IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY LOFTON, AN INDIVIDUAL AND GEORGE LOFTON, AN INDIVIDUAL,
Appellants,
vs.
THE STATE OF NEVADA DEPARTMENT OF HUMAN RESOURCES, HEALTH DIVISION, BUREAU OF FAMILY HEALTH SERVICES SPECIAL CHILDREN'S CLINIC, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; AND ESTHER BERENHAUT, RD, INDIVIDUALLY,
Respondents.

No. 38694

ORDER OF AFFIRMANCE

Appellants Mary and George Lofton (Loftons) appeal from two orders of the district court granting motions to dismiss pursuant to NRCP 12(b)(5) in favor of respondents State of Nevada Department of Human Resources Health Division, Bureau of Family Health Services Special Children's Clinic and its employee, Esther Berenhaut.[1] The Loftons filed a negligence action against the State after Mary was allegedly injured by Berenhaut's gratuitous, yet unsuccessful, attempt to procure certain prescribed dietary supplements. The district court granted the State's motions to dismiss after concluding that the State did not owe any duty to Mary and that the State was immune from liability.

[1]When referred to collectively, the respondents will be referred to as "the State."

When reviewing an order by a district court granting a motion to dismiss pursuant to NRCP 12(b)(5), we have stated that:

> The standard of review for a dismissal under NRCP 12(b)(5) is rigorous as this court must construe the pleading liberally and draw every fair inference in favor of the non-moving party. All factual allegations of the complaint must be accepted as true. A complaint will not be dismissed for failure to state a claim unless 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.[2]

We conclude that the Loftons' arguments are without merit, and accordingly, we affirm the district court's orders granting the State's motions to dismiss.

We have recognized that a duty of care can arise as a result of one party's voluntary undertaking on behalf of another individual.[3] Section 323 of the Restatement (Second) of Torts encapsulates this area of law as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
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> (a) his failure to exercise such care increases the risk of such harm, or

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[2]Simpson v. Mars Inc., 113 Nev. 188, 190, 929 P.2d 966, 967 (1997) (citations omitted).

[3]See Wright v. Schum, 105 Nev. 611, 615-18, 781 P.2d 1142, 1144-46 (1989).

(b) the harm is suffered because of the other's reliance upon the undertaking.[4]

Here, while the State did render services to Mary by assisting her in obtaining dietary supplements, there are no allegations in the complaint to suggest that this assistance increased the risk of harm to Mary or that Mary's alleged reliance upon this assistance resulted in harm. On the contrary, the Loftons admit in their complaint that the State made repeated attempts to get the supplements for Mary, but that Mary's insurer, Health Plan of Nevada (HPN), thwarted these efforts by refusing to authorize coverage. Beyond their bare assertion that they relied upon the State's fruitless assistance, the Loftons are conspicuously silent as to how their alleged reliance upon the State's assistance harmed them when it was HPN that was preventing Mary from receiving the prescribed supplements she needed.

Even if liability had arisen because of Berenhaut's gratuitous actions, the State would still be immune from liability pursuant to NRS 41.032, which provides:

> Except as provided in NRS 278.0233 no action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the state or any of its agencies or political subdivisions which is:
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> . . . .
>
> 2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the

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[4]Restatement (Second) of Torts § 323 (1965); see also Wiseman v. Hallahan, 113 Nev. 1266, 1271-72, 945 P.2d 945, 948 (1997) (applying section 323 of the Restatement (Second) of Torts with regard to an icy sidewalk and concluding that no duty was owed).

> state or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

While the Loftons attempt to characterize Berenhaut's actions as non-discretionary, or operational, their contention is at odds with our prior precedent on this subject. We have defined discretionary actions as those actions requiring "personal deliberation, decision and judgment."[5] In contrast, we have defined operational, or ministerial, actions as:

> "[An] . . . act [that] is defined as absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed designated facts or the execution of a set task imposed by a law prescribing and defining the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion, being a simple definite duty arising under and because of stated conditions and imposed by law. A ministerial act envisions direct adherence to a governing rule or standard with compulsory result."[6]

Here, the Loftons allege that Berenhaut voluntarily gave Mary free samples and communicated with Mary's insurer, the manufacturers and Mary's physicians. The Loftons do not allege that Berenhaut acted in a prescribed legal manner, but that she made personal efforts and decisions to assist Mary. Even if Berenhaut made her phone calls and handed out

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[5]Travelers Hotel v. City of Reno, 103 Nev. 343, 346, 741 P.2d 1353, 1354 (1987).

[6]Foster v. Washoe County, 114 Nev. 936, 942, 964 P.2d 788, 792 (1998) (quoting 57 Am. Jur. 2d Municipal, County, School and State Tort Liability § 120 (1988)).

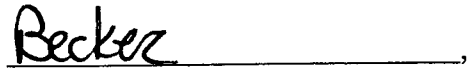
samples according to an internal operating procedure, which the Loftons do not allege, her actions would still be discretionary.[7]

Based on the above, we conclude that the district court did not err when it granted the State's motions to dismiss. Accordingly, we

ORDER the judgments of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt



_____, J.
Becker

cc: Hon. Jennifer Togliatti, District Judge
LoBello Law Offices
Attorney General Brian Sandoval/Las Vegas
Clark County Clerk

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[7]See id. at 941-42, 964 P.2d at 792 (holding that a social services investigation that was conducted according to internal departmental operating procedures was inherently discretionary).