IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH DARGET,
Appellant,
vs.
COUNTY OF WASHOE, PARKS AND RECREATION; AND GALENA CREEK PARK,
Respondents.

No. 44363

FILED

DEC 0 9 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Rubio
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order granting respondents' motion to dismiss appellant's complaint for failure to state a claim upon which relief could be granted. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant filed a complaint alleging that, while he was in Galena Creek Park's snowplay area, a dead tree fell on him, causing injuries. On appeal, appellant argues that the district court erred by dismissing his complaint based on its finding that respondents were immune from liability under the recreational use statute, NRS 41.510. He asserts that, because respondents charge a fee for use of their picnicking facilities, NRS 41.510 does not apply. Appellant also argues that, because respondents engaged in willfull misconduct, they should not have been allowed to benefit from NRS 41.510's immunity protection.

In reviewing an order granting a motion to dismiss, we construe the pleadings liberally and draw every reasonable inference in favor of the non-moving party.[1] A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts entitling him to relief.[2] When a defendant is immune from suit, dismissal under NRCP 12(b)(5) is appropriate.[3]

Under NRS 41.510, landowners are protected from liability when they allow their land to be used for recreational purposes.[4] The statute specifically provides that the landowner "owes no duty to keep the premises safe for entry or use by others for participating in any recreational activity, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes."[5] Immunity does not apply when the landowner has willfully or maliciously failed to warn or guard against a dangerous

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[1]See Vacation Village v. Hitachi America, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994).

[2]See id.

[3]See e.g., Foster v. Washoe County, 114 Nev. 936, 964 P.2d 788 (1998) (affirming a district court order dismissing plaintiff's complaint for failure to state a claim where defendants were entitled to immunity, thus defeating plaintiff's cause of action).

[4]See Boland v. Nevada Rock and Sand Co., 111 Nev. 608, 611, 894 P.2d 988, 990 (1995).

[5]NRS 41.510(1).

condition or when a participant has suffered injury after giving consideration for permission to participate in recreational activities on the landowner's premises.[6] Willful misconduct is "an act that the actor knows, or should know, will very probably cause harm or an act of perversity, depravity or oppression."[7]

We conclude that the district court correctly applied NRS 41.510 in dismissing appellant's complaint. Although NRS 41.510 carves out an exception when permission to participate in recreational activities on the land was granted for consideration, appellant acknowledged that the snowplay area is open to the public, free of charge, and at no time did he allege that he paid any consideration to use the park for any recreational purposes. Appellant's argument that, because the park charges a fee to use the picnic facilities, the entire park falls outside of NRS 41.510's purview, is tenuous and unsupported by any authority. Appellant was not injured in the picnic area and appellant did not pay to use respondents' land; thus, the consideration exception to recreational use immunity does not apply here.

Appellant's "willful misconduct" argument is likewise of no avail. Appellant contends that, because the bark beetle is a known problem in Nevada, appellants had a duty to warn that trees might fall.

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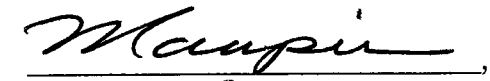
[6]NRS 41.510(3)(a)(1) and (2).

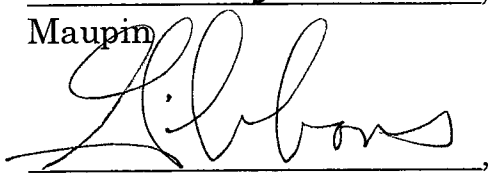
[7]Van Cleave v. Kietz-Mill Minit Mart, 97 Nev. 414, 416, 633 P.2d 1220, 1221 (1981) (internal quotations and citations omitted).

Assuming, arguendo, that bark beetles are a known problem, appellant failed to demonstrate or even allege that respondents therefore knew that trees would very probably fall and result in injury.[8] Thus, because respondents were immune from liability, appellant could prove no set of facts entitling him to relief. Accordingly, there was no error in the district court's order dismissing appellant's complaint, and we

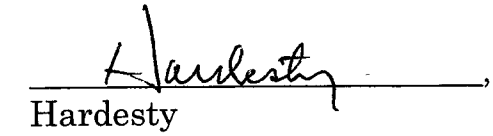
ORDER the judgment of the district court AFFIRMED.



_____, J.
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. Jerome Polaha, District Judge
Kenneth Darget
Washoe County District Attorney Richard A. Gammick/Civil Division
Washoe District Court Clerk

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[8]See Van Cleave, 97 Nev. at 416, 633 P.2d at 1221.