IN THE SUPREME COURT OF THE STATE OF NEVADA

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JAPONICA GLOVER-ARMONT, Appellant, vs. JOHN CARGILE; AND 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 District Court Case No. A-13-683211-C

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that he is an attorney for a governmental party and is therefore exempt from the disclosure requirements of NRAP 26.1.

DATED this 9th day of August, 2017.

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III.
STATEMENT OF THE CASE

This is a case of a plaintiff seeking to second-guess the split-second decisions of a police officer responding to a life-and-death emergency. In the early morning of November 5, 2012, John Cargile, a sergeant with the North Las Vegas Police Department ("NLVPD"), responded to a call of shots being fired, injuring or killing a person, and was driving to the crime scene. (A. App. Vol. 1, 100:18-101:6). In doing so, he made multiple decisions, including the route to take, and whether and how to proceed through a red light at the intersection of 5th Street and Cheyenne Avenue. (A. App. Vol. 1, 97:3-98:19; 102:13-109:5). Because of the lay of the land at that location, Cargile could not see if there were oncoming vehicles

from the west unless he entered the intersection by a few feet. (A. App. Vol. 1, 112:1-113:23). When he did so, Appellant, who was approaching the intersection from the west, hit her brakes and slid 110 feet, resulting in a collision with Cargile. (A. App. Vol. 1, 103:12-104:5). This litigation followed.

By way of the motions listed by Appellant, Respondents argued that because Cargile (1) was engaged in a discretionary act, making multiple decisions as to how to best do his job, and (2) was acting in furtherance of public policy, including policies of enforcing the law and protecting our citizens, he and the City were entitled to discretionary immunity pursuant to NRS 41.032. (A. App. Vol. 2, 427-475). At the close of argument on the original motion for summary judgment, the District Court indicated that a jury should decide if Cargile "decided appropriately" in his course of action. (A. App. Vol. 4, 0878). This "issue of fact" was simply asking whether Cargile abused his discretion – but by its plain language, NRS 41.032 provides discretionary immunity whether Cargile's discretion was abused or not. Accordingly, the Court had incorrectly applied NRS 41.032, necessitating a motion for reconsideration. (A. App. Vol. 4, 885-890). With NRS 41.032 explained in more depth, including authority regarding the limitations of discretionary immunity, the Court agreed with Respondents' position and granted the motions for reconsideration and summary judgment in favor of Respondents. (A. App. Vol. 5, 927-929).

IV.
STATEMENT OF FACTS

Appellant's extensive Statement of Facts primarily display her complete failure, or unwillingness, to understand the elements of discretionary immunity. Focused entirely on issues of fact that go to the question of whether Cargile was negligent, Appellant simply does not get that once the District Court found that the elements of discretionary immunity had been met, the question of negligence became moot. There was no need for the Court to resolve the "issues of fact" expounded upon by Appellant, because even if all such issues were resolved in favor of Appellant, Respondents still would have been immune from her negligence claims and appropriately granted summary judgment.

The factual background of this matter as it relates to discretionary immunity is much simpler than that set forth in Appellant's brief. On November 5, 2012, at approximately 1:50 a.m., Sergeant Cargile was responding to a call of a fight and that shots had been fired at Fountain Falls, an apartment complex in North Las Vegas, and he was attempting to respond to the call. (A. App. Vol. 1, 100:18-101:6). At the time of the call, Cargile was located at the Southwest Command of the NLVPD, which is located at Lake Mead and Bruce. Fountain Falls is located near the intersection of Cheyenne and Simmons in North Las Vegas. (A. App. Vol. 1, 97:3-7). Cargile describes his decision on what route to take as follows:

> The quickest way for us to get down there as we come on to the west side of town, which is on the west side of the I-15 freeway, the North Fifth Street off of Losee is our easiest way to come up, to only have to come up to the light that's at North Fifth and Cheyenne. So we're trying to get to the area that's used less by the civilian traffic. Then I was going to go westbound on Cheyenne from there. All straight up to Simmons. (A. App. Vol. 1, 97:21-98-4).

Immediately upon hearing the call, Cargile jumped into his vehicle and started heading toward the complex. (A. App. Vol. 1, 11:15-17). Cargile was in the process of turning left on Cheyenne from northbound Fifth Street when the accident occurred. Cargile also testified that there are several different routes he could have taken, which may have been preferable if there were "other calls or accidents working." (A. App. Vol. 1, 98:12-19). However, he never indicated that he was aware of a safer route to take.

Once the route had been decided, the next decision facing Cargile was how to proceed through the red light at Fifth Street and Cheyenne. When approaching the intersection, Cargile noted that there were cars stopped in the southbound lanes of Fifth, and as a result, Cargile came to a complete stop for five or six seconds before entering the intersection, and at that time changed the tone of his sirens. (A. App. Vol. 1, 106:1-6). As Cargile explained:

> We have four different siren tones that are on our vehicle. What we do is we'll push from button to button to button. It changes the sound, the tone, how loud it goes, in order to make sure everybody that's in the intersection or nearby is gathering their attention to my patrol vehicle. (A. App. Vol. 1, 103:6-12).

Once Cargile believed there was no oncoming traffic, he started to encroach the intersection to get ready to turn left.

It is undisputed that when Cargile approached the intersection, his emergency lights were activated. (A. App. Vol. 1, 52:8-16). Unfortunately, due to the lay of the land at the intersection (a large hill is built up at the southwest corner of the intersection), visibility of oncoming eastbound traffic on Cheyenne, from Cargile's position, was very limited; essentially, it was impossible for Sergeant Cargile to determine whether any vehicles were approaching the intersection from the west without pulling "a couple of feet" into the intersection. (A. App. Vol. 1, 112:1-113:23). When Sergeant Cargile's vehicle entered the intersection, partially blocking Appellant's lane, Appellant applied her brakes and skidded toward the intersection. (A. App. Vol. 1, 53:10-21). A collision between the vehicles resulted. (A. App. Vol. 1, 117:3-14).

V.
SUMMARY OF THE ARGUMENT

Appellant's opening brief is entirely focused on factual disputes relating to her negligence claim, questioning whether Cargile had his sirens on, whether he chose the best route, etc. However, none of these issues are relevant to the Court's finding of discretionary immunity on the part of Respondents. As set forth above and discussed below, Cargile and the City are entitled to discretionary immunity pursuant to NRS 41.032. It is undisputed that Cargile was making conscious

decisions as to how to respond to the emergency call, including decisions regarding his route and whether and how to proceed through the red light. It is also undisputed that his actions were related to public policy, including policies of enforcing the law, protecting the public, and apprehending criminals. With those two elements of discretionary immunity met, under Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720 (2007), Cargile and the City are immune from liability for Appellant's claims.

With respect to the Motion to Reconsider, the Court had initially incorrectly applied NRS 41.032, finding issues of fact related to negligence. Because discretionary immunity would shield Respondents from Appellant's negligence claim, the Court properly reconsidered its ruling and ultimately found in favor of Respondents. Appellant's position that the Court has no ability to correct itself when it rules in error is absurd.

VI.
ARGUMENT

A. THE ELEMENTS OF DISCRETIONARY IMMUNITY FOR RESPONDENTS WERE SATISFIED WITH UNDISPUTED EVIDENCE.

1. Nevada case law regarding discretionary immunity favors Respondents.

Respondents are entitled to discretionary immunity pursuant to 41.032(2). In Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720, 726 (2007), the Nevada

Supreme Court held that NRS 41.032(2) "provides complete immunity from claims based on a state employee's exercise or performance of a discretionary function or duty. . . ." NRS 41.032(2) states that "no action may be brought under NRS 41.031" which is "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused." In interpreting this statute, the Court in Martinez adopted the two-part Berkovitz-Gaubert test used under the Federal Tort Claims Act ("FTCA"). Id. at 728-29 (citing Berkovitz v. United States, 486 U.S. 531, 536-37 (1988) and United States v. Gaubert, U.S. 315, 322 (1991)). To qualify for discretionary 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." Martinez v. Maruszczak, 123 Nev. 433, 439, 446–47. The Court elaborated that "The focus on the second criterion's inquiry is not on the employee's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis. Thus, the court need not determine that a government employee made a conscious decision regarding policy considerations in order to satisfy the test's second criterion." Id. "A discretionary act requires personal deliberation, decision, and judgment."

Herrera v. Las Vegas Metropolitan Police Dept., 298 F.Supp.2d 1043, 1054 (D.Nev. 2004). "[D]ecisions at all levels of government, including frequent or routine decisions, may be protected by discretionary-act immunity[.]" Martinez, 123 Nev. at 447.

The Nevada Supreme Court has broadly applied the discretionary immunity test set forth in Martinez in cases involving government officers deciding how to perform their duties. In Ransdell v. Clark County, 124 Nev. 847, 192 P.3d 756, 759-63 (2008), the plaintiff challenged code enforcement efforts by Clark County, which had determined that plaintiff's residence, which had essentially become a junkyard, was in violation of several provisions of the Clark County Code. The Nevada Supreme Court, using the Martinez test, held that Clark County was entitled to discretionary immunity from state law claims involving the application for and execution of a "seizure warrant" because the county's officers were required "to use their own judgment and conduct individual assessment of the conditions on [a homeowner's] property to determine if abatement was required under the Clark County Code" and "strong public policy considerations related to public health safety, and welfare are associated with abatement procedures generally." Id. at 859. Plaintiff's claims against the County were dismissed. Id. at 861.

Indeed, even before Martinez changed the landscape of discretionary immunity by expanding its protection to frequent, routine decisions, the Nevada Supreme Court has found in favor of law enforcement, applying discretionary immunity in various cases which involved police exercising personal judgment in how to do their jobs. In Maturi v. Las Vegas Metro. Police Dept., 110 Nev. 307, 308, 871 P.2d 932, 933 (1994), police officers were protected by discretionary immunity from claims arising from their decision to handcuff a prisoner behind his back as opposed to the front. As the Court explained, "Although it can be argued that the officers in this case made the wrong choice as to whether rear handcuffing was 'impractical,' it is clear that they were making a choice, that they were exercising *discretion,"* and therefore they were protected by discretionary immunity. Id. at 310. See also Parker v. Mineral County, 102 Nev. 593, 729 P.2d 491 (1986) (stating that the decision of how to respond to a report is discretionary and should not be "second guessed" by a court with the benefit of hindsight); Ortega v. Reyna, 114 Nev. 55, 62, 953 P.2d 18, 23 (1998) (a state trooper's decisions to stop an appellant, and later to take the appellant to jail, were discretionary because those decisions required the officer to use his personal judgment).

Simply put, in Nevada, discretionary immunity will apply whenever (1) a government officer makes a decision or uses judgment, and (2) his action is related

to any government policy. While discretionary immunity was once deemed to only apply at the operational level (i.e. legislative decisions on policy), Martinez broadened its application to ground level decisions. As long as the officer involved is making a choice or judgment, and the actions involved are related to a public policy, the officer undertaking those actions will be immune from negligence claims.

2. Case law directly on point from other jurisdictions favors a finding of discretionary immunity – and is never addressed by Appellant.

Just as this Court did in Ransdell, supra, it is appropriate that the Court look to factually similar cases for guidance. 124 Nev. at 855. Numerous courts around the country have applied discretionary immunity to instances of a police officer or other government personnel responding to an emergency. Though the immunity goes by different names (such as official immunity, sovereign immunity, etc.), the common thread to all such instances is that when an officer is responding to an emergency, and the officer is required to make decisions or use independent judgment, immunity is granted for any accidents which occur during the officer's response to the emergency. Simply put, we do not want our emergency responders hesitating to act based on a fear that they may be held liable should anything go wrong. Astonishingly, Appellant declined to address the following cases at the District Court level in any way.

Now, on appeal, she continues to ignore case law which is directly on point, making no mention of prevailing case law when courts deal with this crucial factual scenario.

In Vassallo ex rel. Brown v. Majeski, 842 N.W.2d 456 (Minn. 2014), a police officer proceeded through a red light while responding to an emergency call, and collided with plaintiff's vehicle. The trial court found, and the Minnesota Supreme Court ultimately affirmed, that the officer was engaged in a discretionary function and therefore was entitled to official immunity. Id. at 463. At issue in the case was whether the officer's compliance with Minn.Stat. § 169.03, Minnesota's statute that requires an emergency vehicle to "slow down as necessary for safety" was discretionary or ministerial. As the court explained,

> The requirement that the driver of an authorized emergency vehicle shall slow down as necessary for safety, plainly does not impose an absolute duty upon the driver of an emergency vehicle to slow down in every situation upon approaching a red or 'Stop' signal or stop sign. Rather, the requirement is conditioned on the driver's, in this case Deputy Majeski's, determination of the level of speed appropriate for safety under the circumstances. **This is a textbook example of the exercise of discretion: the policy set out in the statute requires individual professional judgment that necessarily reflects the professional goal and factors of a situation, and is therefore discretionary.** Likewise, the duty to "proceed cautiously," as used in this statute, "means to go forward in the exercise of due care to avoid a collision." A requirement to use due care also calls for the exercise of independent judgment and is not absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.

Id. Because the officer exercised his judgment in what was appropriate "due care" while proceeding through the red light, his actions were discretionary, and both he and the city were immune from plaintiff's negligence claims. Id. at 465-466. While Appellant's counsel decries Respondents' argument that the officer responding to an emergency has discretion as to what constitutes "due care" in this scenario, twice referring to such a concept as "unbelievable," they apparently were unaware of the legal basis for the position, or are simply pretending that such case law does not exist. (A. Op. Brief at 15:9; 21:9.)

In Colby v. Boyden, 400 S.E.2d 184 (Va. 1991), a Virginia Beach police officer was in pursuit of a driver who had run a red light. Attempting to flee the officer, the driver ran another red light, and the officer followed, running the red light as well, which resulted in a collision with plaintiff. The Virginia Supreme Court held that a police officer who was involved in an accident when he went through a red light while pursuing another vehicle was entitled to sovereign immunity:

> **[A] police officer, engaged in the delicate, dangerous, and potentially deadly job of vehicular pursuit, must make prompt, original, and crucial decisions in a highly stressful situation. Unlike the driver in routine traffic, the officer must make difficult judgments about the best means of effectuating the governmental purpose by embracing special risks in an emergency situation. Such situations involve necessarily discretionary, split-second decisions balancing grave personal risks, public safety concerns, and the need to achieve the governmental objective. The exercise**

> **of discretion is involved even in the initial decision to undertake the pursuit[.]**

Id. at 187. The Virginia Supreme Court expressed similar concerns as are present here, stating that denying immunity to the police officer "not only ignores the realities of the circumstances under which he performed his job, but also would inhibit law enforcement officers faced with similar decisions regarding vehicular pursuit in the future." Id. Because the response of the officer, in attempting to apprehend a dangerous driver, required decisions on the part of the officer, he was immune from liability. Id.

In Terrell v. Larson, 2008 WL 2168348 (Minn. 2008) (unpublished decision), a deputy responding to a domestic disturbance call ran a red light at between 30 and 45 miles per hour, and collided with another vehicle, resulting in the death of its driver. Under the doctrine of official immunity, “a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong.” The doctrine parallels discretionary immunity in that it hinges on the individual officer’s “exercise of judgment or discretion.” The Terrell opinion discussed the deputy’s duty of care when proceeding through a red light, stating as follows:

> Terrell relies on a statute that provides, in part:
>
> > Stops. The driver of any authorized emergency vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety, but may proceed cautiously past such red or stop sign or signal after sounding siren and displaying red lights.
> >
> > Minn.Stat. § 169.03, subd. 2 (2000). Terrell argues that the words "shall slow down as necessary for safety" imposed a ministerial duty on Deputy Larson, leaving him no discretion to not slow down. Terrell emphasizes the statute's use of the word "shall," but the phrase "as necessary for safety" is a significant qualifier. **That phrase indicates that the degree to which an officer must slow down depends on conditions that the officer perceives at that time. This is a classic example of the use of discretion.**

Id. at *5-6. Because the deputy had discretion as to how to proceed through the red light, including making the decision as to what he needed to do in order to comply with Minnesota's "red light" statute, he was immune from liability (A. App. Vol. 2, 468-475).

Using this same reasoning, in Muse v. Schleiden, 349 F. Supp. 2d 990, 996-98 (E. D. Va. 2004), the court held that a deputy's decision to enter an intersection against a red light without activating his lights and sirens was a discretionary function and therefore the deputy was immune from suit on a claim that the deputy negligently collided with another vehicle when responding to an assault in progress call. The court found that the deputy was required "to balance grave personal risks, public safety concerns, and the need to achieve the governmental objective." Id. at 997. The court reasoned that "[s]overeign immunity protection is necessary

in such circumstances to preserve the emergency responder's discretion to balance a variety of special risks in making the decision on how best to respond to an emergency call" because "activating emergency equipment might alert a criminal to a deputy's arrival or create a disturbance by drawing attention to the scene of the call." Id. at 997-98. The court concluded that "a key purpose for extending sovereign immunity to a county's emergency responders [is] to eliminate public inconvenience and danger that might result from such responders being reluctant to act for fear of damaging lawsuits." Id. at 998.

In Rivas v. City of Houston, 17 S.W.3d 23 (Tex.App. 2000), an ambulance driver transporting a patient ran a red light and collided with the plaintiff. The Court of Appeals of Texas found that the driver was immune from plaintiff's claims because he was engaged in a discretionary function. The court explained that Texas law defines a discretionary act as one which requires "personal deliberation, decision, and judgment," and that a paramedic or emergency medical technician's "decisions concerning how to transport a person to a medical facility will fundamentally involve his discretion." Id. at 29. Because the ambulance driver's duties at the time of the accident involved transporting a patient to the hospital on an emergency basis, the court held that the ambulance driver was performing a discretionary function as a matter of law at the time the accident occurred, and was therefore both he and the city were immune from liability.

In Pletan v. Gaines, 494 N.W.2d 38 (Minn.1992), a police officer's decision to engage in a high speed chase to pursue a fleeing criminal resulted in a fatal accident. Deciding whether the officer's actions were immune from suit, the Minnesota Supreme Court stated that when an official must make instantaneous decisions often on the basis of incomplete information, "[i]t is difficult to think of a situation where the exercise of significant, independent judgment and discretion would be more required." 494 N.W.2d at 41. As the court explained,

> **Official immunity is provided because the community cannot expect its police officers to do their duty and then to second-guess them when they attempt conscientiously to do it. To expose police officers to civil liability whenever a third person might be injured would, we think, tend to exchange prudent caution for timidity in the already difficult job of responsible law enforcement.**

Id. Because the officer responding to the situation was required to make quick decisions in order to fulfill his duty to uphold the law and protect the public, he was granted discretionary immunity.

At the District Court, and now again on appeal, Appellant has no response to any of these cases. They are not mentioned in any pleading or brief filed by Appellant.

3. Cargile and the City are entitled to discretionary immunity.

Because Sergeant Cargile was making decisions and judgments in how to best respond to an emergency, and his actions were in furtherance of public policy, he is entitled to discretionary immunity. The actions taken by Sergeant Cargile

were in the course of his response to a call of a fight and shots fired. Sergeant Cargile's response required quick decisions and judgment, in particular a balancing of the choice to enter the intersection through the red light in order to arrive at the scene of the crime as quickly as possible against the risk of an accident. Furthermore, his actions were in furtherance of public policy, specifically the policies of protecting the public, preventing crime, and enforcing the law. The public policy considerations of protecting public safety are all the more pressing when officers are investigating violent crime such as the one present here, rather than investigating a public nuisance, which Ransdell found to be protected by discretionary immunity. Indeed, the importance of discretionary immunity in situations such as this cannot be overstated. In countless situations, the difference between life and death could be a moment of hesitation on the part of an emergency responder. NRS 41.032 protects our responders from liability even if their discretion is abused because we want lives to be saved, and that means we respect their decisions as to how to best do their jobs. Of course there are risks. But in weighing those risks against the certainty of a crime having already been committed, with at least one person having been shot and a gunman on the loose, those risks are acceptable. Accordingly, Sergeant Cargile was engaged in a discretionary function in furtherance of a public policy, and therefore he is immune from suit on all claims alleged by Appellant.

4. No material issue of fact remains to preclude summary judgment.

Appellant here has no serious argument against the Court's findings that (1) Cargile was engaged in a discretionary act, making decisions as to how to do his job, and (2) Cargile's actions were in furtherance of public policy. Rather, Appellant focuses entirely on issues of fact which relate to negligence. Appellant's backward thinking was summed up at the last hearing of this matter, as her counsel stated to the Court, "If he used due care, he's entitled to immunity." (A. App. Vol. 5, 920:18-19). However, because discretionary immunity applies whether Cargile was negligent or not – whether he abused his discretion or not – these issues are not material.

First, Appellant repeatedly notes the differing testimony between Appellant and Cargile regarding whether he had his sirens on. Appellant states that she did not hear the sirens, while Cargile states he had his sirens on. However, this does not constitute a material issue of fact. As Appellant's expert, Sam Terry, explained, it is entirely possible that Cargile's sirens were activated, but Appellant did not hear them. (A. App. Vol. 1, 217) ("Ms. Glover likely never detected the audible signal from Sergeant Cargile's vehicle siren preceding the collision – whether it had been on or not.") Appellant has offered expert testimony that both she and Cargile could be telling the truth, as opposed to risking a perjury charge,

and then asks the Court to take it as fact that Cargile is lying. Her position is untenable and does not create a material issue of fact.

Appellant also takes issue with Cargile's decisions as to how to proceed through the red light and his route to the scene of the emergency. In doing so, Appellant blatantly misrepresents Cargile's deposition testimony, asserting that Cargile "was also aware of safer choices" with respect to his route, when in reality Cargile stated no such thing. (A. Op. Brief, 11:10-11; 12:13; 20:6-7; A. App. Vol. 1, 098:9-19). Cargile said he was aware of other routes he could have taken, but not safer ones. In any event, as explained above, these constitute routine decisions which, since Martinez v. Maruszczak, are entitled to discretionary immunity so long as they are related to public policy. On all of these issues, even if Appellant could show negligence on Cargile's part, such a showing would not affect the outcome in this matter. Respondents would still be entitled to discretionary immunity before the question of negligence is even reached.

5. No exception to discretionary immunity applied.

As set forth in the Motion for Reconsideration, discretionary immunity bars negligence claims when a public officer is engaged in a discretionary act, and his actions are related to a public policy. While the Court initially felt that such discretion cannot be "unfettered," the Court did not consider that the actual limits on such immunity are (1) bad faith conduct and (2) intentional torts. The limits of

discretionary immunity were discussed in Franchise Tax Bd. of Cal. v. Hyatt, 130 Nev. Adv. Op. 71, 335 P.3d 125, 136 (Nev. 2014). As the Nevada Supreme Court explained,

> The Falline court expressly addressed NRS 41.032(2)'s language that there is immunity "whether or not the discretion involved is abused." Falline v. GNLV Corp., 107 Nev. 1004, 1009 n. 3, 823 P.2d 888 at 892 n. 3 (1991). The court determined that **bad faith is different from an abuse of discretion**, in that an **abuse of discretion occurs when a person acts within his or her authority but the action lacks justification**, while bad faith "involves an implemented attitude that **completely transcends the circumference of authority granted**" to the actor. Id.

The Falline court also explained bad faith conduct in this context as follows:

> Stated otherwise, **an abuse of discretion is characterized by an application of unreasonable judgment to a decision that is within the actor's rightful prerogatives**, whereas an act of **bad faith has no relationship to a rightful prerogative** even if the result is ostensibly within the actor's ambit of authority.

Id. (A. App. Vol. 4, 885-890). As applied to the present case, it is undisputed that Cargile was a police officer responding to an emergency when he entered the intersection where the accident occurred. As such, his actions were within his authority. Even if Appellant is correct that his actions in doing so "lacked justification," or involved "unreasonable judgment," such conduct would still only arise to an "abuse of discretion," for which Cargile and the City are immune from liability under NRS 41.032. While the Court expressed concern that a jury should have a chance to determine "whether or not his discretion to enter the intersection

in the manner he did was proper or not," discretionary immunity still bars Plaintiff's claims, because NRS 41.032 applies "whether or not the discretion involved is abused." (A. App. Vol. 4, 880:4-8).

These limitations on discretionary immunity are not breached in the present case. With respect to intentional torts, none were alleged. With respect to "bad faith," Appellant argued below that Cargile acted in bad faith, with no argument at all other than stating, "[H]ere, the City of North Las Vegas acted with actual 'bad faith' as defined by Franchise Tax Bd. of Cal. and Falline because the City's misconduct is unrelated to any plausible policy objective and should not be shielded from liability." (A. App. Vol. 4, 895:1-4). No explanation whatsoever is made as to how Cargile's actions in responding to an emergency call are unrelated to any public policy objective. As discussed in the Motion for Summary Judgment, Cargile's actions were absolutely in furtherance of public policies such as preventing crime and protecting the public. For Appellant to argue "bad faith" in this context, she would have to argue that Cargile's actions in responding to the emergency call "completely transcend the circumference of his authority," or that they bore "no relationship to a rightful prerogative." Franchise Tax Bd. of Cal., supra; Falline, supra. To the contrary, Cargile was doing exactly what he was sworn to do in furtherance of his oath as a police officer: responding to an emergency call of shots fired, enforcing the law, and protecting the public.

Appellant's assertion that a police officer is acting outside his authority while doing precisely what he has been tasked with doing is nonsense.

6. The case law relied upon by Appellant is inapposite, outdated, or distinguishable.

At District Court, and again here, Appellant relies on cases which are easily distinguished. In Williams v. City of North Las Vegas, 91 Nev. 622, 541 P.2d 652 (1975), a wrongful death claim was brought against the City for its failure to inspect for a dangerous condition. The City was liable because it had a *contractual* duty to inspect as part of its agreement with Nevada Power Company, and the Nevada Supreme Court found that the decedent was a third-party beneficiary of that contract. Id. at 625-627. The holding in Williams has absolutely nothing to do with discretionary immunity.

Appellant also again relies on Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959), and Avery v. Gilliam, 97 Nev. 181, 625 P.2d 1166 (1981), but these cases also do not involve discretionary immunity. Johnson is of no instructive use to the court as it *predates* NRS 41.032, which was not enacted until 1965. Discretionary immunity as we know it was not available as a defense. Avery is no better, as the errant driver was not a public employee. Rather, he was employed by Mercy Ambulance, and as such would not have discretionary immunity under NRS 41.032. None of the foregoing cases relied upon by Appellant below address discretionary immunity, and therefore are of no use to the Court in this matter.

Now on appeal, Respondent cites to a variety of cases which fare no better. Only Garcia v. United States, 826 F.2d 806 (9th Cir. 1987), which centered on a border patrol agent shooting someone in self-defense, mentions law enforcement at all. But its statement that law enforcement decisions are not the sort of "social, economic and political policy choices" which are subject to discretionary immunity, is directly contradicted by Martinez v. Maruszczak, which ascribes discretionary immunity not only to high-level policy choices, but also to "decisions at all levels of government, including frequent or routine decisions." Id., 123 Nev. at 447. It also contradicts Maturi, Ortega, and Parker, supra at p.9, in which this Court repeatedly acknowledges that law enforcement decisions as to how to do their jobs are discretionary in nature and subject to discretionary immunity.

The rest of Appellant's cited cases are factually distinguishable. See Roberts v. United States, 724 F.Supp. 778 (D.Nev. 1989) (violation of AEC regulations); Indian Towing Co. v. United States, 350 U.S. 61 (1955) (negligent maintenance of a lighthouse); Caraballo v. United States, 830 F.2d 19 (2d Cir. 1987) (negligent park service patrol); Butler v. Bayer, 123 Nev. 450, 168 P.3d 1055 (2007) (negligent release of inmate by prison officials); Nguyen v. State, 788 P.2d 962 (Okla. 1990) (negligent release of mental patient); Petersen v. State, 671 P.2d 230 (Wash. 1983) (negligent release of mental patient); J.M.M. v. Hernandez, 151 F.Supp.3d 1125 (D.Nev. 2015) (negligent check for abuse by

social worker); ARA Leisure Service v. United States, 831 F.2d 193 (9th Cir. 1987) (negligent maintenance of road); Seyler v. United States, 832 F.2d 120 (9th Cir. 1987) (negligent maintenance of road, failure to post speed limit signs); Huber v. United States, 838 F.2d 398 (9th Cir. 1988) (negligent ship rescue by Coast Guard). None of these cases have any factual similarity to a situation where an emergency responder must make high-stress, split-second decisions where lives are at stake, and as such have no bearing on this case.

Indeed, while drawing parallels to other factual scenarios is often a worthwhile exercise, it is completely unnecessary and inappropriate given the abundance of case law provided to the Court which is factually on point, and in some cases identical to the case at hand. See Vassallo ex rel. Brown v. Majeski, 842 N.W.2d 456 (Minn. 2014) (police officer immune from liability for accident when proceeding through a red light while responding to an emergency); Colby v. Boyden, 400 S.E.2d 184 (Va. 1991) (police officer immune from liability for accident when proceeding through a red light while chasing suspect); Terrell v. Larson, 2008 WL 2168348 (Minn. 2008) (police officer immune from liability for accident when proceeding through a red light while responding to an emergency); Muse v. Schleiden, 349 F. Supp. 2d 990, 996-98 (E. D. Va. 2004) (police officer immune from liability for accident when proceeding through a red light while responding to an emergency); Rivas v. City of Houston, 17 S.W.3d 23 (Tex.App.

2000) (ambulance driver immune from liability for accident when proceeding through a red light while responding to an emergency). All of the cases bearing any factual similarity to the present case found in favor of immunity for emergency responders making decisions as to how to do their jobs, even in the context of their decision to proceed through a red light while responding to an emergency.

Reliance on cases which are factually similar is critical in this case due to the nature of the conduct at issue. As discussed repeatedly in the cases cited by Respondents, the nature of police work, when officers are responding to emergencies, requires multiple split-second decisions in highly stressful, often life-and-death scenarios. The job is difficult enough without adding the potential for civil liability on the part of our emergency responders should something go wrong. In all the cases presented which actually deal with emergency responders doing their duty, courts have consistently found in favor of the public officers, protecting their decisions with discretionary immunity. And to all of these cases, Appellant has no response whatsoever.

B. RECONSIDERATION OF THE DISTRICT COURT'S INCORRECT APPLICATION OF NRS 41.032 WAS APPROPRIATE.

The Motion for Reconsideration was appropriate because it addressed (1) a point of law which the Court overlooked, and (2) a statute which the Court did not properly apply. As Appellant pointed out in her Opposition to the Motion to

Reconsider, "The primary purpose of a motion for reconsideration is to inform the Court that it has overlooked an important argument or fact, or misinterpreted a statute." In re: Ross, 99 Nev. 657, 659, 668 P.2d 1089, 1091 (1983) (A. App. Vol. 4, 893:26-28). In the present case, the trial court denied the initial motion for summary judgment because it felt there were issues of fact as to whether Cargile was negligent – that is, whether he abused his discretion by his actions in proceeding through the red light. Because Cargile would be immune from liability under NRS 41.032 whether he abused his discretion or not, the Court misinterpreted NRS 41.032. The Motion to Reconsider was properly brought in order to better inform the trial court and reach a correct conclusion. Appellant's position that the court is unable to correct itself is absurd.

Appellant also believes that the Court improperly considered inadmissible evidence in reaching its conclusion, specifically that Appellant was cited for her role in the accident. Appellant's argument here is contradicted within her own brief and not supported by the record. First, as pointed out by Appellant, the Court did state that it was influenced by the fact that Appellant "was **adjudged guilty** of driving without her lights on." (A. Op. Brief at 18). The Court mentioned the guilty verdict for the charge, not the citation alone, but the guilty verdict was not part of the Motion for Summary Judgment or the Motion to Reconsider – rather, it was addressed by way of a Motion in Limine which was never heard or decided

upon. (In the Motion in Limine, Respondent argued that the guilty conviction was admissible). See Stroud v. Cook, 931 F.Supp. 733 (D.Nev. 1996) (judgment of conviction against him for a misdemeanor traffic violation arising from the accident was admissible)). However, nothing in the Order even mentions the charge against Appellant. (A. App. Vol. 5, 927-929). If Appellant believed the Court ruled improperly, or based its ruling on inadmissible evidence, then she should have made some effort to correct it or clarify it in the Order. Appellant had every opportunity to submit her own Order including some mention of the charge, or file her own motion for reconsideration. She did neither.

The Court in this instance went to great lengths to reach the correct result, and was absolutely within its discretion to hear and grant Respondents' Motion to Reconsider.

C. BECAUSE CARGILE IS ENTITLED TO DISCRETIONARY IMMUNITY, THE CITY IS IMMUNE FROM LIABILITY AS WELL.

The City is immune from liability in this matter as well. As explained in Bryan v. Las Vegas Metropolitan Police Dept., 349 Fed. Appx. 132 (9th Cir. 2009), in which plaintiff brought a variety of claims, including state law claims, against LVMPD officers after they entered his apartment and shot him, the District Court found that claims against the LVMPD for negligent hiring, training and

supervision were appropriately dismissed based on discretionary immunity. The court explained as follows:

> Our court has held that "decisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield." Vickers v. United States, 228 F.3d 944, 950 (9th Cir.2000). Because Nevada looks to federal case law to determine the scope of discretionary immunity, and because federal case law consistently holds that training and supervision are acts entitled to such immunity, METRO police is entitled to discretionary immunity on this claim.

Id. at *2. Appellant offered no evidence to support her claims against the City on these claims, but even if she did, the City would be immune. Appellant's claim for vicarious liability fares no better, because Sergeant Cargile's immunity from suit cuts off vicarious liability on the part of the City. See Village Development Company v. Filice, 90 Nev. 305, 310, 526 P.2d 83, 86 (1974) (overruled on other grounds) ("Where no basis exists to charge an employer, other than vicarious liability for the imputed negligence of its agent, courts have often held that a judgment on the merits in the agent's favor bars further action against the employer.") Because Cargile is immune, none of Appellant's claims against the City are viable.

D. THE AWARD OF COSTS WAS APPROPRIATE.

Appellant identifies the award of costs as an issue on appeal, but says nothing further in her brief. Respondents were entitled to costs pursuant to NRS 18.020.

VII.
CONCLUSION

In order for her claims to survive summary judgment, Appellant needed to provide evidence that discretionary immunity should not apply in this case. She failed to do that. Respondents provided uncontested evidence that Cargile (1) made conscious decisions as to how to best respond to the emergency call, and (2) his actions in responding to the emergency were related to public policy. Respondents also provided the Court with numerous cases directly on point, with courts around the country confirming again and again that discretionary immunity applies to an emergency responder's decision to proceed through a red light. Appellant ignores all of these cases, and instead focuses entirely on negligence. Simply put, she missed the point: Discretionary immunity provides immunity from negligence claims. Because Cargile was engaged in a discretionary act in furtherance of public policy, discretionary immunity under NRS 41.032 applies, and both Cargile and the City are immune from liability for Appellant's claims.

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Summary judgment was appropriately granted, and the trial court's ruling in this regard should be affirmed.

DATED this 9th day of August, 2017.

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CERTIFICATE OF COMPLIANCE

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 in font size 14 and Times New Roman.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, is double spaced, and contains 7,171 words.

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

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of August, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of North Las Vegas City Attorney's Office, and pursuant to NRAP 25(b) and NEFR 9(d), that on this 9th day of August, 2017, I electronically filed the foregoing Respondents' Answering Brief with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system. Pursuant to NRAP (c)(1)(B), I also served the following parties by mail listed below:

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