

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEVEN KINFORD,
Appellant,
vs.
DR. JOSEPH WALLS; DIRECTOR
JAMES DZURENDA; AND WARDEN
ISIDRO BACA,
Respondents.

No. 82423-COA

FILED

SEP 10 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Steven Kinford appeals from a district court order dismissing a professional negligence action. First Judicial District Court, Carson City; James Todd Russell, Judge.

Kinford, an inmate currently incarcerated with the Nevada Department of Corrections (NDOC), was injured in a motorcycle accident prior to his incarceration, and was subsequently treated by—among other things—inserting a metal rod and multiple screws into his leg. After he was incarcerated, Kinford continued to receive additional treatment for his injuries. According to Kinford, as part of this additional treatment, he was seen by respondent Dr. Joseph Walls, who attempted to remove the screws from Kinford's leg, but was unable to do so. Kinford alleged that, rather than try additional methods to remove the screws when the initial effort was not successful, Walls closed the incision and sent him back to the prison. Kinford was later seen by Dr. Wulff, who was able to remove both the screws and the metal rod, which Kinford asserts resolved the issues he was experiencing with his leg.

Kinford later filed a professional negligence action against Dr. Walls, NDOC Director James Dzurenda, Northern Nevada Correctional Center Warden Isidro Baca (collectively respondents) and the State of Nevada. Although the complaint referenced NRS 41A.017, and included allegations that his treatment by Dr. Walls failed to adhere to a “community standard of care,” Kinford failed to include the medical expert affidavit required by NRS 41A.071. The record indicates that Kinford planned to contact Dr. Wulff to provide the required affidavit after his complaint was filed, and when he was unable to do so, Kinford filed an amended complaint that purported to add Dr. Wulff as a defendant for the purposes of compelling him to serve as an expert in Kinford’s case.¹

Respondents subsequently moved to dismiss Kinford’s complaint on multiple grounds, but Kinford failed to oppose the motion. Instead, he filed several motions seeking a stay to allow him to obtain an expert affidavit, an injunction requiring NDOC to put him in contact with Dr. Wulff, and leave to file a second amended complaint. Thereafter, the district court granted respondents’ motion to dismiss on all grounds. Among other things, the court determined that Kinford’s claims were barred by the applicable statute of limitations, as well as the doctrines of claim and issue preclusion. The court further held that dismissal was required based on Kinford’s failure to provide a medical expert affidavit to support his professional negligence claims. The district court subsequently denied Kinford’s various motions and this appeal followed.

¹This amended complaint contained no allegations against Dr. Wulff other than the fact that Kinford was unable to contact him. Aside from the addition of Dr. Wulff, Kinford’s amended complaint was identical to his original filing. The record indicates that Dr. Wulff never appeared in the action below, and thus never became a party to the case.

We review district court orders granting an NRCP 12(b)(5) motion to dismiss de novo, accepting all factual allegations in the plaintiff's complaint as true and drawing all inferences in the plaintiff's favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissal is only appropriate "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.

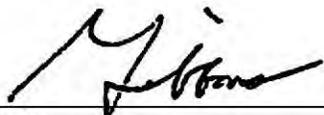
On appeal Kinford acknowledges that he did not provide a medical expert affidavit to support his complaint, but argues that the district court erred in failing to allow him to correct this issue in light of his pro se status and the fact that he was unable to contact Dr. Wulff to obtain an expert affidavit. But given his failure to provide the required expert affidavit, Kinford's complaint was void *ab initio* and could not be amended. See NRS 41A.071 (providing that dismissal is required when a professional negligence claim is filed in the district court without a medical expert affidavit to support the allegations underlying the claim); *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006) (explaining that "[b]ecause a complaint that does not comply with NRS 41A.071 is void ab initio, it does not legally exist and thus it cannot be amended").

And Kinford's pro se status does not exempt him from complying with NRS 41.071's requirements. See *Peck v. Zipf*, 133 Nev. 890, 898, 407 P.3d 775, 781 (2017) (stating that expert affidavit requirement applies to incarcerated persons); cf. *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 659, 428 P.3d 255, 258-59 (2018) (noting that procedural rules cannot be applied differently to pro se litigants), *holding modified on other grounds by Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 471 n.6, 469

P.3d 176, 180 n.6 (2020). Thus, under the controlling statute and case authority, the district court did not err in determining that dismissal was required given Kinford's failure to comply with NRS 41A.071.

Moreover, on appeal, Kinford fails to set forth any arguments regarding the alternate bases on which the district court dismissed his complaint, including its determination that the claims were barred by the applicable statute of limitations and the doctrines of claim and issue preclusion. Thus, any such arguments have been waived, *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 waived), and affirmance of the challenged order is warranted on this basis alone. *See Hillis v. Heineman*, 626 F.3d 1014, 1019 n.1 (9th Cir. 2010) (affirming a dismissal where the appellants failed to challenge an alternative ground the district court provided for it).

Accordingly, based on the reasoning set forth above, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. James Todd Russell, District Judge
Steven Kinford
Attorney General/Carson City
Attorney General/Las Vegas
Carson City Clerk