

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND GILLEN,
Appellant,
vs.
TED D'AMICO, MEDICAL DIRECTOR;
KAREN GEDNEY, M.D.; JOHN
MARSHA, M.D.; AND UTILIZATION
PANEL 1 TO 5,
Respondents.

No. 47854

FILED

MAY 11 2007

ANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This proper person appeal challenges a district court summary judgment in a prisoner civil action based on alleged statutory and constitutional violations. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

In his complaint, appellant Raymond Gillen alleged that respondents, in violation of the Eighth Amendment to the United States Constitution, had denied him adequate medical care by refusing to replace his prosthetic leg, as recommended by an outside medical specialist. Gillen alleged that he was in pain due to respondents' "negligence," and that respondents' conduct violated NRS 209.371, which prohibits "[c]orporal punishment and inhumane treatment of offenders." Because Gillen alleged violations of federal law, the matter was removed to federal district. After the federal court found that a new prosthetic leg was not

medically necessary and that respondents had offered Gillen reasonable alternative treatment options, it entered summary judgment in favor of respondents on Gillen's constitutional-based claims.

The federal district court, however, refused to exercise jurisdiction over Gillen's NRS 209.371-based claim, and remanded that matter to state district court, where the court granted respondents' summary judgment motion, finding that (1) Gillen's action was subject to the provisions of NRS Chapter 41A and Gillen could not escape NRS 41A.071's expert affidavit requirements by couching his malpractice claim in terms of inhumane treatment; (2) Gillen failed to name a proper and necessary defendant to the action, i.e., the State of Nevada; (3) the federal district court's conclusion that a new prosthetic leg was not medically necessary was entitled to a collateral estoppel effect, barring Gillen's state court action; (4) Gillen's claims did not implicate NRS 209.371, since he had not been subjected to corporal punishment and inhumane treatment; and (5) all of the named defendants were entitled to discretionary act immunity from liability under NRS 41.032(2). This appeal followed.

On appeal, Gillen argues that, because he needed immediate redress and all inmate matters are resolved within the department of corrections, he initiated an action under NRS 209.371, rather than NRS Chapter 41A. He also contends that the district court failed to address respondents' "deliberate indifference, negligence and lack of concern to [his] serious medical needs, treatment and welfare." Respondents respond

that summary judgment was properly entered in their favor for the reasons indicated in the district court's order.

This court reviews orders granting summary judgment de novo.¹ Summary judgment was appropriate here if the pleadings and other evidence on file, viewed in a light most favorable to Gillen, demonstrate that no genuine issue of material fact remained in dispute and that respondents were entitled to judgment as a matter of law.² To withstand summary judgment, Gillen may not rely solely on the general allegations and conclusions set forth in his complaint, but must instead present specific facts demonstrating the existence of a genuine factual issue supporting his claims.³

Upon review of the record and consideration of the parties' appellate arguments, we perceive no error in the district court's decision, as judgment in respondents' favor was required for several reasons. First, Gillen failed to name an indispensable party, the State.⁴ Second, "[i]ssue

¹See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

²Id.

³Id. at 731, 121 P.3d at 1030-31.

⁴NRS 41.0337 (providing that no tort action arising out of an act within a State employee's public duties or employment may be brought against that employee unless the state is named a party defendant under NRS 41.031); see also NRS 209.101 (creating the Nevada Department of Corrections as a state department); NRS 41.031(2) (providing that any
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preclusion, or collateral estoppel, is a proper basis for granting summary judgment,”⁵ and here, the federal district court concluded, in the course of resolving Gillen’s constitutional law claims—which were grounded on the same conduct as his state law claim—that a new “prosthetic leg is not medically necessary,” and that the alternative treatment options offered by respondents were adequate. Third, other than the general allegations in his complaint, Gillen presented no specific facts to support his claim that respondents had violated NRS 209.371.⁶ Respondents, on the other hand, provided evidence demonstrating that Gillen had been provided adequate medical treatment. Finally, as the district court recognized,

. . . continued

action against the State “must be brought in the name of the State of Nevada on relation of the particular department . . . of the State whose actions are the basis for the suit”).

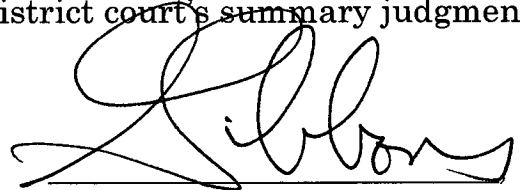
⁵LaForge v. State, University System, 116 Nev. 415, 419, 997 P.2d 130, 133 (2000) (footnote omitted).

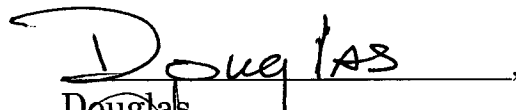
⁶See Black’s Law Dictionary 787, 1247 (7th ed. 1999), defining “corporal punishment” as “physical punishment; punishment that is inflicted upon the body,” and “inhuman treatment” as “physical . . . cruelty so severe that it endangers life or health”; see also Wood, 121 Nev. at 730, 121 P.3d at 1030-31; Estelle v. Gamble, 429 U.S. 97, 107 (1976) (explaining that, where evidence shows that a prisoner was provided with medical treatment, the question of whether additional forms of treatment are indicated by a particular condition “is a classic example of a matter for medical judgment,” which does not rise to the level of cruel and unusual punishment).

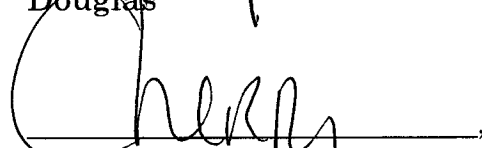
Gillen, by seeking damages, was attempting to assert a medical malpractice action, requiring him to comply with NRS 41A.071's medical expert's affidavit requirement, which he failed to do.⁷

Accordingly, because respondents were entitled to judgment as a matter of law, we affirm the district court's summary judgment.

It is so ORDERED.


Gibbons J.


Douglas J.


Cherry J.

cc: First Judicial District Court Dept. 1, District Judge
Raymond Gillen
Attorney General Catherine Cortez Masto/Las Vegas
Carson City Clerk

⁷Although Gillen apparently argues that it would be difficult for him to comply with NRS 41A.071's requirements, his argument is unavailing, especially since he maintained throughout his complaint that an "outside specialist" had concluded that a new prosthetic leg was medically necessary, and Gillen failed to raise any arguments concerning NRS 41A.071 in the district court.