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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>RONALD WHITMIRE,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>GARY GRAHAM and R. BANNISTER,</p> <p>Defendants - Appellees.</p>

No. 11-17194

D.C. No. 3:11-cv-00502-ECR-VPC

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge, Presiding

Submitted July 17, 2012**

Before: SCHROEDER, THOMAS, and SILVERMAN, Circuit Judges.

Nevada state prisoner Ronald Whitmire appeals pro se from the district court’s judgment dismissing his 42 U.S.C. § 1983 action alleging that defendants were deliberately indifferent to his serious medical needs. We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

under 28 U.S.C. § 1291. We review de novo the district court's dismissal under 28 U.S.C. § 1915A, but we review for abuse of discretion its decision to do so without leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).

We affirm in part, and vacate and remand in part.

The district court properly dismissed without leave to amend Whitmire's complaint against the medical staff who treated him because his allegations fail to state a claim for deliberate indifference and amendment appears futile. *See Toguchi v. Chung*, 391 F.3d 1051, 1059 (9th Cir. 2004) (mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights); *see also Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007) ("Dismissal of a *pro se* complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.").

The district court, however, prematurely dismissed Whitmire's claims against the remaining defendants without first providing him with notice of the deficiencies and an opportunity to amend. *See Weilburg*, 488 F.3d at 1205.

Whitmire shall bear his own costs on appeal.

AFFIRMED in part; VACATED and REMANDED in part.