

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * *

JAPONICA GLOVER-ARMONT,

APPELLANT,

VS.

JOHN CARGILE; CITY OF NORTH
LAS VEGAS, A MUNICIPAL
CORPORATION EXISTING UNDER
THE LAWS OF THE STATE OF
NEVADA IN THE COUNTY OF
CLARK;

RESPONDENTS.

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CASE NO. 70988

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable William Kephart, District Judge
District Court Case No. A-13-683211-C

APPELLANT'S REPLY BRIEF

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9 **NRAP 26.1 DISCLOSURE STATEMENT**

10 The undersigned counsel of record certify that the following are persons and
11 entities as described in NRAP 26.1 (a) and must be disclosed. These representations
12 are made in order that the Justices of this Court may evaluate possible
13 disqualifications or recusal.

14 Appellant is Japonica Glover-Armont. Appellant has been represented
15 exclusively by the undersigned counsel of record in this matter.

16 Dated this 8th day of September, 2017.

17 /s/ Marjorie Hauf Esq.
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Nevada law

A finding that Sergeant Cargile's actions were discretionary would usurp the
power and responsibility of the legislature and executive in contradiction of the
purpose of discretionary immunity.

Sergeant Cargile's actions did not forward any public policy .. 11

Sergeant Cargile did not have discretion to proceed unless it was safe to do
so.

The extra-jurisdictional case law cited by Respondent analyzes laws far
different from those of Nevada.

The Responding Brief makes no mention of NRS 484B.700, the controlling
authority in the case at bar.

Material issues of fact remain which will be determinative of whether
Sergeant Cargile complied with NRS 484B.700.

Sergeant Cargile's conduct was not merely an abuse of discretion.

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The undersigned counsel of record certify that the following are persons and entities as described in NRAP 26.1 (a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Appellant is Japonica Glover-Armont. Appellant has been represented exclusively by the undersigned counsel of record in this matter.

Dated this 8th day of September, 2017.

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1 **TABLE OF AUTHORITIES**

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4 *Dugan v. American Express Travel Related Services Co.*,

5 912 P.2d 1322 (Ariz. App. 1995) 2, 3, 4

6 *Perez v. Las Vegas Med. Ctr.*, 107 Nev. 1 (1991)..... 6, 7, 12

7 *Wood v. Safeway, Inc.*, 121 Nev. 724 (2005)..... 1, 4, 7, 8, 13

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14

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16 **ARGUMENT**

17 **a. STATE LAW LIMITS THE DISCRETION OF OPERATORS OF**

18 **EMERGENCY VEHICLES**

19 The Nevada Legislature has enacted a specific statutory scheme to regulate

20 the operation of emergency vehicles. Specifically, with regard to the privilege

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1 granted to a driver of an emergency vehicle to violate certain rules of the road,
2 NRS 484B.700 expressly states the circumstances under which an emergency
3 vehicle, when responding to an emergency call, may proceed past a red or stop
4 signal or stop sign. NRS 484B.700 provides, in its entirety, as follows:

5 NRS 484B.700 - Privileges granted to driver of authorized
6 emergency vehicle, official vehicle of regulatory agency or vehicle
7 escorting funeral procession; application of privileges; limitation of
8 privileges.

8 1. The driver of an authorized emergency vehicle or an official
9 vehicle of a regulatory agency, when responding to an emergency call
10 or when in pursuit of an actual or suspected violator of the law or
11 when responding to but not upon returning from a fire alarm, or a
12 vehicle escorting a funeral procession, may:

11 (a) Proceed past a red or stop signal or stop sign, but only after
12 slowing down as may be necessary for safe operation.

12 (b) Exceed any speed limits so long as the driver does not
13 endanger life or property, except that a vehicle escorting a funeral
14 procession may not exceed the speed limit by more than 15 miles per
15 hour to overtake the procession and direct traffic at the next
16 intersection.

14 (c) Disregard regulations governing direction of movement or
15 turning in specified directions. The driver of a vehicle escorting a
16 funeral procession may direct the movements of the vehicles in the
17 procession in a similar manner and may direct the movements of other
18 vehicles.

17 2. The privileges granted in subsection 1 apply only when the
18 vehicle is making use of:

18 (a) Audible and visual signals; or

19 (b) Visual signals only,

19 3. The driver of an authorized emergency vehicle or an official
20 vehicle of a regulatory agency may park or stand without regard to the
21 provisions of chapters 484A to 484E, inclusive, of NRS, if the driver
makes use of a warning lamp.

21 4. The provisions of this section do not relieve the driver from
the duty to drive with due regard for the safety of all persons and do

1 not protect the driver from the consequences of the driver's reckless
2 disregard for the safety of others.

3 These very specific provisions of state law evidence an intent by the
4 Legislature to limit conduct by operators of emergency vehicles in Nevada.
5 Because these specific activities are the subject of an express and unambiguous
6 statute any action in violation of those provisions may not be deemed
7 "discretionary." Therefore, excusing actions which do not comply with the law
8 under "discretionary immunity" is not appropriate.

9 **B. Sergeant Cargile did not have discretion to violate Appellant's right**
10 **of way under Nevada law.**

11 Respondent's assertion of discretionary immunity is misplaced under the
12 facts of this case. Sergeant Cargile's decision to violate Appellant's right of way
13 was not a discretionary act because that exact activity is governed by a specific
14 Nevada statute. NRS 484B.700 limits the circumstances under which a police
15 officer may disregard traffic control devices and traffic laws while operating an
16 emergency vehicle in the line of duty. In enacting NRS 484B.700 the legislature
17 communicated a clear intention to place specific restrictions on the discretion an
18 emergency vehicle operator may exercise under the circumstances outlined within
19 the statute. It is axiomatic that any discretion which may be exercised in the
20 operation of an emergency vehicle may not violate specific state law intended to
21 limit said discretion.

1 Respondent's reliance on *Martinez v. Maruszczak*¹ is severely misplaced.
2 In that case this Court adopted the two-part federal test of *Berkovitz v. United*
3 *States*² and *United States v. Gaubert*³. That standard provides immunity only
4 when the defendant's negligent acts "involve elements of judgement or choice,
5 and the judgment or choice is of the kind that the discretionary-function exception
6 was designed to shield, that is, a judgment or choice involving social, economic or
7 political policy considerations." 123 Nev. 433, 435. If the court were to adopt
8 Respondent's bloated interpretation of what constitutes actions related to public
9 policy: "enforcing the law, protecting the public, and apprehending criminals,"
10 there would be virtually no act by a police officer which would NOT fall within
11 the protections of discretionary immunity. After all, "enforcing the law,
12 protecting the public, and apprehending criminals" are the most basic aspirations
13 of any municipal law enforcement agency. Arguably, every act undertaken by a
14 police officer is in support of one or more of those functions.

15 In analyzing the breadth of discretionary immunity protections the *Martinez*
16 Court concluded that decisions which do not "require analysis of government
17 policy concerns"... "remain unprotected by NRS41.032(2)'s discretionary
18

19 ¹ 123 Nev. 433, 168 P.3d 720 (2007)

20 ² 486 U.S. 531, 108 S.Ct. 1954 (1988)

21 ³ 499 U.S. 315, 111. S.Ct. 1267 (1991)

1 immunity.” *Id.* at 447. In that case the Court determined that, “while a
2 physician’s diagnostic and treatment decisions involve judgment and choice, thus
3 satisfying the test’s first criterion, those decisions generally do not include policy
4 considerations, as required by the test’s second criterion.” In this case it cannot be
5 reasonably argued that Sergeant Cargile engaged in “policy considerations” when
6 making the decision to enter the intersection before making sure it was safe.
7 Rather, he made a (poor) decision based merely upon the particular circumstances
8 at that time and place. Further, the decision he made was in direct violation of the
9 express provisions of NRS 484B.700. Therefore, when applying the *Martinez*
10 standard to this case it is clear that Cargile’s decision to enter the intersection in
11 violation of both department policy and NRS 484B.700 is not one which can be
12 protected by discretionary immunity.

13 **C. A finding that Sergeant Cargile’s actions were discretionary would**
14 **usurp the power and responsibility of the legislature and executive**
15 **in contradiction of the purpose of discretionary immunity.**

16 Respondent argues that under *Martinez*, discretionary immunity attaches if
17 the nature of the actions undertaken are susceptible to policy analysis. However,
18 the Court clarified that “susceptible to policy analysis” means situations where a
19 finding of liability meant “the legislative or executive branch’s power or
20 responsibility would be usurped.” Here, a finding of discretionary immunity
21 would have the opposite effect: it would essentially undermine both legislative

1 and executive attempts to regulate the very conduct engaged in by Sergeant
2 Cargile in this case. That is, by enacting NRS 484B.700 the legislature enunciated
3 specific guidelines for circumstance under which an operator of an emergency
4 vehicle may disregard traffic controls. Likewise, the executive branch
5 promulgated similar policies in the form of the NLVPD's policies as discussed
6 more fully in Appellant's Opening Brief. Thus, a finding by this Court that
7 Sergeant Cargile's violation of those laws and regulations was protected by
8 discretionary immunity would itself "usurp" the co-equal branches' power to
9 regulate the conduct of emergency vehicle operators.

10 **D. Sergeant Cargile's actions did not forward any public policy.**

11 Likewise, *Ransdell v. Clark County* is of no assistance to Respondent under
12 the facts of this case. Specifically, the decision by Sergeant Cargile to violate both
13 NRS 484B.700 and NLVP policy by entering the intersection before ensuring it
14 was clear of traffic actually did violence to the very public policies - "enforcing
15 the law, protecting the public, and apprehending criminals" – which respondent
16 cites to support discretionary immunity. The reality is that Sergeant Cargile's
17 decision did exactly the opposite of forwarding those policies: it broke the law, it
18 created a danger to the public, and it created a criminal in the form of Sergeant
19 Cargile himself.

1 **E. Sergeant Cargile did not have discretion to proceed unless it was**
2 **safe to do so.**

3 Neither does this Court's decision in *Maturi v. LVMPD* provide any support
4 for Respondent's arguments. The police officer defendant in *Maturi* was sued for
5 handcuffing the plaintiff behind his back rather than in the front. However, the
6 LVMPD manual which governed the handcuffing of suspects specifically
7 provided that both methods were acceptable based upon the officer's discretion.
8 *Id.* at 308. In contrast, compliance with NRS 484B.700, which Sergeant Cargile
9 violated in this case, is not discretionary. By enacting that statute the legislature
10 declared a clear intent to limit the discretion of an operator of an emergency
11 vehicle to enter an intersection against a red signal. Specifically, the operator may
12 only proceed past a red or stop signal "only after slowing down as may be
13 necessary for safe operation." NRS 484B.700(1)(a). Further, NRS 484B.700(4)
14 makes it clear that an operator of an emergency vehicle is never relived "from the
15 duty to drive with due regard for the safety of all persons" and is not protected
16 "from the consequences of the driver's reckless disregard for the safety of others."
17 The inclusion of the last phrase is significant because that language in and of itself
18 declares an acknowledgment by the legislature that public employees who violate
19 the provisions of NRS 484B.700 will not be immune from the "consequences" of
20 such a violation.

1 So, none of the Nevada cases cited in the responding brief address the issue
2 of a public employee violating the law such as Sergeant Cargile clearly did in this
3 case.

4 **F. The extra-jurisdictional case law cited by Respondent analyzes laws**
5 **far different from those of Nevada.**

6 Similarly, Respondent's initial reliance on Minnesota case law⁴ is misplaced
7 since the Minnesota statute at issue does not contain "warning" language which
8 specifies that emergency vehicle operators have a duty to drive with due regard to
9 the safety of others, such as that contained within NRS 484B.700 (4). Further, this
10 court should not adopt such a clearly hypocritical and contradictory conclusion as
11 was reached by the Minnesota court. Specifically, that court found that "proceed
12 cautiously" ... "means to go forward in the exercise of due care to avoid a
13 collision" but nevertheless found that the deputy's clear failure to do so was not a
14 violation of the statute.

15 The facts of the first Virginia case⁵ cited by Respondent are so inapposite to
16 the facts here as to provide no guidance at all. That case involved a high-speed
17 chase where the officer was involved in the pursuit and apprehension of an
18 individual committing an ongoing crime. Here, Sergeant Cargile was merely
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20 ⁴ Vassallo ex re. Brown v. Majeski, 842 N.W.2d 456 (Minn. 2014)

21 ⁵ Colby v. Boyden, 400 S.E.2d 184 (Va. 1991)

1 responding to a call and was not actively involved in the engagement of a suspect
2 at the time of the crash. Clearly, this exact scenario was considered by the Nevada
3 legislature in enacting NRS 484B.700 where presumably the state's interest in
4 providing police and emergency services was weighed alongside the need to
5 ensure that the public safety is adequately protected during those inevitable times
6 when emergency vehicles will share the roadway with non-involved citizens like
7 Ms. Glover.

8 *Terrell v. Larson*⁶ is another Minnesota case. In that decision the Minnesota
9 Supreme Court acknowledged that, unlike its Nevada counterpart, the relevant
10 Minnesota statute⁷ does not have a requirement for an operator to slow down
11 before entering an intersection when operating an emergency vehicle. 2008 WL
12 2168348 at 6. Contrarily, the unambiguous language of NRS 484B.700(1)(a)
13 states that the driver of an emergency vehicle may "proceed past a red or stop
14 signal or stop sign, but only after slowing down as may be necessary for safe
15 operation." So, the discretion (whether to slow down or not) included within the
16 Minnesota statute and relied upon by the Minnesota court in reaching its
17 conclusion is conspicuously absent from NRS 484B.700. Because the statutes
18 have significantly different requirements, a comparison of the two is unhelpful.

20 ⁶ 2008 WL 2168348 (Minn. 2008)

21 ⁷ Minn. Stat. §169.03

1 The second Virginia case⁸ includes no discussion of a controlling statute at
2 all. Apparently, the Virginia legislature has not undertaken the issue as the
3 Nevada legislature has. This glaring difference renders whatever persuasive
4 power this decision might otherwise have completely specious. The court itself
5 stated that “the line demarcating the boundary of sovereign immunity in Virginia
6 is indistinct; indeed, at least one Supreme Court of Virginia jurist has described
7 the case law applying the sovereign immunity doctrine as an “immunity-liability
8 patchwork” and a “maze of confusion.” 349 F.Supp.2d 990, 994 (2004)
9 However, in Nevada we enjoy the guidance of the legislature in this situation in
10 the form of NRS 484B.700. As a result, we know just what the boundaries are:
11 we know what an operator of an emergency vehicle may and may not do when
12 entering an intersection. We know that such a driver may “[p]roceed past a red or
13 stop signal or stop sign, but only after slowing down as may be necessary for safe
14 operation.” NRS 484B.700 (1)(a) (emphasis added). This clear language removes
15 any discretion that an operator may otherwise have in this area by clearly stating
16 what actions must be taken before entering the intersection.

17 The Texas case cited by Respondent, *Rivas v. City of Houston*, 17 S.W.3d
18 23 (2000), also does not address statutory requirements such as those imposed by
19 NRS 484B.700. This distinction cannot be understated. Nevada law makes it
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21 ⁸ *Muse v. Schleiden*, 349 F. Supp. 2d 990 (E.D. Va. 2004)

1 clear that emergency vehicle drivers do not have discretion to proceed past a red
2 or stop signal UNLESS they have first “slow[ed] down as may be necessary for
3 safe operation.” NRS 484B.700(1)(a). The fact that Sergeant Cargile’s vehicle
4 crashed into Ms. Glover’s vehicle - which indisputably had the right of way – is
5 conclusive proof that Sergeant Cargile violated this mandatory statutory provision.

6 If the intent of the legislature was not clear from that provision alone, any
7 ambiguity is resolved by the inclusion of section 4 in NRS 484B.700:

8 The provisions of this section do not relieve the driver
9 from the duty to drive with due regard for the safety of
10 all persons and do not protect the driver from the
consequences of the driver’s reckless disregard for the
safety of others. NRS 484B.700 (4)

11 Finally, in citing to *Pletan v. Gaines*, 494 N.W.2d 38 (Minn. 1992)
12 Respondent once again looks to Minnesota, a jurisdiction which does not require
13 emergency vehicle operators to slow down prior to entering an intersection. Once
14 again, the provisions of the relevant Minnesota statute are so disparate to those of
15 NRS 484B.700 as to really constitute no relevance at all.

16 Unlike the jurisdictions cited to by Respondent, Nevada has specifically
17 addressed the very scenario that gives rise to this case: An official vehicle
18 responding to an emergency call which proceeds past a red or stop signal. In
19 Nevada, before an operator of such a vehicle may do so he or she must slow down
20 “as may be necessary for safe operation.” Sergeant Cargile’s conduct on
21

1 November 5, 2012 clearly violated this provision. Had Sergeant Cargile slowed as
2 was “necessary for safe operation” the crash which injured Ms. Glover would not
3 have occurred, since by definition causing a crash is not “safe operation.”

4 **G. The Responding Brief makes no mention of NRS 484B.700, the**
5 **controlling authority in the case at bar.**

6 Respondent cheekily asserts that “[c]ase law directly on point from other
7 jurisdictions favors a finding of discretionary immunity – and is never addressed
8 by Appellant.” *Responding Brief*, at page 10. However, as discussed extensively
9 *supra*, each of those case is easily distinguished for the reasons set forth above.
10 While chastising Appellant for allegedly ignoring relevant law, Respondent filed a
11 30 page Responding Brief which, incredibly, makes absolutely no mention of
12 NRS 484B.700, the Nevada statute which directly addresses the situation at bar.

13 Respondent’s arguments that Sergeant Cargile is entitled to immunity for
14 the crash he caused completely ignore the fact that the very discretion which
15 Respondent’s argue was being exercised is specifically limited by Nevada Law.

16 **H. Material issues of fact remain which will be determinative of**
17 **whether Sergeant Cargile complied with NRS 484B.700.**

18 Respondent further argues that the issue of whether Sergeant Cargile had his
19 lights and siren activated at the time of the crash is “not material.” However, the
20 statutory authority granted to an operator of an emergency vehicle to proceed past
21 a red signal is expressly contingent on whether the emergency vehicle is “making

1 use of ...(a) Audible and visuals signals; or (b) Visual signals only” NRS
2 484B.700(2). Absent the display of either lights and siren or emergency lights, an
3 operator like Sergeant Cargile has NO discretion to violate a red traffic signal.
4 This threshold issue of whether Sergeant Cargile’s vehicle was displaying lights
5 and/or siren is one for a trier of fact to decide. There is competing evidence on this
6 issue in this case. The determination of this fact will be a substantial factor in
7 further determining whether Sergeant Cargile was in compliance with these
8 prerequisite requirements.

9 Likewise, a jury could reasonably determine that Sergeant Cargile’s decision
10 to enter the intersection on a red light when, by his own admission “due to the lay
11 of the land at the intersection (a large hill is built up at the southwest corner of the
12 intersection), visibility of oncoming eastbound traffic on Cheyenne, from Cargile’s
13 position was very limited”⁹ was reckless. A factual determination that Sergeant
14 Cargile’s actions constituted a “reckless disregard for the safety of others” would
15 render Respondents liable for Appellant’s injuries under the express language of
16 NRS 484B.700(4).

17 **I. Sergeant Cargile’s conduct was not merely an abuse of discretion.**

18 Respondent argues that Sergeant Cargile’s actions at the time of the crash
19 can only rise to an “abuse of discretion.” However, as discussed at length *supra*,
20

21 ⁹ Responding Brief, page 5 -10

1 there is no indication within the clear language of NRS 484B.700, or otherwise,
2 that compliance therewith is “discretionary.” Therefore, the protections of NRS
3 41.032 will not shield Respondents from liability.

4 J.

5
6 **b. CONCLUSION**

7 Japonica Glover-Armont, Plaintiff/Appellant in this matter, requests that
8 this Court reverse the District Courts’ erroneous findings of fact and conclusions
9 of law, and find instead that: (1) the discretionary immunity under NRS does not
10 bar a governmental actor from being sued for negligence, 2) that violating safety
11 rules and the City’s own policies in not a discretionary function, 3) there are
12 numerous issues of material fact as to Cargile and the City’s use of due care that
13 must be decided by a jury.

14
15 **CERTIFICATE OF COMPLIANCE**

16 1. I hereby certify that this brief complies with the formatting
17 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and
18 the type style requirements of NRAP 32(a)(6) because this brief has been prepared
19 in a proportionally spaced typeface using Microsoft Word 2010 in Times New
20 Roman size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 3,626 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of September, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1), I certify that on this date, I served the foregoing
APPELLANT'S OPENING BRIEF on all parties to this action by electronic
service as follows:

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Dated this 8th day of September, 2017.

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