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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1700**

Freddie James Prewitt-Bey,
Appellant,

vs.

Minnesota Department of Corrections, et al.,
Respondents,

Centurion of Minnesota, et al.,
Respondents,

Kyle Milhaupt,
Respondent.

**Filed May 8, 2017
Affirmed
Reilly, Judge**

Rice County District Court
File No. 66-CV-15-808

Freddie James Prewitt-Bey, Faribault, Minnesota (pro se appellant)

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Minnesota (for respondents Minnesota Department of Corrections, et al.)

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Considered and decided by Smith, Tracy M., Presiding Judge; Reilly, Judge; and Klaphake, Judge.*

UNPUBLISHED OPINION

REILLY, Judge

Appellant Freddie Prewitt-Bey challenges the district court's summary-judgment dismissal of his constitutional and negligence claims against the Minnesota Department of Corrections (DOC) and its medical-services vendor, Centurion of Minnesota (Centurion). We affirm.

FACTS

Appellant Freddie Prewitt-Bey is currently incarcerated at the Minnesota Correctional Facility located in Faribault, Minnesota (the MCF). *See generally State v. Prewitt*, No. A12-1456, 2013 WL 3491078, at *1 (Minn. App. July 15, 2013), *review denied* (Minn. Sept. 25, 2013). The DOC provides health services for inmates who have been committed to the custody of the commissioner of corrections. The DOC contracts with Centurion, a private correctional medical-services vendor to provide primary medical care to inmates at each DOC location.

In April 2015, appellant filed a complaint alleging that the DOC, prison employees, Centurion, and Centurion's employees deprived him of his constitutional rights and were

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

negligent in their treatment of his medical conditions.¹ Specifically, appellant asserts that he received inadequate care for chronic low back pain, knee pain, and the hepatitis-C virus (HCV). Appellant later moved to supplement his complaint to add a cause of action for injunctive and equitable relief. Respondents moved for summary judgment and filed an affidavit and supporting materials from a doctor who set forth in detail appellant's medical records and the efforts undertaken to treat his medical conditions. Appellant did not file any opposition to these motions. The district court granted summary judgment in favor of respondents and against appellant on all claims, denied appellant's motion for injunctive and equitable relief, and dismissed the complaint with prejudice.

This appeal now follows.

D E C I S I O N

Appellant challenges the district court's summary-judgment dismissal of his claims. Where the material facts are undisputed, as they are here, we review de novo the district court's summary judgment order. *Safety Signs, LLC v. Niles-Wiese Constr. Co.*, 840 N.W.2d 34, 37-38 (Minn. 2013).

I. The district court did not err by dismissing appellant's constitutional claims.

A. 42 U.S.C. § 1983

Appellant first asserts a civil-rights claim under 42 U.S.C. § 1983 (2012) against respondents, seeking monetary damages for alleged violations of his constitutional rights.

¹ Appellant's complaint asserted claims against respondents' employees in their official capacities only; appellant did not personally serve any of the respondents in their individual capacities.

Section 1983 “provides a cause of action against a state official who, acting under color of law, deprives a person of a federal constitutional or statutory right.” *Simmons v. Fabian*, 743 N.W.2d 281, 284-85 (Minn. App. 2007) (citing *Wyatt v. Cole*, 504 U.S. 158, 163-64, 112 S. Ct. 1827, 1831-32 (1992)). To prevail on a section 1983 claim, appellant must establish that (1) he was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States and (2) the conduct complained of was committed by a person acting under the color of state law. 42 U.S.C. § 1983; *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S. Ct. 2764, 2769-70 (1982) (articulating this standard).

Appellant fails on both prongs. For the reasons addressed more fully below, we determine that appellant has not established that he was deprived of “rights, privileges, or immunities secured by the Constitution and laws” of the United States. 42 U.S.C. § 1983. Appellant’s claim also fails because he cannot establish that the complained-of conduct was committed by a “person” acting under the color of state law. *See id.* (articulating this requirement). The law is clear that “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989); *see also Montano v. Hedgepeth*, 120 F.3d 844, 849-50 (8th Cir. 1997) (noting that medical providers contracted with a state prison to attend to an inmate’s medical needs are also viewed as state actors). Appellant asserted a section 1983 claim against respondent-employees in their official capacities only. Therefore, the district court did not err by dismissing appellant’s damages claims asserted against state officials acting in their official capacities. *See Will*, 491 U.S. at 71, 109 S. Ct. at 2312 (affirming

dismissal where an appellant brought suit under section 1983 against state officials in their official capacity).

B. Eighth Amendment

Appellant asserts that respondents violated the Eighth Amendment by “den[ying] medically appropriate care for a serious medical need.” To prevail on an Eighth Amendment claim based on inadequate medical care, an inmate must show that he suffered from a serious medical need to which prison officials were deliberately indifferent. *Gordon ex rel. Gordon v. Frank*, 454 F.3d 858, 862 (8th Cir. 2006). This claim involves both an objective and a subjective component, and requires the inmate to demonstrate that (1) he suffered objectively serious medical needs and (2) the prison officials actually knew of, but deliberately disregarded, those needs. *Dulany v. Carnahan*, 132 F.3d 1234, 1239 (8th Cir. 1997).

We assume without deciding that appellant satisfies the threshold element that he suffered objectively serious medical needs. However, appellant’s Eighth Amendment claim fails because he has not presented evidence that respondents knew of, and deliberately disregarded, those medical needs. *See id.* (“The failure to treat a medical condition does not constitute punishment within the meaning of the Eighth Amendment unless prison officials knew that the condition created an excessive risk to the inmate’s health and then failed to act on that knowledge.” (quotation omitted)). “Deliberate indifference is akin to criminal recklessness” and requires appellant to show more than even gross negligence. *Popoalii v. Corr. Med. Servs.*, 512 F.3d 488, 499 (8th Cir. 2008). Appellant “must place verifying medical evidence in the record to establish the detrimental

effect of [a] delay in medical treatment.” *Jackson v. Riebold*, 815 F.3d 1114, 1119-20 (8th Cir. 2016). The undisputed evidence in the record reveals that respondents were responsive to appellant’s medical needs. Medical providers met with appellant approximately 40 times between the May 2012 intake examination and July 2016, and provided treatment for appellant’s back pain, knee pain, and HCV. Appellant has not submitted any medical evidence into the record demonstrating that respondents were deliberately indifferent to his medical needs, and the uncontested record belies any such claim.

Appellant disagrees with the course of treatment furnished by the medical professionals and argues that his HCV should have been treated with a different type of medication. But it is not enough that an inmate disagrees with his medical treatment—he must show deliberate indifference. *Lair v. Oglesby*, 859 F.2d 605, 606 (8th Cir. 1988). Appellant has not done so here. Summary judgment is appropriate where the appellant fails to submit verifying medical evidence indicating that a delay in treatment had a detrimental effect on his prognosis. *Jackson*, 815 F.3d at 1120. Because appellant failed to create a genuine issue of material fact on his Eighth Amendment claim, summary judgment was appropriate and the district court did not err by granting relief in respondents’ favor.

C. Equal Protection

Appellant asserts that respondents denied him equal protection under the law because “he was denied medical care based on his race.” The equal protection guarantees articulated in the United States and Minnesota Constitutions require that persons similarly situated be treated alike unless a rational basis exists for discriminating among them. *See*

State v. Russell, 477 N.W.2d 886, 888-89 (Minn. 1991) (applying a more stringent rational basis test to an equal protection challenge that alleges the legislature enacted a particular statute because of an anticipated racial discriminatory effect); *see also State v. Thiel*, 846 N.W.2d 605, 614 (Minn. App. 2014) (“A classification that does not adversely affect a fundamental right and is not based on a suspect category is constitutional if it passes rational-basis scrutiny.”). Appellant failed to submit any evidence with respect to this claim, and his conclusory allegations of racial discrimination, standing alone, are insufficient. *See Hager v. Ark. Dep’t of Health*, 735 F.3d 1009, 1015 (8th Cir. 2013) (upholding the dismissal of equal protection claim because conclusory assertions are insufficient to establish right to relief). Dismissal of appellant’s equal protection claim was appropriate.

II. The district court did not err by dismissing appellant’s negligence claim.

We next determine that the district court did not err by dismissing appellant’s negligence claim. In order to establish a prima facie case of medical malpractice, appellant must prove “(1) the standard of care recognized by the medical community as applicable to the particular defendant’s conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant’s departure from the standard was a direct cause of the patient’s injuries.” *Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 329 (Minn. 2013) (quotation omitted). “The Minnesota legislature enacted expert-review and expert-disclosure requirements as a means of readily identifying meritless lawsuits at an early stage of the litigation.” *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005). Minnesota law requires a plaintiff file two affidavits: one with the summons and

complaint, stating that an attorney has reviewed the case with an expert; and a second affidavit filed within 180 days of the commencement of discovery explaining the standard of care and chain of causation. Minn. Stat. § 145.682, subds. 2-4 (2016).

It is undisputed that appellant failed to satisfy the expert-affidavit requirements articulated in Minn. Stat. § 145.682, subds. 2-4. The expert-disclosure statute requires strict compliance, and noncompliance results in “mandatory dismissal with prejudice.” *Mercer v. Andersen*, 715 N.W.2d 114, 122 (Minn. App. 2006). The law creates no exception for pro se plaintiffs. *See Paulos v. Johnson*, 502 N.W.2d 397, 400 (Minn. App. 1993) (affirming dismissal where pro se appellant violated an absolute requirement of Minn. Stat. § 145.682 by failing to provide an affidavit of expert review), *review denied* (Minn. Sept. 10, 1993). Because appellant did not submit the expert affidavits required by section 145.682, dismissal was mandatory.

III. The district court did not err by denying equitable or injunctive relief.

Appellant sought injunctive and equitable relief, demanding a particular course of anti-viral HCV treatment, along with compensatory damages. Appellant did not file documentation in support of this motion, nor did he argue in support of this motion at the hearing. The district court denied appellant’s motion. Appellant has not challenged this portion of the order on appeal and, typically, an appellant’s failure to raise an issue in his brief precludes appellate review of that issue. *See State v. Beaulieu*, 859 N.W.2d 275, 278 (Minn. 2015) (noting that issues not briefed on appeal are forfeited). Moreover, “[a]n assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is [forfeited] and will not be considered on appeal unless

prejudicial error is obvious on mere inspection.” *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971). Because appellant has not briefed this issue on appeal and prejudicial error is not “obvious on mere inspection,” we consider these arguments forfeited.

Affirmed.