IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN LITTLE,
Appellant,
vs.
LAS VEGAS METROPOLITAN POLICE DEPARTMENT; OFFICER M. JACKSON; AND OFFICER B. JENSEN,
Respondents.

No. 40407

FILED

NOV 09 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a final judgment of the district court dismissing appellant's complaint pursuant to NRCP 12(b)(5). Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On May 30, 2000, Kathy Loosbroock and Torrey Tracy suffered a sexual assault in their motel room in Las Vegas. The victims reported the crime to respondent Las Vegas Metropolitan Police Department (LVMPD). Approximately one week later, two LVMPD officers, respondents M. Jackson and B. Jensen, presented Loosbroock with a photo lineup. Loosbroock stated that a photo of appellant John Little "looked similar to the suspect." Little had been in Las Vegas on May 30, 2000, as a tourist.

Officer Jensen prepared a declaration of warrant for Little's arrest, which a magistrate signed. Since Little is a Chicago resident, officials in Chicago were informed of the arrest warrant and effectuated Little's arrest. Little claims that he informed the arresting officers that he was on an airplane leaving Las Vegas at the time of the alleged assaults. Nevertheless, Little was extradited to Las Vegas.

Little was charged with burglary while in possession of a firearm, two counts of first-degree kidnapping with the use of a deadly

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weapon, sexual assault with the use of a deadly weapon, robbery with the use of a deadly weapon, and battery with the use of a deadly weapon.

After several months of incarceration, Little produced evidence that he was on an airplane at the time of the alleged assaults. The charges against Little were dismissed and he was released from custody.

Little initiated suit against LVMPD, Officer Jensen and Officer Jackson, alleging false arrest, false imprisonment, defamation, emotional distress and negligence. The complaint states that Officers Jackson and Jensen were employees, agents and servants of LVMPD, "acting within the course and scope of such employment, agency and service." The complaint asserts that LVMPD "was directly responsible for each and every act of said agents and employees which were acting within the course and scope of their employment."

The defamation claim arose out of the respondents causing Little embarrassment and public humiliation by arresting him. Little claimed emotional distress because the false arrest and imprisonment caused him to suffer nervousness, headaches, inability to concentrate and loss of sleep. The complaint alleges that the officers negligently investigated the charges.

The respondents filed a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to NRCP 12(b)(5). Little opposed the motion and the respondents filed a reply. Little failed to appear at the hearing on the motion. The district court granted the motion to dismiss. Little filed a motion for reconsideration, which was denied. Little appeals, arguing that the district court erred by dismissing the complaint. We disagree.

The standard of review for a dismissal of a complaint is well established. Under the rigorous standard of review for dismissal pursuant to NRCP 12(b)(5), this court must construe the pleadings liberally and draw every inference in favor of the non-moving party.[1] All factual recitations in the complaint must be accepted as true.[2] A complaint will not be dismissed pursuant to NRCP 12(b)(5), unless it appears beyond a reasonable doubt that the plaintiff could not have proven a set of facts, which, if true, would entitle him to relief.[3] "Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief."[4]

On appeal, Little claims that the dismissal of his complaint was inappropriate because no legal or probable cause existed for his arrest.

> A police officer is not liable for false arrest or imprisonment when he acts pursuant to a warrant that is valid on its face. The facially valid warrant provides the "legal cause or justification" for the arrest, in the same way that an arrest made with probable cause is privileged and not actionable.[5]

We conclude that the district court properly dismissed Little's claims for false arrest, false imprisonment, defamation and emotional

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

[2]Hampe v. Foote, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002).

[3]Id.

[4]Id.

[5]Nelson v. City of Las Vegas, 99 Nev. 548, 552, 665 P.2d 1141, 1143-44 (1983) (internal citations omitted); see also Hernandez v. City of Salt Lake, 100 Nev. 504, 506, 686 P.2d 251, 252 (1984).

distress. The false arrest and false imprisonment claims fail because Little was arrested pursuant to a facially valid arrest warrant. Little's claims for defamation and emotional distress likewise fail since they rely on the success of his claims for false arrest and imprisonment.

Little's suit for negligence is barred pursuant to NRS 41.032. NRS 41.032 states:

> [N]o 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 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.

Little contends that this statutory immunity is only available when officers exercise their discretion in effectuating an arrest after probable cause has already been established. We disagree.

Although Nevada has waived its sovereign immunity under NRS 41.031, in NRS 41.032(2) it has expressly retained sovereign immunity for state officials exercising discretion. State officials can be sued for torts committed while performing non-discretionary or "ministerial" acts, but not for torts committed while performing discretionary acts.[6] Immunity still attaches if the discretion involved is

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[6]NRS 41.032; Ortega v. Reyna, 114 Nev. 55, 62, 953 P.2d 18, 23 (1998).

abused.[7] "A 'discretionary act' is one which requires the 'exercise of personal deliberation, decision and judgment.'"[8] On the other hand, "[a] ministerial act [for which there is no immunity] is an act performed by an individual in a prescribed legal manner in accordance with the law, without regard to, or the exercise of, the judgment of the individual."[9] Generally, an officer's investigation and decision to arrest is discretionary.[10]

Little's remaining claim for negligence is barred pursuant to NRS 41.032. The officers' investigation, including whether to pursue certain information, is purely a discretionary act for which they have immunity. Additionally, Jensen's decision to submit the declaration of warrant to a magistrate was a discretionary act. The officers were required to exercise their discretion in determining whether they believed there was enough evidence to support an arrest warrant.

Therefore, we conclude that the district court did not err by dismissing the complaint because Little failed to state a claim upon which

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[7]NRS 41.032(2).

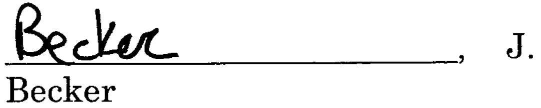
[8]Ortega, 114 Nev. at 62, 953 P.2d at 23 (quoting Travelers Hotel v. City of Reno, 103 Nev. 343, 345-46, 741 P.2d 1353, 1354 (1987)).

[9]Pittman v. Lower Court Counseling, 110 Nev. 359, 364, 871 P.2d 953, 956 (1994) overruled on other grounds by Nunez v. City of North Las Vegas, 116 Nev. 535, 1 P.3d 959 (2000).

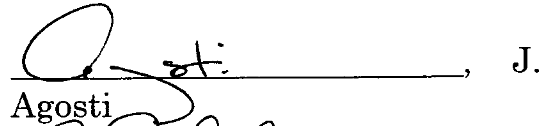
[10]See Ortega, 114 Nev. at 62, 953 P.2d at 23; Foster v. Washoe County, 114 Nev. 936, 941-92, 964 P.2d 788, 792 (1998); Coty v. Washoe County, 108 Nev. 757, 762 n.7, 839 P.2d 97, 100 n.7 (1992); Irvine v. City & County of San Francisco, 2001 WL 967524, 8 (N.D.Cal. 2001).

relief can be granted and because the respondents are immune from suit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_______________________, J.
Becker



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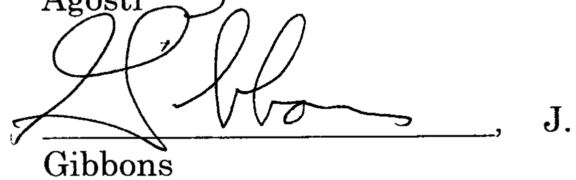

_______________________, J.
Gibbons

cc: Hon. Sally L. Loehrer, District Judge
Flangas Law Office
Marquis & Aurbach
Clark County Clerk