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.

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 OPENING BRIEF

ADAM GANZ, ESQ.
Nevada Bar No. 6650
MARJORIE HAUF, ESQ.
Nevada Bar No. 8111
DAVID T. GLUTH, II, ESQ.
Nevada BarNo. 10596
GANZ & HAUF
8950 W. Tropicana Ave., Ste. 1
Las Vegas, Nevada 89147
Tel: (702) 598-4529
Fax: (702) 598-3626

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. Supreme Court Cases

B. Federal Cases (Ninth Circuit)

C. Federal Cases (Non-Ninth Circuit Cases)

D. Federal Cases (Nevada District Court Cases)

E. Nevada State Cases

F. <u>Non-Nevada State Cases</u>

G. <u>Nevada Revised Statutes</u>

H. Nevada Rule of Appellate Procedure

I. Nevada Rule of Civil Procedure

I. NRAP 26.1 DISCLOSURE:

The undersigned counsel of record certifies that Appellant is an individual and there are no parent corporations of publicly held companies applicable in this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal. In District Court, Japonica Glover-Armont was represented the law firm of Ganz & Hauf. On Appeal, Adam Ganz, Esq., Marjorie Hauf, Esq., and David T. Gluth, Esq., of the law firm of Ganz & Hauf, represent Appellant.

II. JURISDICTIONAL STATEMENT:

This is an appeal from (1) an Order granting a Motion to Reconsider Defendants/Appellees' Motion for Summary Judgment, (2) an Order granting Defendants' Motion for Summary Judgment, and (3) a post-trial award of costs pursuant to NRS 18.110. Appealability is established by NRAP 3A(b)(1) and (8). The appeal is timely because notice of entry of the Order in this case was served on July 6, 2016, and the Notice of Appeal was filed on August 3, 2016.

III. APPELLANT'S STATEMENT REGARDING ROUTING:

Pursuant to NRAP 28(a)(5), Appellant states that this matter is not presumptively retained by the Supreme Court pursuant to NRAP 17. This matter is presumptively assigned to the Court of Appeals because it involves the appeal from an Order granting a pre-trial motion in a tort case resulting in a judgment of

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

$250,000 or less pursuant to NRAP 17(b)(2). Appellant also appealed the judgment.

IV. STATEMENT OF ISSUES:

1. Did the District Court abuse its discretion when it granted Defendants' motion for reconsideration, and allowed Defendants to reargue the same motion to the District Court that was previously denied, because there was no new evidence or change in the law and the District Court's original decision was not clearly erroneous?

2. Did the District Court err when it granted summary judgment in favor of Defendants based on discretionary immunity under NRS 41.032(2) when the District Court previously found that there were disputed issues of material fact that were never resolved by a jury, discovery or any new evidence, as to the issue of whether a City police officer was acting with due care when responding to an emergency call?

3. Did the District Court err when it granted summary judgment in favor of Defendants based on discretionary immunity under NRS 41.032(2) when the undisputed evidence in the record demonstrated that a police officer of the City of North Las Vegas violated its own safety rules and policies in causing a crash?

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

4. Did the District Court err when it concluded that discretionary immunity bars all claims against a police officer so long as they did not commit intentional torts or acted in "bad faith"?

5. Did the District Court err when it considered inadmissible evidence, specifically, the citation and crash report, when deciding Defendants' motion for reconsideration and motion for summary judgment?

6. Whether the award of costs to Defendants was appropriate?

V. STANDARD OF REVIEW:

A. The Motion for Reconsideration (Abuse of Discretion)

The standard of review of the trial court's decision on a motion for reconsideration is an abuse of discretion. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (noting that a motion for reconsideration is reviewed for an abuse of discretion where appealed with the underlying judgment). "A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

B. The Motion for Summary Judgment (*De Novo*)

This Court reviews a district court's granting of summary judgment *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). This

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

Court does not have to give any deference to the lower court's findings. *Id*. This Court has also explained that "[t]he application of sovereign immunity under NRS Chapter 41 presents mixed questions of law and fact." Therefore, this Court reviews "conclusions of law, such as those entailing statutory construction, *de novo*," but "will not disturb a lower court's findings of fact if supported by substantial evidence." *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 755, 191 P.3d 1175, 1179 (2008). Additionally, if the District Court's findings of fact "rest on an erroneous view of the law, they may be set aside on that basis." *Stancle v. Clay*, 692 F.3d 948, 953 (9th Cir. 2012) *citing Pullman–Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

VI. STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

This is a case for damages caused by a police officer's failure to follow the City of North Las Vegas' own policies, causing a car crash with one of its citizens. In the early morning of November 5, 2012, Plaintiff/Appellant, Japonica Glover-Armont ("Glover"), was seriously injured when she was driving and T-boned by Defendant/Respondent, City of North Las Vegas police officer, John Cargile ("Cargile").[1] (A. App. Vol. 1, 0001-0009). Glover was driving eastbound on Cheyenne approaching the intersection of 5th Street in North Las Vegas, Nevada.

[1] For brevity, Defendant/Respondents, John Cargile and City of North Las Vegas, are collectively referred to herein as "Defendants."

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

To her right, a large hill blocks her view of northbound traffic. Cargile, while driving a vehicle owned by his employer, Defendant, City of North Las Vegas ("City"), attempted to cross the blind intersection on a red light without his siren while responding to an emergency call. Cargile crashed into the front side of Glover's vehicle. As a result of the crash, Glover sustained $23,711.69 in medical damages.

On June 10, 2013, Glover filed a Complaint against Cargile and the City (collectively "Defendants") alleging negligence, vicarious liability, negligent entrustment and negligent hiring, training and supervision. (A. App. Vol. 1, 0002-0009)

On December 22, 2015, Defendants filed a Motion for Summary Judgment based on the theory of discretionary immunity pursuant to NRS 41.032(2). (A. App. Vol. 2, 0427-0475). Glover opposed the motion on January 11, 2016. (A. App. Vol. 3, 0476-0664).

The District Court heard argument on February 2, 2016. (A. App. Vol. 4, 0672-0702). The District Court requested supplemental briefing and the motion was continued to March 1, 2016. Supplemental briefing was filed on February 23, 2016. (A. App. Vol. 4, 0703-0860).

On March 1, 2016, the hearing on Defendants' Motion for Summary Judgment, after further briefing was received, took place. The District Court

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

appropriately denied Defendants' Motion for Summary Judgment making factual findings that there were issues of fact that must be presented to the jury. (A. App. Vol. 4, 0861-0884)

On April 7, 2016, Defendants filed a Motion for Reconsideration. (A. App. Vol. 4, 0085-0890). The motion did not present any new facts or issues of law. Instead of allowing the factual issues still in dispute to be decided by a jury, the District Court granted Defendants' motion for reconsideration and motion for summary judgment. (A. App. Vol. 5, 0927-0929). Notice of Entry of Judgment was filed on July 5, 2016. (A. App. Vol. 5, 0956-0959). Plaintiff promptly initiated her appeal of this order and judgment on August 3, 2016. (A. App. Vol. 5,0973-1005).

On July 6, 2016, Defendants filed a Memorandum of Costs and Disbursements. (A. App. Vol. 5, 0930-0955). On July 11, 2016, Glover filed a Motion to Retax Costs. (A. App. Vol. 5, 0961-0968). The District Court granted the motion in part and ordered a total of $4,055.50 in costs to Defendants. (A. App. Vol. 5, 1006-1007). On October 27, 2017, the parties stipulated to stay execution of the judgment for costs pending the outcome of this appeal. (A. App. Vol. 5, 1008-1009).

VII. STATEMENT OF FACTS

A. Factual Background

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

This case involves a motor vehicle crash that occurred on November 5, 2012 between Glover, a civilian, and Cargile, a North Las Vegas Police Officer, while he was on duty. (A. App. Vol. 1, 0002-0009). Glover was driving on Cheyenne heading eastbound and approaching the intersection of 5th Street in North Las Vegas, Nevada. *Id*. Cargile, while driving a vehicle owned by his employer, Defendant, City of North Las Vegas, was driving northbound on 5th Street. *Id*.

Due to a huge hill built up at the southwest corner of the intersection, visibility from oncoming eastbound traffic was blocked. Defendants admit that it was "impossible" for Cargile to determine whether any vehicle were approaching. (A. App. Vol. 2, 0429:15-18). Yet, Cargile chose to cross the intersection on a red light without his siren causing a significant impact with Glover's vehicle. As a result of the crash, Plaintiff suffered injuries to the cervical spine and incurred more than $23,000 in medical expenses. (A. App. Vol. 2, 0425)

B. Disputed Issues of Material Fact

Discovery in this case revealed several issues of disputed material facts that should have been decided by a jury, not the District Court. Some of the issues the District Court originally found to be issues of material fact include the following: (1) Cargile did not have his sirens on at the time of the crash; (2) Cargile hit Glover's vehicle in the intersection; and (3) Cargile failed to use due care when

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

running the red light at the blind Cheyenne intersection violating City of North Las Vegas Policy.

1) Cargile did not have his sirens on at the time of the crash

Everyone agrees that it is a disputed issue of fact as to whether Cargile both his lights and sirens on at the time of this crash. In sworn interrogatories, Glover stated that Cargile did not have his sirens on and she did not see the lights due to a large hill that obstructed the view. (A. App. Vol. 1, 0023). Glover again at deposition testified that Cargile did not have his sirens on at the time of the crash. (A. App. Vol. 1, 0054:24-25:9).

On October 1, 2014, Cargile's deposition was taken. (A. App. Vol. 1, 0067). During his deposition, Cargile disputed Glover's sworn testimony and stated that he had both his lights and sirens on as he approached the intersection. (A. App. Vol. 1, 0102:13-15). At the same time, Cargile agreed that a driver in an emergency vehicle must never enter an intersection on a red light until it is clear and safe, even if he has his lights and sirens on. (A. App. Vol. 1, 090:13-25). Mr. Cargile testified he must use due care:

> Q. Why do you believe that these are important -- just very basic safety rules?
>
> A. **I refer to it as driving with due care. That's just it. It's trying to minimize or limit the risk to all the drivers on the roadway** by yet being able to expedite our response time to those that are in need.

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

Id. (emphasis added). Cargile knew the view at the intersection was blocked by a huge hill and decided to run a red light without his sirens. Therefore, if Cargile did not have his sirens, or his lights were blocked by the 25-foot hill when he ran the light, by his own admission, he did not enter the intersection when it was safe to do so. A reasonable juror could have concluded that Cargile knowing this was not acting with due care and negligent. These material issues of fact as to whether Cargile entered the intersection in a safe manner was never decided by a jury.

2) Cargile hit Glover's vehicle in the intersection

The parties also produced ample evidence that demonstrates material issues of fact as to the position of the vehicles at impact. Glover testified she was traveling 40 to 45 miles per hour, as she approached intersection on a green light, when she saw Cargile about 50 feet from the intersection. (A. App. Vol. 1, 0044). Glover slammed on her brakes and both cars were moving when Cargile hit her vehicle on the left side. (A. App. Vol. 1, 0051). Cargile says he was stopped for 5 to 6 seconds before he attempted to clear the intersection on the red light only going "a couple miles per hour." (A. App. Vol. 1, 0114:15-20). Cargile claims he was stopped at the time of impact. *Id*.at 7-14.

Glover designated Sam Terry, an expert in accident reconstruction. (A. App. Vol.1, 0233) Mr. Terry performed a reconstruction analysis of this crash. Mr. Terry opines that Cargile was not stopped at the time of impact as he testified. (A.

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

App. Vol.1, 0220, p.18) Instead, Cargile was traveling between 6 and 8 miles per hour at the time of the crash. *Id*. Mr. Terry noted that all the damage to Glover's vehicle after the crash existed on the fender, door, and wheel with no visible damage located on the leading edge of her front bumper. *Id*. at 0213, p. 11. Mr. Terry further opined that the physical evidence shows Cargile hit Glover's vehicle in the intersection, not vice versa, meaning Glover had control of the intersection when Cargile hit her. *Id*. Mr. Terry opines that Glover most likely never heard Cargile's siren (whether it was on or not). *Id*. Finally, Mr. Terry concluded that Cargile, who chose to run the red light, was in the best position to avoid this crash. *Id*.

Cargile designated a rebuttal expert, David Ingebretsen, to discuss the nature of the impact. (A. App. Vol. 2, 0247) Predictably, Mr. Ingebretsen disagreed with Glover's expert Mr. Terry and claimed that it did not matter if "one car hit another car. (A. App. Vol. 2, 0258). Mr. Ingebretsen also deemed it was "irrelevant" if Glover did not hear a siren. *Id*. at 0257.

Whether Glover had control of the intersection when Cargile hit her is a material issue of fact that were never decided by a jury. This is important because a reasonable jury could have concluded that nature of the impact shows Cargile was responsible for causing this crash by violating safety rules and failing to exercise due care. Consistent with the expert opinion in the case, the jury could

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

have easily found that Glover had control of the intersection when Cargile was going too fast and without warning struck the side of Glover's vehicle. Therefore, Cargile chose to enter the intersection unsafely, even though he knew the intersection was blind endangering the public.

3) Cargile failed to use due care when running the red light at the blind Cheyenne intersection violating City of North Las Vegas Policy

There is also ample evidence that demonstrates Cargile failed to use due care when he entered the intersection on a red light. Cargile endangered the public when he knew the intersection was obstructed when chose to run the red light. He was also aware of safer routes to get to where he was going.

Everyone also agrees that it was City policy that when responding to emergency calls Cargile was required to use both his lights and sirens.

On October 1, 2015, Glover deposed the City's investigating officer, Jim Byrne's. Officer Byrne testified that if Defendant Cargile chose not have his sirens on when entering the intersection on a red light, he would be violating of North Las Vegas' policy. (A. App. Vol. 1, 00184:9-16) .

Officer Byrne further testified that an emergency driver must never enter an intersection on a red until the intersection is safe to enter. (A. App. Vol. 1, 0090:13-18). Officer Byrne agreed that this is important because the majority of collisions occur between an emergency vehicle and another vehicle when the

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

emergency vehicle enters on a red light. (A. App. Vol. 1, 0155: 22-16-0156:3-7). In other words, this type of harm caused by Cargile from violating the City's safety rules was foreseeable. *Id*. As detailed above, it was also undisputed that Cargile knew a huge hill about twenty-five feet high on the corner of the intersection that blocked the view of oncoming traffic on Cheyenne:

> Q. When you are at that stop bar with that hill on your left, are you able to see -- and I'm talking about stopped right before the stop bar. Are you able to see the eastbound traffic on Cheyenne?
>
> A. Yes, for only a certain distance. There's two limiting factors I see on that one. **One is the obstruction, the large hill that's on that southwest corner, and two is the limited lighting at night to be able -- how far up the hill you can see**.

(A. App. Vol. 1, 0107:20-25- 0108:1-10) (emphasis added).

Knowing that the intersection was obstructed and lighting was limited, Cargile still chose that route on Cheyenne, even though he was also aware of safer choices and "several different ways to get there." (A. App. Vol. 1, 098:9-19). Cargile also admits that regardless if he had lights, or lights and sirens, that he must not enter an intersection until it is safe to do so. (A. App. Vol. 1, 090:13-18).

The material issue of whether Cargile chose to violate City policy and enter the intersection unsafely was taken out of the hands of the jury. There is no question that based on the evidence in this case reasonable jury could have found that Cargile violated the City's policies when he chose to enter that blind

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

intersection on a red light in the manner that he did, and therefore, liable to for the damages he caused.

C. Summary Judgment Hearings

1) February 2, 2016: District Court Finds There are Issues of Material Facts still in Dispute

Discovery closed on November 20, 2015. (A. App. Vol. 2, 0402-0405). On December 22, 2015, despite the clear issues of disputed material facts, Defendants filed a motion for summary judgment based on discretionary immunity. (A. App. Vol.2, 0427). Defendants claimed that because Cargile was responding to an emergency call it does not matter if Cargile chose to enter the intersection unsafely or if Cargile chose to violate City policy. (A. App. Vol. 2, 0436-0467).

The District Court heard oral argument on February 2, 2016. At that hearing, Defendants conceded there was several issues of fact. First, Defendants conceded that it was an issue of fact as to whether Cargile had his lights and siren on at the time of this crash:

> THE COURT: Okay. This is Defendants' Motion for Summary Judgment. I've had an opportunity to review the moving papers. I think the issue that I'm looking at, basically, both of you are in opposite positions, is with respect to **whether or not -- what evidence can be supported that the red lights and sirens were on in the vehicle**, so.
>
> MR. CRAFT: Well, **there is a dispute, a factual dispute on that point**.

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

(A. App. Vol. 4, 0673: 14-21). (emphasis added). While Defendants later attempted to argue that it did not matter if the lights and sirens, the District Court properly recognized that this was a disputed issue of material fact. (A. App. Vol. 4, 0675:18-23. (emphasis added).

In fact, Defendants acknowledged several times during oral argument that the issue as to whether or not Cargile was violating City policy was a factual dispute:

> COURT: I know, but the judgment in this particular case, depend on **what is believed factually, is a judgment -- you're going to -- for purposes of protecting the public and safety of the public and responding to crime, and then in response, he does something that puts the public in peril when he's going through a red light without notifying individuals** that he's -- that he's doing that, going for a call. So that's why --
> . . .
> MR. CRAFT: -- least, undisputed, yeah, and he says he has his sirens on. **I know that's a factual dispute**.

(A. App. Vol. 4, 0679:6-18).

Defendants concede that there was an issue of fact as to whether or not Cargile's vehicle struck Glover vehicle or whether Glover's vehicle struck Cargile's vehicle:

> THE COURT: Did it appear that the -- that the squad car struck the other car or the other car struck the squad car?
>
> MR. CRAFT: **We're going to go ahead and say that's a factual dispute**.
>
> MR. CRAFT: **We have competing experts**.

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

(A. App. Vol. 4, 0688:14-18. (emphasis added). During argument, Glover pointed out that the disputed material fact about the sirens goes directly to the issue of whether Cargile was acting with due care under City policy, and under NRS 484B.700(4) which requires police officers to use due care even if they are responding to a call. (A. App. Vol. 4, 0681:1-9).

While Defendant conceded various issues of fact, Defendants finally argued that they believe that have unfettered discretion to do whatever they want just because Cargile was on duty at the time of the crash. Unbelievably, Defendants claimed they even get to decide what "due care" is:

> MR. CRAFT: And I believe as we've cited in our case, in our motion, **it's his discretion to decide what is due care** even. All these cases that they're citing don't have anything to do with discretionary immunity. They're citing to --
>
> THE COURT: Well, isn't that the factual position that the plaintiff and the defense would always be inapposite with, what is actually due care? **So you're saying it just -- it's the officer's unfettered discretion to decide whether or not it's due care. If he wants to 200 miles an hour down a residential street and he thinks that's due care, under your scenario, the plaintiff would never have a claim**.

(A. App. Vol. 4, 0689:17-25). (emphasis added).

The District Court rightly rejected such tortured argument. The District Court specifically found that it was a "factual dispute" as to whether Cargile was acting with due care. (A. App. Vol. 4, 0690::24-25; 0610:20:1)(emphasis added).

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

The District Court did not decide the motion at the time and requested supplemental briefing as to the diagram of the crash scene and the locations of the vehicles. (A. App. Vol. 4, 0695:13-16). The parties provided supplement briefing. (A. App. Vol. 4, 0703-0860).

2) March 1, 2016: District Court Finds There are Issues of Material Facts still in Dispute And Denies Summary Judgment

On March 1, 2016, the District Court heard continued argument on Defendants' Motion for Summary Judgment. The District Court specifically found that there were genuine issues of material fact that need to be decided by a jury:

> THE COURT: Okay. I asked to have you supplement your previous motion for reasons to get around questions that I had factually. And I don't believe what's been presented to me has satisfied my concerns factually. So for those reasons, I'm going to deny your motion without prejudice. **I do believe there are still genuine issues of material fact here. The simple fact is the arguments between one's perception versus another's perception as to what they saw with respect to the lights and siren or what they saw with respect to somebody coming down the street and the officer proceeds**. I understand the testimony. The officer felt that he had –
> . . .
> So because that -- because the officer's statement is due to -- I mean, is subject to credibility and believability, **I believe that that's a factual issue that the jury has to make a determination of**.

(A. App. Vol. 4, 0862::11-21;0863:1-13. (emphasis added).

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

The District Court also properly found there are issues of material fact regarding whether or not Cargile was using due care and acting in safe manner that must be decided by a jury:

> THE COURT: Well, I'm not -- I'm not -- that kind of goes to a point whether or not the officer saw. I mean, and it may be -- it may be a position that the jury looks at and says, you know what, she entered it, she didn't have her lights on. The officers -- there's no way he can see it. And so when he entered, he entered appropriately believing that -- that he did it with lights and siren. They may believe that that's a requirement, you know, for him to enter in a safe manner. **So I do believe it's an issue of material fact**. **I disagree with you. I believe that that's an issue that the jury has to decide on.**

(A. App. Vol. 4, 0865:5-18). Despite Cargile's arguments to the contrary, the District Court repeatedly held that there were disputed issues of material fact that must go to a jury. The District Court properly denied summary judgment.

3) May 31, 2016: District Court Reverses Itself Despite No New Evidence on the Disputed Issues of Material Fact, And Grants Summary Judgment On Defendants' Motion For Reconsideration By Applying the Wrong Standard

Discovery had long been closed and nothing had changed since the District Court found there remained issues of material fact and properly precluded summary judgment in this case on March 1, 2016. Yet, about a month later, on April 7, 2016, Defendants filed a motion to "reconsider" to reargue the issue, with absolutely no new issues of fact or law that could have surfaced in the intervening 36 days. Instead, Defendants cited two old cases, *Franchise Tax Bd. of Cal. v.*

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

Hyatt, 130 Nev. Adv. Op. 71, 335 P.3d 125, 136 (Nev. 2014) and *Falline v. GNLV Corp*., 107 Nev. 1004, 1009 & n. 3, 823 P.2d 888, 892 & n. 3 (1991)[2], as some sort of new authority for their position that immunity always applies *unless* Defendants act in bad faith and/or commit intentional torts. (A. App. Vol. 4, 0888:9-10).

On May 31, 2016, the District Court heard oral argument on the motion to reconsider. During the hearing, the court inappropriately considered inadmissible evidence to decide Defendants' motion to reconsider summary judgment. The District Court stated that it was "influenced" by the fact that Glover was cited for having no headlights:

> THE COURT: Right. But I still can't -- but then **I'm influenced by the fact that your client was adjudged guilty of driving without her lights on.**
> . . .
> THE COURT: -- it something -- **isn't it a factual scenario that the Court can consider when I'm making** – trying to make a factual determination of what happened on this?

(A. App. Vol. 5, 0910:13-25;0911:1-20). (emphasis added). Then, the District Court adopted the wrong standard proffered by Defendants that Cargile could only be liable if he there was evidence of a bad faith[3]:

---

[2] As detailed below, both *Falline* and *Franchise Tax Bd.* are inapposite to the case at bar. *Falline* dealt with the bad faith denial of worker's compensation benefits and *Franchise Tax Bd v. Hyatt* discussed where a tax payer alleged intentional torts and bad faith conduct during audits.

[3] As detailed herein, Glover submits this is not the law with regard to discretionary immunity and there was ample evidence for jury to reasonably conclude that Cargile violated City policy and entered the intersection unsafely.

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

> THE COURT: Right. The issue that I had and what I was trying to determine is whether or not it would get to **a level that a jury could make a determination of whether or not they're allowed on the terms of whether or not there was some type of bad faith act**.

(A. App. Vol. 5, 0907:6-10) (emphasis added). Using the improper "bad faith" test, the District Court forgot about the material issues of fact he previously found and did a "180." The District Court improperly took this case out of the hands of a jury and granted summary judgment even though none of the issue of fact were every decided. This case was not heard on the merits and Glover did not get her day in court.

4) July 5, 2016: Order Granting Summary Judgment Omits Material Issues of Fact That Have Never Been Resolved And Made Erroneous Conclusions of Law

The Order granting Defendants' Summary Judgment was a sparse three pages. (A. App. Vol. 5, 0927-0929) The District Court made only three findings: 1) That Cargile responding to an emergency call while driving a police vehicle, 2) That Cargile made the decision to proceed through the intersection at 5th Street and Cheyenne on a red light, and 3) That a collision occurred while Cargile was "clearing the intersection" *Id*. Conspicuously missing were any findings the court made related to the manner in which Cargile entered the intersection. *Id*.

However, there was also evidence that Cargile knowingly violated City policy when there we safer choice to be made which could lead a jury to find there was bad faith here. Unfortunately, a jury never got to hear the evidence.

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

The District Court had already found there was substantial evidence in the record that demonstrated that there remained in dispute, material issues of fact as to whether Cargile was using due care, including but not limited to, whether he violated City policy, whether he chose to run the light in an unsafe manner, whether he had his sirens on, who had control of the intersection, and whether he ignored safer routes. Defendants conceded many of those issues were disputed as well.

Based on those sparse findings, the District Court made erroneous conclusion of law. The court concluded that just because Cargile was responding to an emergency call, he was protected by discretionary immunity. (A. App. Vol. 5, 0928, ¶2-3). The District Court improperly concluded that because this was a negligence case and no intentional tort or bad faith were pled that Cargile and the City were immune. (A. App. Vol. 5, 0928, ¶4).

VIII. SUMMARY OF ARGUMENT

The evidence is in this case overwhelmingly shows several undecided and disputed issues of material fact that preclude summary judgment. The District Court repeatedly made factual findings that there were genuine issues of fact about Cargile's actions, and the City's, exercise of due care when Cargile chose to run a red light at a blind intersection, without his siren, when responding to a call and

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

crashed into Glover. The record shows that the District Court properly denied Defendants' motion for summary judgment in the first instance.

Days later, with no resolution of those issues of fact, the District Court reversed course and unexplainably took this case out of the hands of the jury. Defendants' muddied the applicable standard of law in this case and asserted that Cargile and the City are immune from liability so long as they did not commit intentional torts or acted in "bad faith," even when they concede they are in violation of their own policies to keep the public safe. Unbelievably, Defendants try to drive a truck through the discretionary immunity doctrine and claim that it is up to them to "decide" what even due care means, and therefore, they cannot be sued for negligence period. Essentially, Defendants argue that when a police officer responds to an emergency call, they can choose to be as reckless and unsafe as they want so long as they did not "intend" to hurt someone. Defendants are wrong.

The District Court erred by failing to take the evidence in a light most favorable to the Plaintiff; as the District Court and this Court must do. The District Court erred by applying the wrong standard of law to the facts of this case. The District Court erred by usurping the role of the jury and ignoring the disputed issues of material fact. Fortunately, this Court can right this wrong. There are issues that must be decided by a jury. Glover is entitled to her day in court and the

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

case should be heard on the merits. Glover requests that summary judgment be reversed and this case remanded for a trial on the merits.[4]

IX. ARGUMENT

A. The District Court Abused Its Discretion When It Allowed Defendants' Motion to Reconsider the Denial of Its Motion for Summary Judgment When There was No Change in Law or Facts to Warrant Reconsideration.

In Nevada, "[o]nly in rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). A motion for reconsideration is not a mechanism for rearguing issues presented in the original filings. *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985). In fact, "points or contentions not raised in the original hearing cannot be maintained or considered on rehearing." *Achrem v. Expressway Plaza Ltd*., 112 Nev. 737, 742, 917 P.2d 447, 450 (1996).

Only 36 days after the District Court denied Defendants motion for summary judgment expressly finding there were issues of fact for a jury, Defendants filed a motion to reconsider, rearguing the points that had already been rejected. There were no new issues of fact and no new law to support

[4] Defendants were awarded taxable costs as the prevailing party in this matter. If this Court overturns any portion of the District Court's judgment, this award of costs should also be overturned.

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

Defendants' argument for reconsideration. Defendants cited two old cases of *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. Adv. Op. 71, 335 P.3d, 125, 136 (Nev. 2014) and *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009 & n. 3, 823 P.2d 888, 892 & n. 3 (1991), in an effort to reframe the standard that Defendants cannot, ever, be sued for negligence. (A. App.) Not only did Defendants fail to reference these cases in their Motion for Summary Judgment, the cases did not change anything about the issues of fact, or the applicable law, in this case. Both of those cases are distinguishable from the cases at bar.

In *Falline*, this Court dealt with the bad faith refusal to pay workers' compensation benefits by a self-insured employer. The Court held that "if failure or refusal to timely process or pay claims is attributable to bad faith, immunity does not apply whether an act is discretionary or not." In other words, this Court recognized an exception to discretionary-function immunity for intentional torts and bad-faith conduct. *Id*. at 1009 & n. 3. This Court has never held that all negligence claims are barred by NRS 41.032, and in fact, eight years later, in *Martinez v. Maruszczak*, 168 P.3d 720, 726 (Nev. 2007), this Court expressly held that certain acts, although discretionary, do not fall within the discretionary-function exception's ambit because they involve 'negligence unrelated to any plausible policy objectives.'" *Id*. at 446. (adopting *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988), and *United States v.*

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991) tests to determining the applicability of discretionary-function immunity).

The *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. Adv. Op. 71, 335 P.3d 125, 136 (2014), *vacated and remanded sub nom. Franchise Tax Bd. of California v. Hyatt* on other ground, 136 S. Ct. 1277, 194 L. Ed. 2d 431 (2016) case involved a taxpayer who brought an action against an out-of-state franchise tax board alleging intentional torts and bad faith conduct during audits. The tax board argued that *Martinez* test abolished the *Falline* intentional tort or bad-faith conduct exception. *Id*. This Court never overruled the *Martinez* test. Instead, it simply reaffirmed the *Falline* exception, that NRS 41.032 does not protect a government employee for intentional torts or bad-faith misconduct. *Id*. P.3d 125 at 139. This Court did not limit the waiver of discretionary immunity to only intentional torts and bad faith as Defendants suggest. Such a ruling it would be contrary to the public policy of this State and contradictory to the holding in *Martinez*.

There was nothing new in those cases, and no changes in the material facts, to support a change in the court's prior ruling. Lastly, the District Court, in reconsidering its previous denial, never came to the conclusion that it acted clearly erroneous. That discussion and standard never was contemplated as the court simply changed its mind. The standard for a motion to reconsider, again, is

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

new evidence or law and/or the previous decision was clearly erroneous. The District Court never found that its previous ruling was clearly erroneous, and there was no new law or evidence to support a granting of the motion to reconsider. Therefore, the District Court abused its discretion by reconsidering its denial of summary judgment.

B. The District Court Erred When It Granted Defendants' Motion for Summary Judgment Because It Already Found Genuine Issue of Material Fact as to whether Defendants are immune from liability under NRS 41.032(2) That Were Never Resolved.

This Court reviews the Order on Summary Judgment *de novo*. It is well settled that Rule 56 of the Nevada Rules of Civil Procedures allows for summary judgment only when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." This Court has consistently and unambiguously defined the appropriate standard for summary judgment, holding that: "Summary judgment is only appropriate when, after review of the record viewed in light most favorable to non-moving party, there remain no genuine issues of material fact and moving party is entitled to judgment as a matter of law." *Harrington v. Syufy*, 113 Nev. 246, 248, 931 P.2d 1378, 1379 (1997). "In ruling on a motion for summary judgment, all of non-movant's statements must be accepted as true, and the trial court may not pass on the credibility of affidavits." *Id.* at 1379. "Properly supported factual allegations and all reasonable inferences of the party opposing summary judgment must be

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

accepted as true; however, conclusory statements along with general allegations do not create issue of material fact." *Michael v. Sudeck*, 107 Nev. 332, 334, 810 P.2d 1212, 1213 (1981). The non-moving party must forth specific facts demonstrating the existence of a genuine factual issue. *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). A genuine issue of fact exists when a rational jury could return a verdict for the nonmoving party. *Id.* at 731.

Here, the District Court properly found several issues of material fact that needed to be decided by the jury. These findings were supported by substantial evidence and even conceded by Defendants' counsel. The District Court improperly decided questions of fact, which are outside its purview. As there is sufficient evidence to establish genuine factual issues on these questions, Defendants are not entitled to summary judgment.

Moreover, this Court must review the evidence *de novo*. Taking the factual evidence in a light most favorable to Glover, and drawing all reasonable inferences from it, there are several issues of material fact that absolutely preclude summary judgment. There is no question that based on the evidence in this case a reasonable jury could find Cargile was negligent. A police officer driving a City vehicle running through a red light without sirens is not discretionary. A police officer driving a City vehicle choosing to run a red light in an intersection where the view is blocked by 25-foot-high hill is not

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

discretionary. A police officer violating City policy to act safely and needlessly endangering the public is not discretionary.

NRS 41.032(2) provides immunity from claims based on a state employee's exercise or performance of a discretionary function or duty only when it is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." Because NRS 41.032(2) mirrors the Federal Tort Claims Act ("FTCA"), this Court in *Martinez v. Maruszczak*, 168 P.3d 720, 726 (Nev. 2007), adopted the *Berkovitz-Gaubert* test in order to determine which acts are entitled to discretionary-function immunity. This Court held that to fall within the scope of discretionary-act immunity, a decision must (1) involve an element of individual judgment or choice and (2) be based on considerations of social, economic, or political policy. *Id.* at 445-447. When a case presents a close question as to whether the alleged conduct falls within the statute, the courts must favor a waiver of immunity. *Hagblom v. State Director of Motor Vehicles*, 1977, 571 P.2d 1172, 93 Nev. 599 (1977)

1. Defendant Cargile's actions were not discretionary.

Defendants argue that Defendant Cargile's actions of entering an intersection on a red light is discretionary just because he was responding to an emergency call while on duty. Although it might be discretionary to enter an intersection on a red light in that circumstance, it certainly is not discretionary to

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

enter the intersection unsafely. That is, once the choice is made to enter the intersection on a red light, Cargile must not needlessly endanger the public. City policies to keep the public safe must be followed. Lights and sirens must be used. A police office must not ignore a safer route of travel.

Consistent with the City of North Las Vegas policy testified to by both Cargile and responding Officer Byrne, NRS 484B.700 provides an emergency vehicle may enter on a red light if the vehicle is making use of " (a) Audible and visual signals; or (b) Visual signals only, as required by law." However, the Nevada Legislature has specifically waived any immunity resulting from the failure to drive with due care. A police officer is never allowed disregard the safety of the public just because he happen to be responding to an emergency call. *Roberts v. United States*, 724 F. Supp. 778, 790–91 (D. Nev. 1989) ("Conduct of a government agency or employee is not immune from scrutiny as a "discretionary function" simply because it involves an element of choice.") The plain language of NRS 484B.700 (4) is unambiguous:

> **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 not protect the driver from the consequences of the driver's reckless disregard for the safety of others.** (emphasis added).

This Court has held that discretionary immunity does not relieve a governmental actor from its obligation to act with due care. In the case of

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

William v. City of North Las Vegas, 1975, 541 P.2d 652, 91 Nev. 622, this Court held that the City was not immune from liability with regards to the death of a person who was electrocuted while working on a billboard because the City violated city ordinances when a power line was located too close to the billboard. This Court held that governmental immunity did not protect the City regarding its duty to act with care. *Id.*

In the case of *Johnson v. Brown*, 75 Nev. 437, 345 P.2d 754, 755 (1959), this Court held that a firefighter was not driving with due care when he was driving a fire engine truck in response to an emergency call. The firefighter was driving beyond the speed limit, ran a stop sign and crashed into another vehicle. As such the Supreme Court of Nevada held that the firefighter was liable to the plaintiff. *Id.*

The United States District Court, District of Nevada, in *Roberts v. United States*, 724 F. Supp. 778, 790–91 (D. Nev. 1989) has similarly applied the *Berkovitz-Gaubert* test adopted in Nevada and held that that the government was not immune because it violated Atomic Energy Commission regulations in carrying out certain aspects of the nuclear tests which resulted in the alleged injuries. *Id*.

Simply stated, the discretionary function cannot save the government from liability because once it decides to act, it is responsible to ensure its actions that

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

are not negligently carried out. In *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), the United States Supreme Court stated this principle as follows:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, **it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.**

Id. 350 U.S. at 69. (emphasis added). Other courts have also followed this well-established rule of law. The Second Circuit Court of Appeals held that once the park service made the decision to patrol, it was "not absolved of liability on a claim of discretionary function for the manner in which it executed that decision." *Caraballo v. United States*, 830 F.2d 19, 22 (2d Cir. 1987)

Here, under Nevada common law and NRS 484B.700, Cargile is not relieved of his duty to drive with due care and is still responsible for the consequences of his reckless disregard for the safety of others. Similarly, Cargile by his own admission is not relieved from following the City' safety policies. Just because he is driving an emergency vehicle and responding to a call, does not obviate his duty to drive safely, including taking the safest route,

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

following City's policies, and using his lights and sirens when entering an intersection on a red light.

The record in this case demonstrates ample evidence for a reasonable jury to conclude Cargile failed to act with due care. Glover testified that her view was blocked by the huge hill at the intersection. Glover testified that Cargile did not have his sirens on at the time of the crash. Cargile admits that he knew about the other safer routes but chose to run the red light anyway. Glover's accident reconstruction expert opines that Cargile hit Glover's vehicle and was in the best position to avoid the crash. It is simply up to a jury to decide this question of fact. Therefore, a genuine issue of material fact exists and the District Court must be overturned.

2. Cargile's decision to violate safety rules and City policies including running a red light without lights and sirens is NOT discretionary, it is NOT based on considerations of social, economic or political policy.

In *Martinez*, this Court held that "certain acts, although discretionary, do not fall within the discretionary-function exception's ambit because they involve 'negligence unrelated to any plausible policy objectives.'" *Id.* at 446. **The Court gave an example that a government employee who falls asleep while driving her car on official duty is not protected by the exception because her negligent judgment in falling asleep "cannot be said to be based on the purposes that the regulatory regime seeks to accomplish."** *Id.* (emphasis

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

added). The purpose of enacting this exception was "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* Therefore, "if the injury-producing conduct is an integral part of the governmental policy-making or planning, if the imposition of liability might jeopardize the quality of the governmental process, or if the legislative or executive branch's power or responsibility would be usurped, immunity will likely attach under the second criterion." *Id.*

This Court in *Martinez* performed an analysis of the *Berkovitz-Gaubert* test and opined that "**Dr. Martinez did not engage in policy-making decisions in this treatment of Mr. Maruszczak, he is not entitled to immunity from suit under NRS 41.032(2).**" *Id.* at 447. (emphasis added). Given that Nevada's waiver of sovereign immunity is to be broadly applied, the Court concluded that Dr. Martinez's proposed interpretation of discretionary-act immunity would violate the intent of the Legislature in enacting NRS 41.031. *Id. See also, Butler v. Bayer*, 123 Nev. 450, 168 P.3d 1055 (2007) (prison officials decisions coordinating an inmate's release were not based on considerations of public policy, therefore, the prison officials were not entitled to discretionary-act immunity under NRS 41.032(2); *Garcia v. United States*, 826 F.2d 806, 809 (9th Cir. 1987) ("While law enforcement involves exercise of a certain amount of

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

discretion on the part of individual officers, such decisions do not involve the sort of generalized social, economic and political policy choices that Congress intended to exempt from tort liability.") (citing *Caban v. United States*, 671 F.2d 1230 (2nd Cir. 1982)); *Nguyen v. State*, 1990 OK 21, 788 P.2d 962, 964-65 (Okla. 1990) (noting that the majority of states utilizing the FTCA immunity framework provide discretionary-act immunity for initial policy and planning decisions, but not for "operational level decisions made in the performance of policy."); *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230, 240 (Wash. 1983) (noting that discretionary-act immunity is an "extremely limited exception," and applies only to basic policy decisions).

The failure to follow safety rules is NOT subject to discretionary immunity. Violation of safety rules cannot be related to social, economic, or political policy. As one federal district court judge in District of Nevada eloquently articulated the *Berkovitz-Gaubert* test, choosing to violate safety standards in not subject to discretionary function immunity:

> The appropriate analysis laid down by our own Ninth Circuit cases and consistent with *Berkovitz* can be summarized for purposes of this case as follows. **Conduct of a government agency or employee is not immune from scrutiny as a "discretionary function" simply because it involves an element of choice. It must be a choice rooted in social, economic or political policy. If it is a choice to be exercised within established objective safety standards, and the plaintiffs claim negligence in failure to follow such standards, the discretionary function exception does not apply.**

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

Roberts v. United States, 724 F. Supp. 778, 790–91 (D. Nev. 1989). In other words, just because Cargile made a choice to run the red light, does not mean he could also choose to violate established safety rules, including the City' own policies, with impunity.

For example, in an analogous situation, Nevada courts have held that a social worker may be immune for discretionary decisions such as recommending a child is place or removed from foster care. However, a social worker is not immune for carrying out her duties unsafely because that cannot be based on governmental policy, even if they involve some amount of personal judgment:

> A social worker's day-to-day supervisory decisions involve a certain degree of personal judgment and choice and thus satisfy the first prong of the *Berkovitz-Gaubert* test, but those decisions are generally not based on governmental policy considerations, as required to satisfy the second prong. **Brochu's alleged decisions not to conduct required body checks, report allegedly obvious signs of abuse, or require the Hernandezes to provide required medical documents were not based on considerations of social, economic, or political policy**

J.M.M. v. Hernandez, 151 F. Supp. 3d 1125, 1133 (D. Nev. 2015)

Further, it is clear that violation of safety rules, like which has been alleged here, supports negligence cause of action. In *ARA Leisure Services v. United States*, 831 F.2d 193 (9th Cir.1987), a tour bus went off the road in a national park. The owner of the bus, after being sued by passengers on bus for injuries, sued the United States for contribution, alleging that the road had not been

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

maintained in a safe condition. *Id*. at, 831 F.2d at 194. The trial court granted summary judgment in favor of the government because the claim was barred by the discretionary function exception because maintenance was a matter of "choice." The Ninth Circuit reversed, holding that where the "choice" is a failure or refusal to follow safety standards, there is no immunity. *Id*.

In *Seyler v. United States*, 832 F.2d 120 (9th Cir.1987), the Ninth Circuit held that failure to maintain a road in a safe condition was not a decision protected by the discretionary function exception. In that case, plaintiff was injured while riding on a motorcycle while on turning on a road maintained by the Bureau of Indian Affairs. The plaintiff therein alleged that the Bureau negligently failed to post speed limit signs on the road. *Id*., 832 F.2d at 122. The court reversed the district court and held that "any decision not to provide adequate signs would be of the nature and quality that Congress intended to shield from tort liability." (internal quotations omitted). *Id*. at 123.

In *Huber v. United States*, 838 F.2d 398 (9th Cir.1988), the Ninth Circuit held that the discretionary function exception did not bar suit against the Coast Guard for negligence in connection with its attempt to assist a ship in distress. The court recognized that the Coast Guard, could not help all ships in distress, and had to make a policy judgment to use its limited resources to help plaintiff's ship. The decision itself was a protected discretionary decision. *Id*, 838 F.2d at

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

401. However, the court also held that the Coast Guard's conduct after the decision was made in giving assistance was not immune and had to comply with the "applicable standard of care." *Id*.

Here, Cargile's negligent actions of violating City policy, running a red light without his sirens in a blind intersection, on in no way, shape, or form related to "an integral part of the governmental policy making or planning" and does not "jeopardize the quality of the governmental process" in apprehending criminals in society. It is as unreasonable for a police officer to knowingly enter a red light without any awareness for oncoming traffic, and without sirens as it was for the *Martinez* example of a defendant falling asleep. As with *Martinez,* it is not justifiable under the discretionary immunity statute. Under Defendants' rationale, a police officer would never be responsible for his negligent actions.

Cargile himself testified that a driver in an emergency vehicle must never enter an intersection on a red light until the intersection is safe even if he has his lights and sirens on. (A. App. Vol. 1, 0089:13-25). Cargile agrees that entering the intersection when it was not safe to do so, is in violation of City of North Las Vegas' policy. Certainly, this policy is intended to protect the community from harm. This is especially important because Officer Byrne testified that the majority of collisions occur between an emergency vehicle and another vehicle when the emergency vehicle enters an intersection and runs the light. (A. App.

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

Vol. 1, 0155: 22-16-0156:3-7). Cargile's actions "cannot be based on the purposes that the regulatory regime seeks to accomplish," therefore, no immunity can be found. The action of choosing to run a red light without sirens and without any concern for the safety of others cannot be determined to be "grounded in social, economic, and political policy," as required for immunity to apply. Genuine issues of fact exist which preclude summary judgment and the District Court must be reversed.

3. The City is Responsible for Defendant Cargile's actions.

Defendants also argues on summary judgment that the City is immune from liability as well. Defendants argue that they are immune from liability for the causes of action of vicarious liability and negligent hiring, training and supervision. There is nothing in which Defendants can point to which absolves the City of liability under NRS 484B.700 and to ensure that Cargile was trained and supervised to do his job safely. See *Scott v. Las Vegas Metro. Police Dep't*, No. 2:10-CV-01900-ECR, 2011 WL 2295178, at *11 (D. Nev. June 8, 2011) (holding LVMPD's alleged failure to adequately train its officers regarding constitutional violations is not based on a policy judgment of the type discretionary immunity is intended to protect). There is no authority which absolves the City from being vicariously liable for Cargile's tortious acts. As such, the City is not immune from liability just as Cargile is not immune.

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

C. The District Court Erred When It Considered Inadmissible Evidence To Support Defendants' Summary Judgment Motion

It is axiomatic that the District Court cannot rely on inadmissible evidence in deciding a motion for summary judgment. NRCP 56(e); *Henry Prods., v. Tarmu*, 114 Nev. 1017, 1019, 967 P.2d 444, 445 (1998) (holding evidence introduced in support of, or opposition to, a motion for summary judgment must be admissible evidence).

It is well settled in Nevada that second-hand conclusions of an investigating police officer are inadmissible at trial. *Frias v. Valle*, 101 Nev. 219, 698 P.2d 875 (1985). In *Frias*, the Nevada Supreme Court expressly stated that "[i]t is the function of the trier of fact to decide who and what caused an accident. The conclusions of police officer based upon statements of third parties and a cursory inspection of the scene, did not qualify him to testify as to who was at fault." *Frias*, 101 Nev. at 221. Accordingly, the evidence of the citation and the citation itself are never admissible in a civil trial. Personal conclusions as to "negligence" or "fault" because his legal conclusions about the accident are improper. *Mikulich v. Carner*, 69 Nev. 50, 55–56, 240 P.2d 873, 875 (1952) ("The general rule is that a witness must testify to the evidentiary facts and not to his conclusions, opinions, or inferences.")

Here, on reconsideration, the District Court stated that he was influenced by the fact that Glover was cited by the City police involving a crash with another

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

City police officer. This was improper. Further, the District Court had previously found that there were issues of fact including that there was differing testimony and competing experts about how the crash occurred. The investigating officer, from the same department as Cargile, is not an accident reconstruction expert and did not do any such analysis. Clearly, evidence of a citation is inadmissible and the role of the jury as trier of fact would be irreparably hijacked if police officers were allowed to testify as to ultimate fault based on the mere fact a citation issued. This type of testimony at trial would never be allowed at trial because a jury may take the testimony from an authority figure such as a police officer as binding. In other words, it is the role of the jury to determine negligence, not the investigating officer. The District Court should not have considered this evidence.

X. CONCLUSION:

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

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New 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 9,558 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.

///

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626

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 __7th___ day of June, 2017.

/s/ Marjorie Hauf, Esq.

ADAM GANZ, ESQ.
Nevada Bar No. 6650
MARJORIE HAUF, ESQ.
Nevada Bar No. 8111
DAVID T. GLUTH, II, ESQ.
Nevada Bar No. 10596
GANZ & HAUF
8950 W. Tropicana Ave., Suite 1
Las Vegas, Nevada 89147
(702) 598-4529
Email: mhauf@ganzhauf.com

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:

Christopher Craft, Esq.
Deputy City Attorney
2250 Las Vegas Blvd Ste 810
North Las Vegas, NV 89030
Attorneys for Respondents

Dated this __7th____ day of June, 2017.

__*/s/ Jessica Rodriguez*_____
An employee of the law firm of
GANZ & HAUF

GANZ & HAUF
0 W. Tropicana Ave., #1
Las Vegas, NV 89147
Phone: (702) 598-4529
Fax: (702) 598-3626