IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERTA KIM ELLIOT,
Appellant,
vs.
WASHOE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, INDIVIDUALLY,
Respondent.

No. 89460-COA

FILED

JUN 26 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Roberta Kim Elliot appeals from a district court order dismissing her complaint with prejudice. Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

Elliot filed a complaint against Washoe County alleging a single claim for premises liability. Elliot alleged she was riding her bicycle on Jennifer Street in Incline Village when she struck a pothole/manhole cover, which caused her to fall from the bicycle and sustain injuries. Elliot alleged Washoe County was aware the pothole/manhole cover was dangerous but negligently failed to correct or warn against the dangerous condition.

Washoe County filed a motion to dismiss arguing it was entitled to immunity pursuant to NRS 41.510(2) because Elliot was engaged in a recreational activity and that it was further entitled to discretionary immunity pursuant to NRS 41.032 because decisions regarding the construction and maintenance of roadways are discretionary and related to economic policy concerns. Elliot opposed and argued that, because she alleged Washoe County was aware that the pothole/manhole cover was not flush with the street, it was aware it presented a dangerous condition and

thus fell within NRS 41.510(3)(a)(1)'s exception for a landowner's "[w]illful or malicious failure to guard[ ] or to warn" against a dangerous condition. Elliot further argued that the decision to repair or maintain a road safe for bicyclists was a matter of routine maintenance and thus Washoe County was not entitled to discretionary immunity.

The district court granted the motion to dismiss, finding Washoe County was entitled to immunity under NRS 41.510 and was further entitled to discretionary immunity. Specifically, the district court found Elliot was engaged in a recreational activity at the time of the accident and that she failed to allege facts demonstrating Washoe County willfully or maliciously failed to guard or warn against the allegedly uneven pothole/manhole cover. Further, the district court concluded the decision to design or maintain a road that is safe for both vehicles and bicyclists is a discretionary decision related to economic and safety considerations. Accordingly, the district court dismissed the complaint with prejudice. Elliot now appeals.

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal, with all alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Id.* Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672.

Elliot argues the district court erred by finding NRS 41.510 barred her suit because NRS 41.510(3)(a)(1) provides an exception when the landowner acts willfully or maliciously in failing to correct or warn against

a dangerous condition.[1] NRS 41.510(1) states that an owner of any premises "owes no duty to keep the premises safe for entry or use by others for participating in any recreational activity[.]" However, an exception to the privilege exists if a landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity. NRS 41.510(3)(a)(1). Willful or malicious conduct under NRS 41.510 has been defined as "intentional wrongful conduct, done *either* with knowledge that serious injury to another will probably result, *or* with a wanton or reckless disregard of the possible result." *Abbott v. City of Henderson*, 140 Nev., Adv. Op. 3, 542 P.3d 10, 14 (2024) (internal citation omitted). Although the question of willfulness is generally a question of fact, where a plaintiff fails to allege sufficient facts demonstrating willfulness dismissal is warranted. *See id.* (holding summary judgment is appropriate on the question of willfulness when the plaintiff presented no evidence of willful conduct); *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992) (stating a complaint must "set forth sufficient facts to demonstrate the necessary elements" of the claim).

We conclude the district court did not err by concluding Elliot failed to allege sufficient facts demonstrating willful or malicious actions. Notably, Elliot alleged Washoe County either negligently created the road in such a way that the pothole/manhole cover was dangerous to bicyclists or that it negligently failed to properly remedy or maintain the pothole/manhole cover. There was no allegation that Washoe County

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[1]Elliot does not dispute that she was engaged in a recreational use encompassed by NRS 41.510, and thus we do not address that issue. *See* NRS 41.510(4) (defining what constitutes a recreational use for purpose of NRS 41.510).

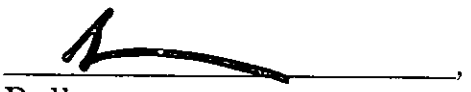
designed the pothole/manhole cover to not be flush with the road with a "design to inflict injury." *Abbott*, 140 Nev., Adv. Op. 3, 542 P.3d at 14. (citation omitted) (holding when a plaintiff alleges the defendant willfully created the hazard, the plaintiff must demonstrate it was done with a "design to inflict injury"). Further, while Elliot argued Washoe County knew the pothole/manhole cover was not flush with the road, there is no allegation that Washoe County's decision not to remedy this alleged hazard was done with the knowledge that a serious injury would probably result or with a reckless disregard to the possible result. *See Rocky Mountain Produce Trucking Co. v. Johnson*, 78 Nev. 44, 51, 369 P.2d 198, 201 (1962) ("Willfulness and negligence are contradictory terms. If conduct is negligent, it is not willful; if it is willful, it is not negligent." (citation omitted)). Indeed, Elliot's opposition seems to concede that her complaint did not contain any allegations of willful or reckless behavior because she alleged discovery was necessary[2] to determine whether Washoe County was willfully indifferent to the alleged hazard. And Elliot did not argue—either below or on appeal—that she should have been granted leave to amend her complaint to add the necessary allegations of willful or reckless behavior or that she would have even been able to do so.

Given the foregoing, because Elliot alleged only that Washoe County was negligent, and did not allege that it acted with willful or malicious failure to guard or warn against a dangerous condition such that Washoe County was not shielded from the recreational use privilege by the

[2]Elliot does not repeat her discovery argument on appeal, and thus we need not address that issue. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

exception set forth in NRS 41.510(3)(a)(1), we discern no error in the district court's dismissal of Elliot's complaint. *Buzz Stew, LLC*, 124 Nev. 224 at 227-28, 181 P.3d at 672 (holding we review a motion to dismiss de novo). We therefore affirm that decision.[3]

It is so ORDERED.



_____, C.J.
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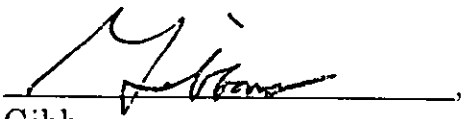

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Kathleen A. Sigurdson, District Judge
Roberta Kim Elliot
Washoe County District Attorney
Washoe District Court Clerk

[3]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered these arguments and conclude they need not be addressed given our resolution of this matter.