

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALVIN D. BARNER,
Appellant,

vs.

ROBERT B. BANNISTER; JOHN
SCOTT; JACK PALMER; AND NEVADA
DEPARTMENT OF CORRECTIONS,
Respondents.

No. 52611

FILED

OCT 08 2009

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

ORDER AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

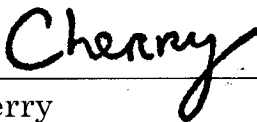
This is a proper person appeal from a district court order dismissing appellant's complaint in a tort matter. Having reviewed the papers filed and the record on appeal, we affirm the district court's dismissal of appellant's medical malpractice and negligence causes of action, but we reverse and remand on appellant's cruel and unusual punishment cause of action.


The district court properly dismissed the medical malpractice and negligence claims based on appellant's failure to submit a medical affidavit with his complaint. NRS 41A.071; Washoe Med. Ctr. v. Dist. Ct., 122 Nev. 1298, 1302-03, 148 P.3d 790, 793-94 (2006); Perry v. Stanley, 83 S.W.3d 819, 825 (Tex. App. 2002) (holding that the requirement to file a medical affidavit with a complaint can properly be applied to an inmate because the inmate bears the burden of proof at trial, which requires expert testimony). The district court erred, however, in dismissing appellant's cruel and unusual punishment cause of action because claim preclusion did not apply, as this case involves different circumstances than the prior lawsuit, Five Star Capital Corp. v. Ruby, 124 Nev. ___, ___, 194 P.3d 709, 713-14 (2008) (explaining that claim preclusion only applies

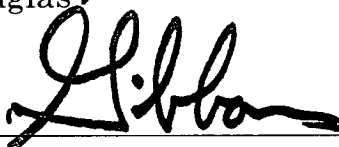
when the second suit “is based on the same set of facts and circumstances as the first suit”), appellant sufficiently pleaded the cause of action against respondents, and the district court recognized that appellant sufficiently exhausted his administrative remedies as to his claims regarding insufficient treatment of his pain in his back, hips, and legs.

Therefore, we remand this cause of action to the district court to consider appellant’s cruel and unusual punishment cause of action as to those claims for which he properly exhausted his administrative remedies. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Douglas


_____, J.
Gibbons

cc: Hon. Richard Wagner, District Judge
Alvin D. Barner
Attorney General Catherine Cortez Masto/Carson City
Pershing County Clerk