly submitted to that court based on confidentiality concerns, and thus, we conclude that he waived this objection, and we deny that motion. 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, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Finally, we deny Kille's motion to unseal his medical records.

cc: Hon. James C. Shirley, District Judge  
Hon. Richard Wagner, Senior Judge  
David August Kille, Sr.  
Attorney General/Carson City  
Pershing County Clerk