


IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD,  
Appellant,  
vs.  
CARDINAL HEALTH, A PRIVATE  
CORPORATION; THE STATE OF  
NEVADA DEPARTMENT OF  
CORRECTIONS; AND JAMES  
DZURENDA, DIRECTOR,  
Respondents.

No. 85826

FILED  
MAY 10 2024  
ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Appeal from a final judgment in a tort and contract action. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

In 1999, appellant Zane Michael Floyd was found guilty of four counts of first-degree murder with the use of a deadly weapon and sentenced to death for each murder. *Floyd v. State*, 118 Nev. 156, 162-63, 42 P.3d 249, 254 (2002). After announcing its intention to seek a warrant of execution against Floyd, respondent Nevada Department of Corrections (NDOC) published an execution manual, which identified the combination of lethal drugs it intended to use in Floyd's execution. Floyd filed a complaint against the drug distributor, respondent Cardinal Health, and NDOC alleging breach of contract, negligent performance of an undertaking, and false pretenses. Citing portions of the sale agreements and Controlled Distribution Program agreements (CDPs) between Cardinal Health and

certain drug manufacturers that were made public in the litigation stemming from the planned execution of Nevada inmate Scott Dozier in 2018, Floyd alleged that he is a third-party beneficiary to the CDPs. He alleged that Cardinal Health breached the CDPs and negligently undertook the act of implementing them by failing to track products that it knew were desired for use in capital punishment and failing to ensure that the manufacturers' products were not sold to state prisons for lethal injections. Floyd alleged NDOC intentionally defrauded Cardinal Health by concealing the letters from the manufacturers indicating they did not want their drugs used in lethal injections and/or failing to inform Cardinal Health that it intended to use the products in lethal injections, thereby falsely representing that it had legitimate medical rationales for the purchase of such drugs. Floyd alleged he was subjected to "imminent injury or death" due to Cardinal Health and NDOC's failures.

*Cardinal Health's motion to dismiss*

Cardinal Health filed a motion to dismiss Floyd's complaint, which the district court granted over Floyd's opposition, finding Floyd's claims were dependent on Floyd being a third-party beneficiary to the sale agreements or the CDPs, and Floyd failed to allege sufficient facts to support a third-party beneficiary status. While Floyd made a showing that he was at least an incidental beneficiary, the district court found he had not shown, or adequately alleged, how he relied on the agreements. The district court concluded that amendment would be futile as Floyd could not overcome this insufficiency. Regarding the negligent performance of an undertaking claim, the district court found Floyd did not properly allege that Cardinal Health owed him a duty or allege a duty existed, which he was entitled to enforce.

*NDOC's Motion for judgment on the pleadings*

NDOC answered the complaint, denying all the material allegations related to the false pretenses claim and asserting various affirmative defenses. In its subsequent motion for judgment on the pleadings, NDOC argued that Floyd did not have standing to assert a claim on behalf of Cardinal Health and this was fatal to his false pretenses claim. NDOC also argued that Floyd's claim failed on the merits. Floyd opposed. The district court initially denied NDOC's motion, finding that resolution of the case under NRCP 12(c) was inappropriate because NDOC filed an answer wherein it denied all the material allegations in Floyd's complaint. NDOC moved for reconsideration, arguing that the district court should have deemed all the allegations in the complaint admitted for the purposes of the motion despite NDOC's answer. Over Floyd's opposition, the district court granted the motion, concluding that while Nevada jurisprudence precluded it from granting judgment on the pleadings, dismissal was appropriate because Floyd lacked standing and therefore failed to state a claim upon which relief could be granted.

*Discussion*<sup>1</sup>

*The district court did not err in granting Cardinal Health's motion to dismiss*

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<sup>1</sup>Floyd filed a motion asking this court to take judicial notice of a status report filed in a related federal litigation. *Floyd v. Cardinal Health*, Docket No. 85826 (Appellant's Motion for Leave to File Request to Take Judicial Notice, Feb. 20, 2024). This court provisionally took judicial notice of the status report attached to the motion but maintained it would disregard any information that is deemed to be inappropriate for consideration. *Floyd v. Cardinal Health*, Docket No. 85826 (Order, Mar. 25, 2024). This court declines to consider the information contained in the status report given our decision here on grounds that do not depend on its review.

We review dismissals under NRCP 12(b)(5) de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Dismissal is warranted “if it appears beyond a doubt that [the plaintiff] could prove no set of facts” that, if true, would entitle the plaintiff to relief. *Id.* The court accepts all factual allegations in the complaint as true and construes all inferences in favor of the plaintiff. *Id.* The court generally only considers the pleadings being attacked but “may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the authenticity of the document.” *Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015) (quoting *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011)).

*Floyd failed to allege he was a third-party beneficiary to the contracts between Cardinal Health and the manufacturers*

“To assert standing as a third-party beneficiary to a contract, a plaintiff must show (1) a clear intent to benefit the third party, and (2) the third party’s foreseeable reliance on the agreement.” *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 197, 444 P.3d 436, 441 (2019). Whether an individual is an intended third-party beneficiary depends on the parties’ intent, as gleaned from the contract and considering the circumstances under which it was entered. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604-05 (2005). Mere incidental benefit from the performance of an agreement is not sufficient to entitle a third party to bring an action based on the agreement. *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 380, 566 P.2d 819, 825 (1977).

Floyd contends the district court applied the incorrect legal standard because it focused on actual reliance instead of foreseeable

reliance. Reliance is defined as “[d]ependence or trust by a person, esp. when combined with action based on that dependence or trust.” *Reliance*, *Black’s Law Dictionary* (11th ed. 2019); see *Lear v. Bishop*, 86 Nev. 709, 714, 476 P.2d 18, 22 (1970) (holding reliance was foreseeable and reasonable where a party “was made aware of [a] promise, relied upon it and changed its position [because of the promise]”). Foreseeable reliance is predicated on the existence of actual reliance because reliance cannot be foreseeable if there is not reliance in the first place. Cf. *Detrimental Reliance*, *Black’s Law Dictionary* (11th ed. 2019) (“Reliance by one party on the acts or representations of another, causing a worsening of the first party’s position.”). Thus, to allege foreseeable reliance, Floyd must also have alleged actual reliance. Floyd’s complaint lacks allegations of any action, inaction, or change in behavior on his part that was based on the promise made by Cardinal Health in the CDPs to prevent the sale of the manufacturers’ drugs to prisons. Construing all inferences in his favor, Floyd failed to allege sufficient facts that would support his status as a third-party beneficiary to the sale agreements or CDPs. Without status as a third-party beneficiary, the district court properly determined that Floyd lacks standing to assert the breach of contract claim against Cardinal Health.

*Floyd failed to allege Cardinal Health owed him a duty*

“An indispensable predicate to tort liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured.” *Mangeris v. Gordon*, 94 Nev. 400, 402, 580 P.2d 481, 483 (1978). Generally, common law does not impose a duty to control the potentially dangerous actions of others. *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 296, 255 P.3d 238, 244 (2011). However, an individual can assume a duty of care owed by another to protect a third

party where they undertake the duty. *Wright v. Schum*, 105 Nev. 611, 615-16, 781 P.2d 1142, 1144-45 (1989). To survive a motion to dismiss a negligent performance of an undertaking claim, the claimant must allege sufficient facts on which to conclude that the defendant undertook to perform a duty owed by another to a third person, i.e., the claimant. Restatement (Second) of Torts § 324A(b); see *Wright v. Schum*, 105 Nev. at 615, 781 P.2d at 1144 (1989) (observing that § 324A(b) sets out the principle of law for a negligent undertaking claim). To be liable under such a theory, the defendant must have taken affirmative steps to prevent the type of harm that ensued. *PetSmart, Inc. v. Eighth Jud. Dist. Ct.*, 137 Nev. 726, 731, 499 P.3d 1182, 1187 (2021).

Here, whether Cardinal Health owed a duty to Floyd is informed by his lack of status as a third-party beneficiary to the service agreements and the CDPs between Cardinal Health and the manufacturers. While a plaintiff generally need not allege a duty arising from a contract for a negligent performance of an undertaking claim, the alleged duty Cardinal Health undertook here arose directly from the CDPs. *Cf. PetSmart*, 137 Nev. at 731, 499 P.3d at 1187 (looking to the language of defendant's contract with an adoption agency to aid in determining whether PetSmart undertook a duty to protect people from dangerous dogs). Floyd alleged that Cardinal Health negligently performed its undertaking of implementing the CDPs. The allegations in Floyd's complaint and the language of the CDPs support that Cardinal Health undertook its obligations under the CDPs to restrict the sale of certain drugs to prisons because the manufacturers disapproved of the use of their drugs in lethal injections. However, the complaint lacks any allegations that Cardinal Health took any actions for the particular purpose of protecting Floyd or

similarly situated individuals from preventing any so-called “botched executions.” The letters the manufacturers sent to NDOC explain that these companies object to the use of their drugs in capital punishment and have controls in place to ensure their drugs are being used to save and improve patients’ lives. The use of their drugs in capital punishment would be fundamentally contrary to the intended use of saving and improving life. The controls referenced in the letters likely refer to the CDPs where Cardinal Health was directed to “restrict sales to all prison and retail customers.” However, the statements from the manufacturers and the language from the CDPs do not support that Cardinal Health undertook to do anything more than what the CDPs required it to do. Specifically, it does not support that Cardinal Health undertook to restrict sales to prisons for the purposes of protecting death row inmates from botched executions. Thus, the district court properly concluded that Floyd failed to allege sufficient facts to show that Cardinal Health owed him a duty and that his negligent performance of an undertaking claim therefore failed.

Floyd argues that his claim survives under the Restatement (Third) of Torts § 43—but applying that section instead of the Restatement (Second) § 324A(b) would not change the outcome here because Floyd has not alleged that Cardinal Health undertook enforcement of the CDPs while it knew or should have known its services would reduce the risk of physical harm to Floyd. The mere reference to “botched executions” is not sufficient to support that Cardinal Health had knowledge or should have had knowledge that by enforcing the CDPs it would reduce the risk of physical harm to Floyd or other death row inmates. Rather, consistent with the language of the CDPs, the complaint alleges the CDPs were implemented to ensure alignment with the manufacturers’ promotion of health and

wellbeing in their patients. Therefore, under either Restatement, we perceive no error in the district court's conclusion that Floyd failed to allege sufficient facts to support a negligent performance of an undertaking claim. *The district court did not err in granting NDOC's motion for reconsideration, despite its flawed reasoning*

“Under NRCP 12(c), the district court may grant a motion for judgment on the pleadings when the material facts of the case ‘are not in dispute and the movant is entitled to judgment as a matter of law.’” *Sadler v. PacifiCare of Nev.*, 130 Nev. 990, 993, 340 P.3d 1264, 1266 (2014) (quoting *Bonicamp v. Vazquez*, 120 Nev. 377, 379, 91 P.3d 584, 585 (2004)). Motions for judgment on the pleadings present a question of law which we review de novo. *Sadler*, 130 Nev. at 993, 340 P.3d at 1266. Reconsideration of a prior decision “may be appropriate where a party introduces substantially different evidence or the court's decision is clearly erroneous.” *Saticoy Bay, LLC, Series 34 Innisbrook v. Thornburg Mortg. Sec. Tr. 2007-3*, 138 Nev., Adv. Op. 35, 510 P.3d 139, 146 (2022).

In considering the motion, the district court observed that NDOC had denied material factual allegations in its answer, such that denial seemed appropriate. *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1241 (1987) (“[A] motion for a judgment on the pleadings has utility only when all material allegations of fact are admitted in the pleadings and only questions of law remain.”). NDOC, however, also claimed that Floyd failed to state a claim upon which relief can be granted in its motion for judgment on the pleadings. NRCP 12(h)(2)(B) (“Failure to state a claim upon which relief can be granted . . . may be raised . . . by a motion under Rule 12(c)”). The district court granted reconsideration, reasoning that denial would delay the inevitable, which it surmised would be a later summary judgment motion from NDOC, and waste valuable



limited judicial resources. The court reasoned that it would grant such a motion because Floyd lacks standing to bring the action against NDOC given that he “failed to allege (and even if alleged) cannot prove NDOC owed a duty to him; NDOC made any representations to him; NDOC intended to defraud him; that he relied on NDOC’s representations; or that he *has* suffered any damages.”

Floyd alleged that NDOC intentionally defrauded Cardinal Health, concealed letters written by the drug manufacturers from Cardinal Health, failed to disclose to Cardinal Health its intention to use the drugs in lethal injections, and made false representations to Cardinal Health that it had legitimate medical rationales for purchasing the drugs. Without more, as the district court found, Floyd failed to allege any facts to support his standing to bring a claim on Cardinal Health’s behalf because none of the alleged injuries were his own. *See Beazer Homes Holding Corp. v. Eighth Jud. Dist. Ct.*, 128 Nev. 723, 730-31, 291 P.3d 128, 133, (2012) (recognizing that a party generally cannot raise the claims of a third party because an action must be commenced by the real party in interest, i.e. the party with the right to enforce the claim); *Arguello v. Sunset Station*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) (“The inquiry into whether a party is a real party in interest overlaps with the question of standing.”); *see also Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016) (“Generally, a party must show a personal injury and not merely a general interest that is common to all members of the public.”).


While the district court incorrectly concluded that granting judgment on the pleadings was improper given that NDOC filed an answer denying all the material allegations of the pleadings, it ultimately reached the correct conclusion that Floyd lacked standing and as a result could not

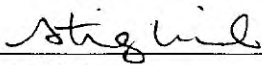
state a claim upon which relief could be granted. NRCP 12(h); see *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (“This court will affirm a district court’s order if the district court reached the correct result, even if for the wrong reason.”).

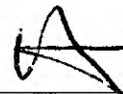
*The district court did not err in dismissing the complaint with prejudice*


Absent an abuse of discretion, this court will not disturb a district court’s decision denying leave to amend. *Allum v. Valley Bank of Nevada*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993) (internal citation omitted). Here, the district court did not abuse its discretion in dismissing the complaint with prejudice because any amendment would have been futile. *Id.* (discussing futility as a basis for denying leave to amend). With respect to the breach of contract claim, the district court properly found that Floyd could not allege any set of facts to support that he was a third-party beneficiary of the contracts between Cardinal Health and the drug manufacturers. With respect to the negligent performance of an undertaking claim, no amendment could cure that Cardinal Health did not owe a duty to Floyd. Similarly, Floyd cannot amend his complaint to successfully assert claims on behalf of Cardinal Health against NDOC.

Therefore, we will not disturb the district court's decision to dismiss Floyd's complaint with prejudice. For the foregoing reasons, we ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

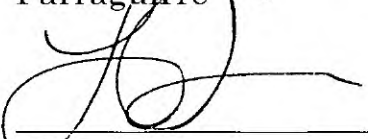
  
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Cadish

  
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Stiglich

  
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Herndon

  
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Lee

  
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Parraguire

  
\_\_\_\_\_, J.  
Bell

cc: Hon. Steve L. Dobrescu, District Judge  
TALG, NV, Ltd.  
Attorney General/Carson City  
Crowell & Moring LLP  
Attorney General/Las Vegas  
Morris Law Group  
White Pine County Clerk

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<sup>2</sup>The Honorable Kristina Pickering, Justice, did not participate in the decision in this matter.