

IN THE SUPREME COURT OF THE STATE OF NEVADA

EWALD LITKE AND BETTE J. LITKE,
Appellants,
vs.
CITY OF SPARKS, RHONDA KNOX,
ROBERT PICKINS AND MARGARET
POWELL,
Respondents.

No. 37394

FILED

JUL 09 2002

ANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a motion to dismiss pursuant to NRCP 12(b)(5).

The standard of review for dismissal under NRCP 12(b)(5) is rigorous as this court must construe the pleadings liberally and draw every fair inference in favor of the non-moving party.¹ All factual allegations in the complaint must be accepted as true, and this court's "task is to determine whether or not the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief."² A complaint sufficient to assert a claim for relief must give fair notice of the nature and basis of a legally sufficient claim and the relief requested.³

¹Edgar v. Wagner, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985) (citation omitted).

²Id. at 227, 699 P.2d 111.

³Breliant v. Preferred Equities Corp., 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993); see also NRCP 8 (complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief and the relief requested); NRCP 15 (a party may amend pleading once as a matter of course and thereafter leave shall be freely given when justice requires).

This court will, however, affirm a district court's dismissal of a complaint for failure to state a claim when it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief.⁴

Appellants Ewald and Bette Litke contend that the district court erred by dismissing their complaint, and that they were singled out for prosecution under the sign ordinance because they had a history of unpleasant relations with respondent City of Sparks zoning enforcement officers Rhonda Knox, Margaret Powell, and Robert Pickens. The Litkes urge this court to remand this case to the district court for a trial on their negligence, intentional interference with prospective economic advantage, abuse of process, and malicious prosecution claims.

NRS 41.032 precludes an action against the state, its political subdivisions, and officers or employees of the state for the performance of discretionary functions.⁵ This court has defined discretionary functions as "those which require the exercise of personal deliberation, decision, and judgment."⁶ Decisions to enforce zoning ordinances represent discretionary functions which trigger governmental immunity.⁷ In this case, Knox, Powell, and Pickens are immune from the Litkes' negligence

⁴Breliant, 109 Nev. at 845, 858 P.2d at 1260.

⁵NRS 41.032(2).

⁶Wayment v. Holmes, 112 Nev. 232, 238, 912 P.2d 816, 819 (1996).

⁷Willow Creek Ranch v. Shelby, 611 N.W.2d 693, 700 (Wis. 2000); see also Travelers Hotel v. City of Reno, 103 Nev. 343, 345-46, 741 P.2d 1353, 1354 (decision to issue special use permit pursuant to ordinance was discretionary function).

claim pursuant to NRS 41.032 because their enforcement of zoning ordinances and their inspections and issuance of permits pursuant to ordinances was a discretionary function. Moreover, the City of Sparks is immune from suit by virtue of Knox, Powell, and Pickins' immunity.⁸ Accordingly, we conclude that dismissal of the Litkes' negligence claim was proper.

The tort of intentional interference with prospective economic advantage requires proof of the following elements: "(1) a prospective contractual relationship between plaintiff and a third party; (2) knowledge by the defendant of the prospective relationship; (3) intent to harm the plaintiff by preventing the relationship; (4) the absence of privilege or justification by the defendant; and (5) actual harm as a result of the defendant's conduct."⁹ Intent requires a purposeful act to interfere with the plaintiff's prospective contractual relation as opposed to mere negligence or inadvertence.¹⁰

The Litkes' complaint alleges that they lost business as a result of the careless actions of Powell, who came to their market on several occasions demanding that signs be removed and threatening to initiate criminal charges against them. The Litkes also generally allege that the City of Sparks and Powell delayed permitting on at least one business project, which delay caused them economic harm. These general

⁸See Wayment, 112 Nev. at 238, 912 P.2d at 819 (finding county immune from suit by virtue of employee's official immunity).

⁹Wichinsky v. Mosa, 109 Nev. 84, 88, 847 P.2d 727, 729-30 (1993).

¹⁰LTR Stage Line v. Gray Line Tours, 106 Nev. 283, 287, 792 P.2d 386, 388 (1990).

allegations do not state a claim for intentional interference with prospective economic advantage and thus, we conclude that dismissal of this claim was proper as well.

With respect to the Litkes' malicious prosecution and abuse of process claims, the elements of a malicious prosecution claim are: (1) want of probable cause to initiate the prior criminal proceedings; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage.¹¹ Further, the elements of an abuse of process claim are: (1) an ulterior purpose by the defendants other than resolving a legal dispute; and (2) a willful and improper use of the legal process to accomplish that purpose.¹²

Although the Litkes allege in their complaint that the criminal proceedings were initiated against them for an ulterior purpose other than resolving a legal dispute, namely, to harass and intimidate them, they do not allege "a willful act in the use of the legal process not proper in the regular conduct of the proceedings."¹³ To the contrary, the Litkes concede that there was probable cause to initiate the criminal proceedings against them because they displayed signage in violation of the Sparks Municipal Code. The Litkes simply allege that they were singled out for prosecution under the sign ordinance because they had a history of unpleasant relations with respondent City of Sparks zoning. However, the conscious exercise of some selectivity in enforcement of the law is not in itself a

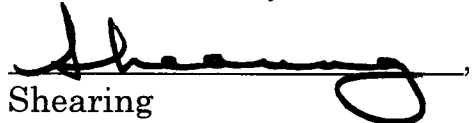
¹¹LaMantia v. Redisi, 118 Nev. ____, ____, 38 P.3d 877, 879 (2002).

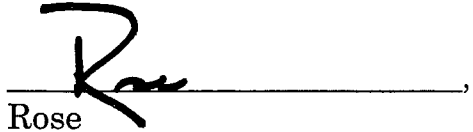
¹²Id.

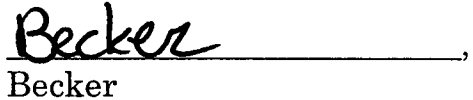
¹³See Lamantia, 118 Nev. at ____, 38 P.3d at 879-80 (abuse of process claim requires showing of willful and improper use of the legal process).

constitutional violation, and absent a showing of deliberate or purposeful discrimination based on an unjustified standard such as race, religion, or other arbitrary classification, "mere selective enforcement of a zoning ordinance does not establish an equal protection violation."¹⁴ Accordingly, we conclude that the district court's dismissal of the Litkes' remaining claims was also proper, and we

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. Steven R. Kosach, District Judge
Kenneth J. McKenna
Sparks City Attorney
Washoe District Court Clerk

¹⁴City of Burligton v. Kutzer, 597 P.2d 1387, 1390 (Wash. Ct. App. 1979); see also Salaiscooper v. Dist. Ct., 117 Nev. ___, 34 P.3d 509 (2001) (successful selective prosecution claim requires proof that a public officer enforced a law or policy in a discriminatory manner and that the enforcement was for a discriminatory purpose).